BEFORE LORD JUSTICES WARD, MANTELL & LONGMORE : C.A. 22nd January 2003.

JUDGMENT : Lord Justice Mantell:

1. On 26 June 2002, by summary judgment, His Honour Judge Wilcox sitting in the Technology and Construction Court enforced an adjudicator's decision in an ongoing construction contract.
2. This is an appeal from that order.
3. The contract in point had been drafted in compliance with Section 108 of the Housing Grants Construction and Regeneration Act 1996 which came into force on 1 May 1998 and which requires all construction contracts, as defined, to allow for resolution of interim disputes by reference to an adjudicator.
4. A central issue in the appeal is whether, pending final resolution by arbitration or litigation, an adjudicator's decision should be enforced in derogation of contractual rights with which it may conflict.
5. s. 108, so far as material, provides as follows:

"(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose "dispute" includes any difference.

(2) The contract shall-

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral to the dispute to him within 7 days of such notice;

(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;

(e) impose a duty on the adjudicator to act impartially; and

(f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

(4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omissions is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.

(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply."

6. s. 108 (5) is simply a deeming provision which has the effect of incorporating the main terms of section 108 where the draftsman has failed to do so.
7. The scheme provided by section 108 was explained by Dyson J in **Macob Civil Engineering Ltd v. Morrison Construction Ltd** [1991] BLR 93 at para. 24. *"The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decision of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement: see s 108(3) of the Act and paragraph 23(2) of Part 1 of the Scheme. The timetable for adjudications is very tight (see s 108 of the Act). Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. So far as procedure is concerned, the adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially (s 108(2)(e) of the Act and paragraph 12(a) of Part 1 of the Scheme). He is, however, permitted to take the initiative in ascertaining the facts and the law (s 108(2)(f) of the Act and paragraph 13 of Part 1 of the Scheme). He may, therefore, conduct an entirely inquisitorial process, or he may, as in the present case, invite representations from the parties. It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute*

resolution process. Crucially, it has made it clear that the decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved."

8. Further explanations are to found in **Bouygues v. Dahl-Jensen** 2000 BLR 522 and **C B Scene Concept Design Ltd v. Isobars Ltd** 2002 EWCA Civ 46. In the former, at para. 2, Buxton LJ described the section as being: *"To enable a quick and interim, but enforceable, award to be made in advance of what is likely to be complex and expensive disputes."*

   In the same case at para. 26 Chadwick LJ stated: *"The purpose of those provisions is not in doubt. They are to provide a speedy method by which disputes under construction contracts can be resolved on a provisional basis. The adjudicator's decision, although not finally determinative, may give rise to an immediate payment obligation. That obligation can be enforced by the courts. But the adjudicator's determination is capable of being reopened in subsequent proceedings. It may be looked upon as a method of providing a summary procedure for the enforcement of payment provisionally due under a construction contract."*

   In the latter, Sir Murray Stuart-Smith lent further emphasis to the draconian character of s. 108 at para. 23: *"The whole purpose of s. 108 of the Act, which imports into construction contracts the right to refer disputes to adjudication, is that it provides a swift and effective means of resolution of disputes which is binding during the currency of the contract and until final determination by litigation or arbitration, s. 108 (3). The provisions of s.109-111 are designed to enable the contractor to obtain payment of interim payments. Any dispute can be quickly resolved by the adjudicator and enforced through the courts. If he is wrong, the matter can be corrected in subsequent litigation or arbitration."*

9. The case of **Bouygues** is a good illustration of the scheme put into practice. The adjudicator had made what was acknowledged to be an obvious and fundamental error which resulted in the contractor recovering monies from the building owner whereas in truth the contractor had been overpaid. The Court of Appeal held that since the adjudicator had not exceeded his jurisdiction but had simply arrived at an erroneous conclusion, the provisional award should stand. In this context the court adopted the test formulated by Knox J in **Nikko Hotels(UK) Ltd v. MEPC Plc** 1991 2 EGLR 103 at 108B: *"If he answered the right question in the wrong way his decision will be binding. If he has answered the wrong question, his decision will be a nullity."*

10. With that by way of background I turn to the facts of the present appeal.

11. Towards the end of June 2001 Levolux AT Ltd agreed to supply and fit brise soleil and louvre panelling at a site in Filton, Bristol as sub-contractor to Ferson Contractors Ltd.

12. The sub-contract incorporated the conditions of the standard GC/Works/Sub-Contract with certain amendments. The sub-contract complied with the requirements of s. 108 to the 1996 Act.

13. Clause 38A, as amended, by paragraph 1 provided for the reference to an adjudicator of any dispute, difference or question arising under, out of or relating to, the sub-contract. Paragraphs 2-6 inclusive set out the timetable and procedures to be followed.

14. Clause 38.7 provided: *"Subject to the proviso to clause 38B.1, the decision of the adjudicator is binding until the dispute is finally determined by arbitration or agreement; and the parties do not agree to accept the decision of the adjudicator as finally determining the dispute."*

    Clause 38B.1 allowed for a reference to arbitration with the following proviso: *"Provided always, that where any dispute, difference or question has been referred to an adjudicator under Clause 38A and the adjudicator has issued his decision thereon, a Party shall not be entitled to refer such dispute, difference or question to arbitration, and the adjudicator's decision thereon shall become unchallengeable, unless that Party serves the above notice within 42 days of receipt of notification of the adjudicators decision; and, for the avoidance of doubt, this proviso shall apply whether or not the adjudicator has notified his decision within the time limit specified in Clause 38A5."*

    The "notice" referred to is that by which either party may refer the matter to an arbitrator.

15. However, notwithstanding Clause 38B, Clause 38A.9 provided that: *"The Contractor and the Sub-contractor shall comply forthwith with any decision of the adjudicator; and shall submit to summary judgment/decree and enforcement in respect of all such decisions."*

16. Pursuant to the sub-contract, Levolux carried out certain work on site and received a first interim payment. On 18th December 2001 Levolux applied for a second interim payment of £56,413.07 of which Fersons agreed to pay only £4,753.65. Fersons relied upon a 'Notice of With-Holding Payment' in respect of the balance. That payment was made on 22nd February 2002 albeit that Levolux had claimed that the instalment had been due on the 31st January. In the mean time, Levolux stopped working at the site. On 4th March Fersons gave notice to Levolux that it required work to recommence failing which it threatened termination of the contract pursuant to Clause 29.6.2 on the basis that Levolux had wrongly suspended its performance of the sub-contract. Levolux gave notice of intention to refer the dispute to adjudication.

17. On 22nd March 2002 Fersons purported to determine the contract.

18. In due course, and all appropriate steps having been taken, on 30th April 2002 the adjudicator, a Mr John Redmond, arrived at his decision which was that Levolux were entitled to the sum of £51,659.42 (including VAT) and had been so entitled from 22nd February. He assessed interest at £758.62 and further awarded costs to Levolux of £3,617.00. He directed that payment should be made within 7 days of his decision.

19. The principal issue before the adjudicator was whether or not Fersons 'notice of with-holding payments' complied with the provisions of s. 111 (2)(a) of the Housing Grants Construction and Regeneration Act 1966. As the adjudicator put it: *"If it did, then (subject to a further argument about pay-when-paid clauses) the withholding was lawful and the Claimant's case fails. If it did not comply, the Respondent was not entitled to withhold the payment and the Claimant's case succeeds."*

    The adjudicator held that the notice of withholding payment did not comply with the statutory requirements in that it did not specify the ground for withholding. Accordingly he found for Levolux.

20. Fersons did not pay in accordance with the decision and Levolux brought proceedings to enforce the decision in the High Court. In the first place the application was made under CPR Part 8. At the hearing before His Honour Judge David Wilcox it was agreed that the procedure was inappropriate and that such an application if for summary judgment was more properly brought under Part 24. The matter proceeded on that basis with the full agreement of the parties. In resisting the application Fersons relied, amongst other matters, on an entitlement to terminate the sub-contract under Clause 29.6.2 in which case Clause 29.8 would bite. *"If the Contractor shall determine the Sub-Contract for any reason mentioned in Clause 29.6,"(including wrongful suspension of work) "the following provisions shall apply:-*

    (1) All sums of money that they may then be due or accruing due from the Contractor to the Sub-Contractor will cease to be due or to accrue due;"

21. In support of the proposition Mr Collings, of counsel, who appeared for Fersons before the judge as he does on this appeal, submitted that the sums adjudged due to Levolux by the Adjudicator were not payable because of the provisions of Clause 29 and in particular he relied upon a passage in the judgment of MB Lloyd QC in **K & S Industrial Services (Birmingham) Ltd v. Sindall Ltd** 17th July 2000 at para 28: *"If therefore, by the time an Adjudicator makes a decision requiring payment by a party the contract has been lawfully terminated by that party (or that party has real prospects of success in supporting that termination) or some other event has occurred which under the contract entitles the party not to pay, then the amount required to be paid by the decision does not have to be paid".*

22. The judge held that the necessary implication of the Adjudicator's award was that Levolux had been entitled to suspend the works and accordingly that the purported determination based upon wrongful suspension had no contractual effect. Moreover, he held that Clause 29.8 did not apply to monies due under an Adjudicator's award provided always that the adjudicator had not exceeded his jurisdiction. There was no suggestion in this case that the adjudicator had not acted within his jurisdiction.

The Appeal.

23. The appeal has been conducted on the assumed basis that the contract had been validly terminated on 22nd March 2002 and that the adjudicator had been in error insofar as his decision was inconsistent with that assumed basis.

24. As his first point Mr Collings for the appellant submits that the judge has wrongly interpreted the adjudicator's decision. As referred to earlier, the judge decided: *"The necessary implication of the award which was a competent award within the Adjudicator's jurisdiction and arose out of the terms of the reference is that the Claimant was entitled to suspend the works and that the purported determination based on wrongful suspension has no contractual effect."*

    Mr Collings argues that all that can be read into the adjudicator's decision is that a certain sum was due and owing as at 22nd February 2002. The adjudicator was not required to, and accordingly did not, decide whether or not there had been a valid determination of the contract. It follows that the point was available for argument before the judge without in any way resiling from the binding nature of the adjudicator's decision.

25. In my view, that argument is ingenuous at best. One only has to refer to the terms of adjudicator's decision to see that the judge was plainly right in concluding that it was implicit in the award that there had been no valid determination. Indeed, that conclusion followed inexorably from the finding that the appellant had not been entitled to withhold payment. More than that, it is entirely clear that the adjudicator was not simply referring back to what the position had been as at 22nd February but was stating in terms that the claimant was entitled to the payment of £51,659.42 as at the date of his decision.

26. That argument being rejected, Mr Collings nevertheless submits in the light of recent authority that it does not necessarily follow that the adjudicator's decision should be accorded supremacy over clear provisions contained elsewhere in the contract. Clause 29. 8 provides: *"If the contractor shall determine the Sub-Contract for any reason mentioned in clause 29.6 the following provisions shall apply:*

    1. All sums of money that may then be due or accruing due from the Contractor to the Sub-Contractor shall cease to be due or accrue due;"

    Clause 29.9 provides: *"Until after completion of the Sub-Contract Works and the making good of defects as referred to in clause 14.3 the contractor shall not be bound by any provisions of the sub-contract to make any further payment to the sub-contractor."*

27. Mr Collings asks, rhetorically, whether there is any real reason that effect should not be given to those clear contractual provisions. He submits that there are three main exceptions to the principle that an adjudicator's decision is binding and enforceable pending final resolution by arbitration or litigation. These he identifies as (1) where the adjudicator did not have jurisdiction or failed to act fairly or in conformity with the applicable procedures, (2) the terms of the contract override the apparent obligation to make payment in accordance with the adjudicator's decision and (3) where the decision is overridden by another applicable adjudication. The first of these is uncontroversial and already referred to at an earlier place in this judgment. Exceptions (2) and (3) are derived from the judgment of His Honour Judge Thornton QC in **Bovis Lend Lease v. Triangle Developments Ltd** 2nd November 2002, a transcript of the judgment of which has been provided. In that case Judge Thornton QC conducted a thorough review of a number of cases at first instance where this point has arisen and having noted the exceptions to the general position, to which I have referred, finally concluded that:

    "(1) The decision of an adjudicator that money must be paid gives rise to a second contractual obligation on the paying party to comply with that decision within the stipulated period. This obligation will usually preclude the paying party from making withholdings, deductions, set-offs or cross-claims against that sum.

    (2) For a withholding to be made against an adjudicator's decision, an effective notice to withhold payment must usually have been given prior to the adjudication notice being given, or possibly the decision being given, and which was ruled upon and made part of the subject matter of that decision.

    (3) However, where other contractual terms clearly have the effect of superseding, or provide for an entitlement to avoid or deduct from a payment directed to be paid by an adjudicator's decision, those terms will prevail.

    (4) Equally where a paying party is given an entitlement to deduct from or cross-claim against the sum directed to be paid as a result of the same, or another, adjudication decision, the first decision will not be enforced or, alternatively, judgment will be stayed."

It is, of course, upon the third conclusion that Mr Collings relies in support of his submissions and that which gives rise to the obvious question; was Judge Thornton right in reaching that particular conclusion?

28. His Honour Judge Thornton was much influenced by a judgment of His Honour Judge Lloyd in **K & S Industrial Services (Birmingham) Ltd v. Sindall Ltd** (2001) 75 Con. LR 71. In that case Judge Lloyd was faced with an argument that a clause in the contract, which allowed for the determination of the contractor's employment, was capable of overriding the decision of the adjudicator. At para. 28 Judge Lloyd concluded: *"Other rights under the contract which were not the subject of the decision remain available to the relevant party. If, therefore, by the time an adjudicator makes a decision requiring payment by a party to the contract, the contract has been lawfully terminated by that party (or that party has real prospects of success in supporting that termination) or some other event has occurred which under the contract entitles a party not to pay, then the amount required to be paid by the decision does not have to be paid."*

    Judge Thornton also had recourse to a decision of this court in **Parsons Plastics (Research and Development) Ltd v. Purac Ltd** (2002) BLR 334. In that case the court was not concerned with a construction contract as such, but with a contract which nevertheless contained what may be termed the s. 108 provisions. It follows, that the point of construction was much the same as here. At para. 15 Pill LJ stated: *"It is open to the respondents (employer paying party) to set-off against the adjudicator's decision any other claim they have against the appellants (contractor receiving party) which had not been determined by the adjudicator. The adjudicator's decision cannot be re-litigated in other proceedings but, on the wording of this sub-contract, can be made the subject of set-off and counter-claim."*

    However, having referred to that passage, Judge Thornton went on to say that the adjudication was a purely contractual adjudication without the statutory backing of the HGCRA, and that "it is only clear words that can trump the payment decision".

29. It is, I think, important to note that in **Parsons Plastics (Research and Development) Ltd v. Purac Ltd** the court did not have to consider what impact s. 108 might have on the construction of the relevant clause and, moreover, was concerned with a set-off and counter-claim upon which there had been no adjudication. On that, if no other basis, it can clearly be distinguished from the instant case. Here what was claimed, in opposition to the application for summary judgment, was a right to withhold payment following a valid determination of the contract. Rightly or wrongly the adjudicator held that there had been no valid determination. So, even accepting that the logic of **Parsons Plastics** applies in the circumstances of the present case, its application would not result in clauses 38A.7 and 38A.9 being overridden by clauses 29.8 and 29.9. And in any event this logic is insufficient to support Judge Thornton's conclusion expressed, as it is, in such broad terms.

30. But to my mind the answer to this appeal is the straight forward one provided by Judge Wilcox. The intended purpose of s. 108 is plain. It is explained in those cases to which I have referred in an earlier part of this judgment. If Mr Collings and His Honour Judge Thornton are right, that purpose would be defeated. The contract must be construed so as to give effect to the intention of Parliament rather than to defeat it. If that cannot be achieved by way of construction, then the offending clause must be struck down. I would suggest that it can be done without the need to strike out any particular clause and that is by the means adopted by Judge Wilcox. Clauses 29.8 and 29.9 must be read as not applying to monies due by reason of an adjudicator's decision.

31. For those reasons I would dismiss this appeal.

Lord Justice Longmore:

32. I agree. I have no doubt that Parliament's intention was to avoid just the kind of arguments to which we have listened in the present case.

33. Although the Parliamentary intention is clear, the parties themselves chose to underline it when they provided:- *"38A.9 Notwithstanding clause 38B [the arbitration clause], the Contractor and the Sub-Contractor shall comply forthwith with any decision of the adjudicator; and shall submit to summary judgment/decree and enforcement in respect of all such decisions."*

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The parties have thus agreed not merely that the adjudication is to be binding but also that they will comply with the adjudication notwithstanding the arbitration clause. For good measure, they have agreed they will submit to applications for summary judgment. If Ferson had a genuine point, there would then be a dispute which would have to be referred to arbitration but the parties have expressly agreed that course is not open to them once an adjudication has occurred. The clause thus prevents the party who has lost the adjudication from applying for a stay and, for good measure, requires him to submit to applications for summary judgment. The point of that must be not that the court should hear argument, at the stage of the application for summary judgment, about matters which (apart from the adjudication provision) should be referred to arbitration, but rather that summary judgment should be given without further ado. That is what HH Judge Wilcox correctly did.

34. Even without this particular clause 38A.9, I would conclude for the reasons given by Mantell LJ that the obligation to pay the amount stated in an adjudicator's decision must take precedence over clauses 29.8 and 9 of the contract to the extent that there is a conflict but clause 38A.9 puts the matter completely beyond doubt.

Lord Justice Ward:

35. For the reasons given by my Lords with which I agree, I too would dismiss this appeal.

Mr N Collings (instructed by Messrs McCloy & Co) for the Appellant

Mr S Brannigan (instructed by Davies and Partners) for the Respondent