JUDGMENT : HIS HONOUR JUDGE JOHN BEHRENS : **Leeds District Registry QBD** : 12th May 2003

1. Introduction

1. There are before the Court two applications for summary judgment in relation to a claim under the Third Parties (Rights Against Insurers) Act 1930 ("the 1930 Act"). It involves consideration of the effect of an adjudication under the Housing Grants Construction and Regeneration Act 1996 ("the 1996 Act") against an insolvent insured party.

2. Both Counsel accept that the Claimant can be in no better position against the insurer than the insured would have been if it had not been insolvent. There is, however, a significant difference between Counsel as to the effect of the adjudication award.

3. Mr Howd on behalf of the Claimant contends that the adjudication award itself is sufficient to enable the insured to claim an indemnity under the policy. Subject to other defences which are not the subject of the summary judgment application and which admittedly give rise to triable issues he therefore contends he is bound to succeed under the 1930 Act.

4. Mr Neish on behalf of the Defendant takes the contrary view. He submits that the adjudication award is not sufficient to establish a loss under the policy and give rise to a right of indemnity as between the insurer and the insolvent insured. He contends that in order to establish such a loss the Claimant must take steps to enforce the adjudication award. Until that is done the liability of the insured is not established with the result that its rights under the 1930 Act are not transferred to the Claimant. It is common ground that no steps have been taken to enforce the adjudication award. It

   follows that even if the other defences fail the claim cannot succeed. Accordingly Mr Neish contends that the claim must fail and should be struck out.

2. Representation

5. As already noted the Claimant has been represented by Mr Stephen Howd and the Defendant by Mr Andrew Neish. The case has been extremely well and concisely argued. Both Counsel have produced very full and helpful skeleton arguments and I am most grateful to them for their assistance in resolving a by no means straightforward point.

3. Evidence

6. The only evidence before the Court were the pleadings which were verified by statements of truth and a short witness statement from Mark Harris, a partner in the firm of Masons who act for the Claimant. Mr Harris's witness statement is largely uncontroversial but does set out the relevant facts clearly and exhibits relevant documents including correspondence between the parties, the adjudication application, the award and the policy of insurance.

4. The Facts

4.1. Background

7. The claim arises out of a construction project in Leeds for which the Claimant ("Galliford") was the main contractor and in respect of which Michael Heal Associates Limited ("MHA") acted as consulting structural engineers. The construction contract involved the conversion of the Wellesley Hotel in Leeds into flats.

8. There is a dispute between the parties as to the terms of the contract between Galliford and MHA. Galliford contend that it was a contract in writing and that the contract incorporated the ACE Conditions of Agreement version BI which provide for the reference by either party of any dispute to adjudication in accordance with the Construction Industry Council Model Adjudication Procedure. The Syndicate does not accept this.

4.2. The dispute

9. A dispute arose between Galliford and MHA. It is summarised in paragraphs 9 to I I of the Notice of Adjudication which are set out in paragraph 21 of the adjudication award.

   Galliford asserts that MHA has breached express and/or implied terms and/or tortious obligations concerning the performance of its investigations and design duties owed to Galliford .....

   Galliford appointed MHA to advise and prepare a detailed design on behalf of Galliford. In undertaking its duties under the agreement MHA failed to advise on the further investigations necessary and failed to check

the adequacy of the outline design. Crucially Galliford assumed that the design was adequate during its negotiations with the employer and in adopting design responsibility.

Part way through the construction the existing roof slab was found to be inadequate to support the additional floors safely and the design had substantially changed following MHA's failure to produce design or structural calculations ... to support its design. The amendments to the design resulted in a critical 24 week delay to the project and £2,118, 332 additional direct and time related cost...

10. A letter of claim was sent by Galliford to MHA on 2nd July 2001. A further more detailed letter (exhibited to Mr Harris's statement) was sent in March 2002.

11. On 31st July 2002 MHA passed a resolution for voluntary winding up and a liquidator was appointed.

4.3. The adjudication award

12. On 15th August 2002 Galliford commenced adjudication proceedings under the 1996 Act. The adjudication proceedings were fully contested. At all times the conduct of MHA's defence was undertaken by Messers Beachcroft Wansbroughs - the solicitors who have at all times acted for the Syndicate.

13. It is important to note that in addition to challenging the application on its merits, MHA disputed the jurisdiction of the adjudicator to make an award. The grounds upon which the challenge was made appear in paragraph 11 of the adjudication award. In particular MHA challenged the jurisdiction on the grounds that no written contract was ever concluded. In the course of his submissions Mr Neish showed me the written submissions made to the adjudicator on the point. Paragraph 1 of those submissions includes:

It is our submission that no construction contract in the form of an Appointment under the ACE conditions was ever concluded between MHA and Galliford. Since such a contract was neither concluded in writing nor otherwise neither the 1996 Act nor a contractual adjudication based on the ACE Conditions can apply. Accordingly you have no jurisdiction either under the Act or by contractual agreement between the parties.

14. By letter dated 6th September 2002 the adjudicator rejected the argument and determined that he did have jurisdiction. His reasons are set out at paragraph 15 of the adjudication award and I need not repeat them. The adjudication then proceeded on its merits. Mr Harris makes the point that the procedure adopted was a procedure which complied with the 1996 Act.

15. The adjudicator's decision is dated 14th October 2002. It is summarised in paragraphs 49 to 51 of the adjudication award. In summary he decided that MHA was liable to Galliford in respect of the changes to the roof slab design and of the changes to infil steelwork design but not in respect of other matters. He assessed quantum in the sum of £722,586 inclusive of interest. He ordered MHA to pay that sum to

Galliford within 14 days of the decision and he directed that MHA should pay his fees.

4.4. The policy of Insurance

16. It is common ground that MHA had the benefit of a policy of insurance with the Syndicate. It is further common ground that the period of cover extended to claims made before 31st July 2001 and that there was a policy excess of £2,500.

17. In the light of the submissions made it is necessary to look at some of the terms of the policy in some detail.

"The Syndicate agree... subject to the terms, limitations, exclusions and conditions of this Certificate to indemnify [MHA] against Loss

I arising from any Claim or Claims made against [MHA] during the Period of Insurance
(a) by reason of a Wrongful Act committed by (I) [MHA]-..
in or about the conduct of [MHA 's] Business"

"Loss " is a defined term (relevantly) meaning.'

"(i) (a) [MHA 's] legal liability for damages awarded against [MM] '.

By an Endorsement, MHA's cover was extended to cover certain payments which might be required from MHA under adjudication procedures. The relevant wording was:

"The indemnity provided by this Certificate is extended to include Loss under Insuring Clause I consequent upon an Adjudicator's Award under a procedure complying with the [the 1996 Act]

Underwriters shall not be liable to pay or indemnify [MHA] against Loss(es) where the Assured

(i) has agreed to accept the decision of an Adjudicator as finally determining the dispute which is the subject of the Claim...

[MHA] may be required by [the Syndicate] in their absolute discretion to contest any adjudication process under [the 1996 Act] whether or not counsel so advises as a condition precedent to their right to payment or indemnity under this Certificate. "

4.5. These proceedings.

18. It is common ground that no part of the sum awarded by the adjudicator has been paid to Galliford. It is equally common ground that Galliford did not seek to apply to the Court to enforce the adjudication award.

19. These proceedings were launched in January 2003. The Particulars of Claim sets out the position in clear terms. The heart of the claim is contained in paragraph 5 where it is alleged that the effect of the resolution for voluntary winding up was to transfer and vest in Galliford MHA's rights to be indemnified against any liability arising from the claim. It is therefore alleged that the Syndicate is indebted to Galliford in the sum of £730,675, being the adjudication award less the policy excess plus the adjudicator's fee. Interest is claimed over and above that sum.

20. The Defence takes a number of points which are not the subject of the Part 24 proceedings. They are helpfully summarised in paragraphs 4 and 5 of Mr Neish's skeleton argument and I include them for completeness only:

4. The Syndicate denies that it was liable to indemnify MHA because of a breach of a condition precedent in MM s Policy requiring MHA to notify the Syndicate of Galliford 's claim and/or circumstances which might lead to Galliford's claim immediately upon become aware of either and in writing. The Syndicate's case is that, although MHA was aware of a claim and/or notifiable circumstances in February 2001, it failed to inform the Syndicate until July 2001. Because the Claims Notification clause was a condition precedent to the Syndicate's liability. the Syndicate contends that, as a matter of law, it need demonstrate no prejudice to it as a result of the breach. However, the Syndicate is, in any event, able to demonstrate prejudice (see D& CC, paragraph 15(2)).

5. Galliford denies that MHA was aware of a claim and/or notifiable circumstances in February 2001 and says that, in any event, the Syndicate has waived any entitlement to rely on a breach of condition because it has conducted MHA 's defence of the claim. Alternatively, Galliford contends, the Syndicate is estopped from relying on the claims condition because, by conducting MHA 's defence, it implicitly represented that it would indemnify MHA causing Galliford to incur expense in pursuing its claim.

21. In paragraphs 7(2) and (3) of the Defence the Syndicate deny that MHA's rights were transferred to and vested in Galliford on the passing of the resolution for voluntary winding up. They assert that rights are not transferred until a relevant liability is ascertained by judgment award or agreement.

22. In paragraph 8(4) of the Defence the Syndicate record that MHA disputed the jurisdiction of the adjudicator.

23. In paragraph 9 the Syndicate do not admit that the making of an adjudication award constituted the ascertainment of a relevant liability for the purposes of the 1930 Act so as to transfer and vest MHA's rights under the policy to Galliford.

24. By these applications both parties seek summary determination of the issues raised in paragraphs 7(2), (3) and 9 of the Defence. Both Counsel agree that they raise a question of law which is suitable for summary determination, though they disagree fundamentally as to the correct answer to the determination.

25. If the Syndicate is right it is common ground that Galliford had no cause of action as at the date of issue of proceedings and the claim must fail. If Galliford is right it will be necessary for the Court to determine the other issues which I have summarised above. As these issues will take between 3 and 4 days to try it is obviously convenient to determine the point of law at this stage.

5. The 1930 Act

26. Section 1 of the 1930 Act provides:

"Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then -...

'b) in the case of the insured being a company, in the event of ... a resolution for a voluntary winding-up being passed, with respect to the company...

if either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred. "

27. The Act has been considered by the Court of Appeal in **Post Office v Norwich Union** 1 [1967] 1 AER 577, [1967] 2 QB 36and the House of Lords in **Bradley v Eagle Star.** 2 [19891 1 AER 961, [1989] 1 AC 957In the House of Lords Lord Brandon expressly approved the reasoning of Lord Denning and Salmon LJ in the Post Office case. He cited with approval the following passages:

Referring to s 1(1) of the 1930 Act, Lord Denning MR said ([1967] 1 All ER 577 at 579-580, [1967] 2 Q8 363 at 373-374):

'Under that section the injured person steps into the shoes of the wrongdoer. There are transferred to him the wrongdoer's "rights against the insurers under the contract". What are those rights? When do they arise? So far as the "liability" Of the insured is concerned, there is no doubt that his liability to the injured person arises at the time of the accident, when negligence and damage coincide; but the "rights" of the insured person against the insurers do not arise at that tune. The policy in the present case provides that "the [defendants] will indemnify the insured against all sums which the insured shall become legally liable to pay as compensation in respect of loss Of or damage to property. " It seems to me that [Potters] acquire only a right to sue for the money when their liability to the injured person has been established so as to give rise to a right of indemnity. Their liability to the injured person must be ascertained and determined to exist, either by judgment of the court or by an award in arbitration or by agreement. Until that is done, the right to an indemnity does not arise. I agree with the statement by DEVLINJ, in West Wake Price & Co. v. Ching ([1956] 3 All ER 821 at 825, [1957] 1 WLR 45 at 49): "The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until they have been found liable and so sustained a loss. " Under s. 1 of the Act of 1930 the injured person cannot sue the insurance company except in such circumstances as the insured himself could have sued the insurance company. Potters could only have sued for an indemnity when their liability to the third person was established and the amount of the loss ascertained. In some circumstances an insured might sue earlier for a declaration, e.g., if the insurance company were repudiating the policy for some reason; but where the policy is admittedly good, the insured cannot sue for an indemnity until his own liability to the third person is ascertained. `

Lord Denning MR continued ([1967] 1 All ER 577 at 580, [1967] 2 QB 363 at 375):

'In these circumstances I think the right to sue for these moneys does not arise until the liability is established and the amount ascertained. How is this to be done? If there is an unascertained claim for damages in tort, it cannot be proved in the bankruptcy, nor in the liquidation of the company; but the injured person can bring an action against the wrongdoer. In the case of a company, he must get the leave of the court. No doubt leave would automatically be given. The insurance company can fight that action in the name of the wrongdoer. In that way liability can be established and the loss ascertained. Then the injured person can go against the insurance company. '

Salmon LJ agreed with Lord Denning MR. He said ([1967]1 All ER 577 at 582, [1967] 2 QB 363 at 377-378).

*'The case really resolves itself into this simple question: could Potters on June 17, 1965, have successfully sued their insurers for the sum of £839 I 0s. 3d. which they were denying they were under any obligation to pay to the Post Office? Stated in that way, I should have thought the question admits of only one answer. Obviously Potters could not have claimed that money from their insurers. It is quite true that if Potters in the end are shown to have been legally liable for the damage resulting from the accident to the cable, their liability in law dates from the moment when the accident occurred and the damage was suffered. Whether or not there is any legal liability, however, and, if so, the amount due from Potters to the Post Office can, in ow view, only be finally ascertained either by agreement between Potters and the Post Office or by an action or arbitration between Potters and the Post Office. It is quite unheard of in practice for an v assured to sue his insurers in a money claim when the actual loss against which he wishes to be indemnified has not been ascertained. I have never heard of such an action, and there is nothing in law that makes such an action possible. I agree with the statement of DEVLI N J., in **West Wake Price & Co. v. Ching** ([1956) 3 All ER 821 at 825, [195711 WLR 45 at 49), to which LORD DENNING, MR., has already referred. This statement is obiter, but I think it correctly states the legal position, although it does not expressly point out that liability and quantum can be ascertained not only by action but also by arbitration or agreement*

28. Subject to an argument on the effect of the endorsement which I shall consider below the definition of "loss" in the policy with which I am concerned is indistinguishable from the definition in the Post Office case. It follows that the principles set out above apply.

29. It **follows that, contrary to the allegation paragraph 5 of the Particulars of Claim, there was no transfer of MHA's rights against the Syndicate as at the date of the resolution for voluntary** winding up. As at that date the adjudication procedure had not been commenced. In no sense can it be said the liability of MHA to Galliford had been established either by judgment, arbitration or otherwise.

30. That conclusion is not, of course, determinative of this application. Indeed it was not controversial during the course of the hearing. The crucial question is whether there was a transfer and vesting following the adjudication award in October 2002. In order to resolve that question it is necessary to consider the effect and scope of the 1996 Act.

6. The 1996 Act

Section 108 of the 1996 Act, 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 s e c t i o n.

For this purpose "dispute "includes any difference.

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 (3) 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.

(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.

31. It is common ground between the parties that the contract between Galliford and MHA was a construction contract within the meaning of section 104 of the 1996 Act. It is also common ground that the adjudication provisions only apply if the contract is in writing within the meaning of section 107 of the 1996 Act. If it is not in writing the adjudicator has no jurisdiction to make an award.

32. The nature of the adjudication procedure has been the subject of a number of decisions both at first instance and in the Court of Appeal. There is a helpful summary of those decisions in paragraphs 7 - 9 of the decision of Mantell LJ in **Levolux v Ferson**[3] unreported 22 January2003 - [2002] EWCA Civ 11 8

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 PartI 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 I of the Scheme). He is, however, permitted to take the initiative in ascertaining the facts and the law (s 108(2) of the Act and paragraph 13 of Part 1 of the Scheme). He may, therefore, conduct on 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. "

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. "

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. UEPC Plc** 19912 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. "

33. These passages make clear that although the procedure is provisional the adjudication award gives rise to an immediate payment obligation. That payment obligation may be enforced through the Courts normally by means of a claim followed by an application for summary judgment. As is made clear from the analysis of the **Bouygues** decision cited above the application for summary judgment is likely to succeed if the adjudicator has not exceeded his jurisdiction and has answered the right question even if it can be shown he has made an obvious and fundamental error in giving the answer.

34. It is thus a defence to the application for summary judgment to show a real dispute as to whether the adjudicator has exceeded his jurisdiction but not a defence to show that he has given the wrong answer to the question.

6.1. Submissions of Counsel

Mr Howd's submissions

35. Mr Howd referred me to the terms of the policy and in particular to the Endorsement which I have set out above. He submitted that the policy was specifically extended to cover an adjudication award. He accepted that it was necessary to show that MHA would have been entitled to sue the Syndicate under the terms of the policy but he submitted that MHA could have done so. He submitted that it was quite unnecessary to require Galliford to take proceedings against MHA to enforce the adjudication award. He made the point that under the terms of the policy the Syndicate was entitled to require MHA to contest the adjudication process. There was no such requirement in relation to proceedings to enforce the adjudication award. This, he said, demonstrated that it was not envisaged that enforcement of the award by action was a condition precedent to a right of indemnity under the policy.

Mr Neish's submissions.

36. Mr Neish referred me first to paragraphs 4, 5, 30 and 31 of the CIC terms under which this adjudication proceeded. It is not necessary for me to set out paragraph 4 (which echoes section 108(3) of the 1996 Act) or paragraph 31 (which emphasises the provisional nature of the award in the event of subsequent proceedings or arbitration).

Paragraphs 5 and 30 are in the following terms:

37. *5 "The **Parries shall implement the adjudicator's decision** without delay whether or not the dispute is to be referred to legal proceedings or arbitration "*

*30 "The Parties shall be entitled to the redress set out in **the decision and to** seek summary enforcement, whether or not the dispute is to be finally determined by legal proceedings or arbitration. "*

38. Mr Neish submits that the effect of these paragraphs is to create a contractual obligation enforceable summarily on the part of MHA to comply with the adjudication award even though the award is necessarily a provisional award. Thus he submitted that an adjudication award was not equivalent to a judgment or an arbitration award. It was no more or no less than a contractual obligation to pay. Furthermore although it is enforceable summarily it is a defence to an application to enforce the award that the adjudicator exceeded his jurisdiction.

39. Mr Neish referred me to the wording of the Endorsement. He made the point that the extension provided was "to include Loss under Insuring Clause I consequent upon an Adjudicator's Award under a procedure complying with the [the 1996 Act] ". It was not an indemnity as to the adjudication award itself but as to loss consequent upon such an award. He referred me to the definition of Loss as being MHA's legal liability for damages awarded against MHA.

40. For the purpose of this hearing Mr Neish did not take any point on the distinction between liability for debt or for damages, though he wished to reserve his position on it for a future date. He recognised that a failure to pay a contractual sum could give rise to an action for damages in the same sum. Furthermore if there was force in the argument it would mean that the endorsement was devoid of any meaning at all.

41. He did, however, contend that until MHA's legal liability for (debt or) damages was established by action, arbitration or agreement there was no loss within the policy and MHA could not have sued the Syndicate under the policy.

42. He made the point that MHA had contested the jurisdiction of the adjudicator in the adjudication proceedings and that it would have been open to MHA to have repeated the challenge in any attempt to enforce the adjudication award. Until such challenge is determined either summarily or otherwise there is no loss under the policy.

43. Accordingly he submitted that, as at the date when the proceedings were issued, there was no loss under the policy with the result that the proceedings were bound to fail.

7. Conclusions

44. As I have set out the arguments and the authorities in some detail I can express my views quite shortly. In short I prefer the submissions of Mr Neish to those of Mr Howd.

45. The starting point is the guidance given by Lord Denning cited above:

    It seems to me that [Potters] acquire only a right to sue for the money when their liability to the injured person has been established so as to give rise to a right of indemnity. Their liability to the injured person must be ascertained and determined to exist, either by judgment of the court or by an award in arbitration or by agreement

46. At the time of the **Post Office_**decision the adjudication procedure did not exist. Thus the question is whether the adjudication award is the establishment of MHA's liability to Galliford and is equivalent to a judgment of the Court, agreement or an arbitration award. For the reasons given by Mr Neish and set out above I do not think it is. The adjudication award creates a contractual obligation on MHA to pay Galliford but it is not an absolute obligation. In particular it will not be enforced by the Court if the adjudicator has exceeded his jurisdiction. In my view, therefore, liability under the policy is not established until the adjudication award is enforced by a judgment of the court or agreement.

47. It follows that these proceedings were issued prematurely and fall to be dismissed.

48. I am conscious that this is a point on which there is no direct authority and of some general importance. In the circumstances my provisional view is that Galliford should have permission to appeal.

Permission to appeal was subsequently given