JUDGMENT : HIS HONOUR JUDGE THORNTON QC : TCC : 15th January 2003.

1. Introduction

1. The claimant, Joinery Plus Limited (in administration) ("Joinery") undertook joinery subcontract work for the defendant, Laing Limited ("Laing"). Joinery referred a number of disputes to an adjudicator for decisions. One of the decisions that was given was to require Laing to pay Joinery £58,107.15 plus interest plus VAT. Joinery now seeks from the court a declaration or an answer to a question of law as to whether that adjudication decision was valid or a nullity. I am also asked to decide what the consequences should be of my determination of these questions, in particular whether the sum that was decided should be paid by Laing, which it paid, should be repaid and whether Joinery can now refer any of the disputes previously referred to a second adjudicator for decision in a second adjudication.

2. Joinery was a wholly owned subsidiary of In plus Group Limited which specialises in office interior contracting and the manufacture and installation of specialist joinery. It had been incorporated in August 1993. Joinery undertook two separate and unrelated subcontracts for Laing in 2000 and both were entered into on 13 January 2000. The subcontract with which I am concerned involved the supply and installation of joinery as part of the main contract work being carried out by Laing that involved the design and construction of the new Stakis London Metropole hotel and Conference Centre at Harrow Road, London, W2. The subcontract was of some considerable size, given that the new complex was located on sixteen floors with two basements. Joinery's work was to be carried out to back of house and bedroom corridor areas on the fifth to the fourteenth floors. The subcontract sum was £1,705,726/45 and the envisaged working period was 36 weeks. The subcontract incorporated a heavily amended version of the standard DOM/2 conditions of subcontract published by BEF, 1981 Edition, incorporating Amendments 1 to 6. This subcontract, therefore, was a purely domestic subcontract where the main contractor was undertaking the design work and where no design team would be engaged by the employer and where the valuation and payment for the subcontract work was entirely the responsibility of Laing as main contractor.

3. The second Laing subcontract was for a very different type of project. The work involved the supply and installation of specialist joinery at a site known as the Old Admiralty Building, New Road, London. The form of subcontract was the JCT Works Contract, 1998 Edition. This is a form of contract for use by subcontractors undertaking works packages for a management contractor where the main contract work is subject to a design team engaged by the employer who will have some involvement in valuing the subcontract work and in determining what payment will result to both the main contractor and, through it, to the works packages subcontractors. The nature of Joinery's work and the value of the subcontract was, however, similar to the Stakis London Metropole Hotel subcontract.

4. Both subcontracts become contentious. Initially, the parties were in dispute in relation to the Old Admiralty Building work. This dispute was concerned with alleged under valuations of Joinery's work in the period between December 2000 and February 2001 and in corresponding failure by Laing to ensure that the correct value of Joinery's work was included in certificates issued by the Architect under the main contract. This dispute was, therefore, purely concerned with the correct valuation of work on an interim basis. It was referred to adjudication by Joinery in January 2001, Mr C J Hough was nominated as adjudicator by the RICS and his decision that a sum of £85,283.80 and interest should be paid to Joinery was made on 8 May 2001.

5. Meanwhile much more extensive disputes had arisen between the parties on the Stakis London Metropole Hotel subcontract. Joinery regarded itself as being entitled to substantial additional sums by way of loss and expense payments under the subcontract or of damages for breach of the subcontract as a result of significant delays and disruption it had incurred following significant changes in the sequence and timing of the release of work areas and the consequent change to Joinery's programmed working methods and programme. Practical completion of the main contract occurred on 16 October 2000 but, as Laing saw the situation, Joinery first intimated a significant claim for the costs of these delays and disrupting events when it served a notice of adjudication on 13 June 2001.

6. The RICS was again invited to nominate an adjudicator and again, it nominated Mr C J Hough. This nomination was made on 15 June 2001 and was followed by a referral notice dated 20 June 2001 that was

served by Joinery and which identified a claim for almost £700,000. The adjudicator's decision, dated 6 August 2001, was to the effect that Laing should pay Joinery £58,107.15 plus interest plus VAT. A cheque for £70,424.80, being the sum directed to be paid plus interest plus VAT, was sent to Joinery who received it on 13 August 2001 and banked it on its receipt. Joinery notified Laing that this cheque was accepted by it generally on account towards its overall entitlement to payment for loss and expense since the adjudicator's decision had not decided the questions referred to him. Laing immediately responded that the payment had been made in settlement of the issues referred to adjudication which it considered had been decided by the adjudicator.

7. Joinery, in taking issue with the validity of the decision, which had been accompanied by reasons, did so because the reason throughout referred to the subcontract as being one that made reference to clauses from that form whereas, as already stated, the relevant conditions were amended BEF DOM/2 subcontract conditions. Joinery complained to the RICS as the nominating body, on 8 August 2002 that the adjudicator's decision had been based on the wrong subcontract and could not be said to be a decision reached on the referral to him. This led to correspondence from the adjudicator who accepted that his decision had in several places erroneously referred to the wrong subcontract standard conditions. This error had arisen, he stated in a letter to the parties, because he had used his earlier decision relating to the Old Admiralty Building "as the basis from which the second decision had been drafted". However, he also stated that he had re-visited his written decision and was satisfied that his errors were of no material relevance to the substance of his decision and that, even if he had jurisdiction to do so, he saw no reason to change that decision. The adjudicator did, however, inform the parties that he would correct the errors he had referred to if either party requested him to do so.

8. Since neither party requested the adjudicator to correct his decision, the decision remains uncorrected. However, in a letter dated 23 August 2001, Joinery invited Laing to agree to a further referral to a different adjudicator since the adjudicator's decision had not answered the questions referred in that these questions were answered by reference to the wrong contract. Joinery concluded that the adjudicator's decision was not, for this reason, a decision at all. Laing declined this invitation on the grounds that the decision fully addressed the questions referred to the adjudicator and, therefore, Laing was not prepared to consent to a further referral raising the same questions.

9. On 9 October 2001, Joinery served a further notice of adjudication that led to the appointment by the RICS of another and different adjudicator who published his decision on 12 November 2001. The dispute that was referred to this adjudicator by joinery was a valuation dispute concerning the correct way to value the doors and door frames work. Essentially, Joinery contended that the basic document to be used that defined the subcontract work before variations and errors of description were taken into account and on which the subcontract sum was to be taken to have been calculated was a door schedule incorporated into the subcontract whereas Laing contended that the valuation starting point should be the bills of quantities. The adjudicator agreed with Laing and decided in consequence that Joinery was not entitled to any part of its claim for £55,896.96. What is clear from the adjudicator's decision, however, is that the scope of Joinery's work was not readily capable of determination given the complex and not entirely consistent nature of the various documents, including drawings, schedules and bills of quantities, that were incorporated into the subcontract with the BEF DOM/2 conditions.

10. Unfortunately, five days after this second decision was sent to the parties, on 16 November 2001, an administration order was made and two administrators were appointed by the court, one of whom was Mr P J Bridger, a licensed insolvency practitioner. Mr Bridger's appointment was subject to a term of the administration that the present proceedings should be pursued. Due to financial difficulties arising from the need to collect some outstanding monies from another subcontract and to defend, ultimately successfully, a claim from a former director for the recovery of a director's loan, these proceedings were not commenced until 19 August 2002.

2. The Proceedings

11. The disputes referred to adjudication need first to be considered with some care. Joinery was claiming an overall, or global, sum of nearly £700,000 which essentially was made up of four components: (1) the difference between the tender or subcontract allowance for labour and the actual cost to Joinery in

employing labour on site; (2) overtime payments; (3) additional preliminaries; and (4) overhead recovery. The basis of claim was the alleged failure to provide access co the individual parts of the subcontract works so as to enable Joinery to start, carry out or complete those parts of the works in accordance with the subcontract programme prepared in accordance with the contractual requirements for programming. This led to different and delayed working to that contracted for with a consequent greatly increased need for and use of labour to that contracted for. It is the additional cost of that labour that Joinery claimed, without making any specific allocation of that additional labour to particular delays, areas of the site or work.

12. Two causes of action were relied on. Firstly, Joinery contended that the claim was for direct loss and/or expense caused by the material progress of the subcontract works being materially affected by acts, omissions and defaults of Laing. This gave rise to a contractual entitlement to a valuation of such loss under clause 13.1 which, it was contended, Laing had a contractual obligation to agree. Laing's failure to agree gave rise to a further breach of contract whose loss was the sum that should have been agreed for this claim. Secondly, Joinery claimed damages for breach by Laing of its contractual obligation to give Joinery such access to the works as it needed to enable it to carry out and complete them in accordance with the contractual programming requirements.

13. Various relief was sought. Joinery sought declarations that Laing had failed to make various parts of the site available to it; that it was entitled to recover the consequent amount of the direct loss and expense that Laing had failed to agree; and that, as an alternative, Joinery was entitled to damages for breach of contract. Finally, Joinery claimed statutory interest or interest as damages for the late payment of the sums being claimed.

14. Laing' s case in the adjudication was that, save for the claim for additional preliminaries, no claim had previously been notified or made so that no dispute had arisen and the adjudicator lacked jurisdiction. Moreover, Joinery had not complied with the contractual preconditions to a valuation since it had made no appropriate written applications, had provided no appropriate information in support of written application and had supplied no details of the claimed loss and expense. The additional precondition of recovery, namely services of notices of delay, had also not occurred. Furthermore, neither the causes of Joinery's delays nor the factual link between the defaults alleged and loss claimed had been provided. Finally, Joinery was allegedly making a global claim which failed since, unlike the present case, such claims are only permitted when specific linkage between causes and consequences is impossible.

15. Joinery’s claim, as set out in the referral notice, consisted of a short summary of the global claim and its quantification, a witness statement from its project contracts manager and a limited amount of supporting documentation. The adjudicator gave a direction at an early stage of the reference that Joinery should prepare a schedule of delaying events and additional preliminaries which the parties were then to discuss with the aim of agreeing matters of fact and narrowing issues with particular regard to identifying the degree of disruption that had been caused by each delaying or disrupting event identified by the schedule consisting of 89 separate and discrete items and, against each, both Joinery and Laing put discrete sum by way of an assessment of the number of hours of additional time that were involved. Each event constituted a separate delaying event and a brief statement of the consequence was provided. By way of example, the first item which Laing accepted was to the effect restricted staircase access necessitating the use of lifts for both access and return visits. A sum of £1,400 was accepted by Laing.

16. Following the parties’ meeting and the production of a schedule which recorded the agreements reached, the adjudicator held a meeting with both parties together and went through the schedule. He then prepared and issue his decision. This started by stating that it was made in relation to the JCT Works Contract for supply and installation of joinery at the Old Admiralty Building which contained provisions for adjudication in Section 9 of the conditions which did not require him to give reasons so that he was only doing so to the limited extent necessary to outline the basis of his decision. He then set out the procedural steps that had been taken and set out the matters for which a decision was required verbatim. The sub-paragraph setting out the claim for a declaration of the entitlement to have loss and

expense agreed with Laing was the only one which referred correctly to the relevant clauses of the DOM/2 subcontract conditions rather than to the Works subcontract conditions.

17. The adjudicator then summarised the nature of Joinery's global claim and found that it was not satisfactory because there was a serious possibility that Joinery's tender underestimated the extent of the required labour resources and because he was not satisfied that it was not possible to pursue the claim on any other basis or that Joinery had demonstrated that any fault of its own had incurred merely negligible additional cost. The adjudicator then found that Joinery could and should have done more to establish the factual link between delaying events and the loss being claimed, in particular by the production of an as built programme, a critical path analysis, contemporary documentation evidencing this casual link and some notification of delay or disruption, even though such was not a condition precedent to a claim.

18. The concluding section of the decision read as follows: *"I am not satisfied that Joinery has established, in its referral notice and subsequently, the nexus between the events that it alleges caused delay/disruption and the resultant delay/disruption. However, I am satisfied that Joinery has suffered some disruption and possibly delay leading to an entitlement to an extension of time by reason of piecemeal access to working areas and other matters claimed. ... There is no evidence to support the contention that the additional/wasted hours claimed resulted from the listed events and it is apparent that the figures are virtually entirely theoretical. ... Laing has made submissions sufficient to create doubt as to the validity of the theoretical calculations so that I cannot be satisfied that they can justifiably be relied upon."*

    The adjudicator then decided that he was satisfied that Joinery had suffered in some degree loss and expense caused in the way suggested by Joinery but was unable to establish the amount and was not prepared to speculate or "*guestimate*" it. In consequence, he awarded a minimum sum which he was confident could not be too much, a sum on the basis of the allocation sheets he had been provided with of no more than £5,000.

19. However, the adjudicator also went through the schedule with some care and allowed specific amounts against 18 items totalling £53,107.15. The adjudicator referred to the fact that some of the items in the schedule had not been detailed in the referral notice but chat he was still prepared to consider them. The items he allowed were ones that Laing had accepted in full (14 items) or had accepted in principle but where the quantification was varied by the adjudicator (4 items).

20. Thus, the adjudicator's decision was that Joinery had suffered some delay and disruption which he assessed in the sum of £5,000; that any failure by Laing to reach agreement as to the resulting loss could not amount to a breach of the subcontract; that with particular regard to clause 4.51 (of the Works subcontract), a claim for damages was still maintainable despite the contractual entitlement to a valuation of loss and expense; that a sum of £53,107,15 should be paid by Laing for those 18 items in the Cause and Effect Schedule that Laing had accepted as creating a liability to make payment; that interest was payable on the sums awarded under clause 4.26.4 (of the Works subcontract) in the sum of £1,765.00; and that, pursuant to clause 9A.5.7 (of the Works subcontract), each party should bear its own costs.

21. Two further features of this decision should be noted. Firstly, the clause under which a contractual award of interest was made appears in the works subcontract conditions but there is no such clause in DOM/2 since it has no clause providing for a contractual payment of interest on sums certified or paid late. Secondly, the clause providing that each party should bear their own costs appears in the works subcontract within a detailed contractual code for adjudication but does not appear in DOM/2, the relevant version of which contains no relevant provisions for adjudication. As a result, Joinery had applied for adjudication in reliance on the Housing Grants, Construction an Regeneration Act 1996 and the adjudication was governed by the rules set out in the statutory Scheme for Construction Contracts.

22. Joinery, when finally challenging the validity of the adjudicator's decision, did so by issuing a CPR Part 8 claim which seeks a declaration that the decision was null and void or such other declaration as was proper or, alternatively, an answer to the question: "Is the purported decision of Mr Hough dated 6 August 2001 valid?" It became clear during the hearing that what Joinery also wanted was a declaration to the effect that this decision or purported decision did not preclude an unfettered

entitlement to refer the same disputes for adjudication in a second adjudication conducted by a second adjudicator. In turn, Laing wished to contend that Joinery was estopped from claiming that the decision was a nullity since Joinery had affirmed the decision by accepting payment of £70,424.80. It also wished to argue that any declaration in favour of Joinery should be accompanied by a condition that no further adjudication should be started unless £70,424.00 plus interest had first been repaid to Laing notwithstanding Joinery's administration and financial difficulties. I gave permission for these issues to be raised and adjourned the hearing to allow further skeletons to be served dealing with these further issues.

23. It follows that these issues must be resolved:
    1. Was the whole or any part of the adjudicator's decision dated 6 August 2001 a nullity?
    2. If so, has Joinery affirmed that decision by accepting payment of £70,424?
    3. In the light of the answers to issues 1 and 2, may Joinery start a fresh adjudication in relation to the disputes referred to adjudication by the referral notice dated 20 June 2001?
    4. Can and should the court impose a condition that there may be no fresh referral to adjudication unless and until Joinery has repaid Laing £70,424.00?
    5. If a condition would otherwise be imposed, should Joinery's administration and alleged inability to repay this sum allow it to make a fresh referral without such a repayment condition?
    6. What declarations or other relief should the court give in the light of the answers to issues 1 - 5?

3. The Adjudicator's Decision

3.1. Background

24. In order to determine whether the adjudicator decided the questions that Joinery had referred to him, it is necessary to consider with some care the notice of adjudication, the referral notice, the relevant terms of the contract, the procedural rules and the procedure under which the adjudication was being conducted and the reasoned decision of the adjudicator.

1. Notice of Adjudication

25. The notice of adjudication made it clear that the disputed claim was being made pursuant to clause 13 of the DOM/2 conditions in each of three ways: (1) a valuation of the sum recoverable under clause 13.1 as a result of Joinery having been caused direct loss and expense because its progress had been materially affected by acts, omissions and defaults of Laing; (2) damages for breach by Laing of its contractual obligation to agree the sum recoverable under clause 13.1; and (3) damages for breach by Laing of its contractual obligation to make various parts of the site available to it on dates stated in the subcontract, a claim left open to Joinery by clause 13.5 despite its contractual entitlement to a contractual valuation for such breaches. The notice made it clear that the consequence of the breaches that were being relied on were four-fold and were closely inter-related: (1) the postponement of the various dates for the start of work at the many different locations on the site where work was to be undertaken; (2) the reduction in the periods of time to be allocated to the work at each of these locations; (3) the revision of the relationship of the various activities to each other; and (4) subsequent further delays in making various parts of the site available from the postponed dates that had been agreed.

2. Referral Notice

26. The referral notice made it clear that the referral was under paragraph 7(1) of the statutory Scheme and that written reasons were to be provided, a requirement that a party can impose on an adjudicator by paragraph 21 of the Scheme. The notice identified in greater detail the allegations of Laing's default and stated that the four direct consequences of that default already summarised resulted in the need to use additional site labour. The loss arising from the use of this labour was quantified by comparing the cost of labour actually used with the value of labour provided for in the tender. The whole of the difference was attributed to Joinery's loss.

27. Joinery also alleged that it had given sufficient and appropriate notices of the delay and disruption to Laing during the course of the work and, significantly, that the method it had adopted to particularise and quantify the loss and the causal link between Laing's breaches and that loss was reasonable given the contractual provisions relating to notification and given also: *"the disruption arose as a consequence of*

Laing's specific requirements for the re-programming of the subcontract works and Laing has not requested Joinery to submit any details of its direct loss and/or expense nor endeavoured to agree any amount thereof."

28. The referral notice was accompanied by a detailed witness statement with annexed supporting documents and by a copy of the extensive documentation forming the subcontract.

29. Although Laing disputed that the adjudicator had any jurisdiction, on the grounds that it had never previously been notified of this dispute, the adjudicator by implication accepted that this claim had previously been notified to Laing and that Laing had rejected it and had, thereby created a dispute since he accepted jurisdiction and continued with the reference. Laing has not, in these proceedings, renewed its contention that the adjudicator lacked jurisdiction on the grounds that no current dispute had been referred by Joinery.

30. Laing, as the adjudicator recorded in his decision, challenged the entire factual basis of these disputes but it did accept and concede that, as recorded in the decision: *"Laing has agreed that the quantum of Joinery's entitlement to loss and expense may be calculated from the number of hours of delay/disruption and an appropriate hourly rate."*

3 The Subcontract

31. The subcontract is a compendious bible of documents which include an agreement; a detailed appendix incorporating 14 additional and detailed documents which include detailed programming requirements; a form of tender drawings; a contractors' requirements document; a rules and instructions for the project document; documents outlining the scope of works, the main interfaces with other trade packages, trade specific requirements and the arrangements for co-ordination and integration of the services to be provided by Joinery; door schedules and detailed bills of quantities. The DOM/2 conditions with amendments 1 - 6, amended by a list of amendments also incorporated into the subcontract is applicable to this bible of documents. Of particular significance is this amendment: *"Appendix part 1 amended to allow the main contract conditions, obligations and requirements affecting order of works, and the location and type of access to be referred rather than listed."*

32. The subcontract required Joinery to submit to Laing for approval within 14 days of the signing of the subcontract a programme of all off-site activities including design, manufacture and procurement being undertaken to suit site installation periods and recorded in the subcontract in a level of detail to Laing's satisfaction: a programme of all site activities being commenced and completed and an information release schedule. Laing did not suggest in the adjudication that this requirement had not been complied with by Joinery and, by inference, it is to be assumed that the detailed programmes and activity information that Joinery was to produce and then adhere to were produced and provided timeously to Laing.

33. It is helpful to set out parts of clause 13 of the DOM/2 standard conditions which were directly applicable to the referred dispute. Joinery's claim had been made and the resulting dispute had been referred solely under clause 13.1. which reads:

"13.1 Disturbance of regular progress of Sub-Contract Works - Sub-Contractor's claims

If due to the . . regular progress of the subcontract works is materially affected by any act, omission or default of the Contractor or is materially affected by any one or more of the Relevant Matters referred to in clause 13.3 and if the Sub-Contractor shall within a reasonable time of such material effect becoming apparent make written application to the Contractor, the agreed amount of any direct loss and/or expense thereby caused to the subcontractor shall be recoverable from the Contractor as a debt. Provided always that:

.1 the Sub-Contractor's application shall be made as soon as it has become, or should reasonably have become, apparent to him that the regular progress of the works or any part thereof has been or is likely to be affected as aforesaid, and

.2 the Sub-Contractor shall submit to the Contractor such information in support of the application as is reasonably necessary to show that the regular progress of the subcontract works or any part thereof has been or is likely to be affected as aforesaid, and

.3 the Sub-Contractor shall submit to the Contractor such details of such loss and/or expense as the Contractor request in order reasonably to enable that direct loss and/or expense as aforesaid to be agreed. ..."

The passage underlined in clause 13.1 was not relied on by Joinery in its claim, and the dispute that that claim gave rise to was not referred to, or presented by, reference to those contractual. provisions or to the relevant events listed at length in clause 13.3.

34. Other provisions of clause 13 need also to be considered:

"13.2 If, and to the extent that, it is necessary for the agreement of any direct loss and/or expense applied for under clause 13.1, the Contractor shall state in writing to the Sub-Contractor what extension of time, if any, has been made under clause 11 in respect of the Relevant Events referred to in [the relevant clauses of the Main Contract Conditions and of the Sub-Contract.

13.3.1. - 13.3.8. [The Relevant Events are set out in considerable detail]."

13.5 Reservation of rights and remedies of contractor and subcontractor

The provisions of clause 13 are without prejudice to any other rights or remedies which the contractor or subcontractor may possess."

4. The Adjudication

35. The referral was made pursuant to, and the adjudicator's acceptance of his nomination was subject to, the statutory Scheme for Construction Contracts. The particularly relevant rules that this contains are as follows:

(1) Paragraph 7. *"A referral notice shall be accompanied by copies of, or relevant extracts from, the construction contract and such other documents as the referring party intends to rely upon."*

(2) Paragraph 9 (2) *"An adjudicator must resign where the dispute is the sane or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication."*

(3) Paragraph 12. *"The adjudicator shall (a) act impartially ... and shall do so in accordance with any relevant terms of the contract."*

(4) Paragraph 13. *"The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication. In particular he may-*
(a) - (g) [wide-ranging and extensive powers are provided for]
(h) issue other directions relating to the conduct of the adjudication."

(5) Paragraph 14. *"The parties shall comply with any request or direction of the adjudicator in relation to the adjudication."*

(6) Paragraph 20. *"The adjudicator shall decide the matters in dispute. He may take into account guy other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute. In particular, he may ...*
(b) decide that any of the parties to the dispute is liable to make a payment under the contract ...
(c) having regard to any term of the contract relating to the payment of interest decide the circumstances in which, and the rates at which, and the periods for which simple or compound rates of interest shall be paid."

(7) Paragraph 22. *"If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision."*

(8) Paragraph 23. *"The decision of the adjudicator shall be binding on the parties and they shall comply with it until the dispute is finally determined."*

36. I have already referred to the directions given by the adjudicator for the preparation of a schedule of delaying events. The relevant directions he gave following a meeting with the parties when the content had been discussed with them and agreed to by them read as follows:

"Joinery is to prepare and deliver to me and to Laing a schedule of delaying events and additional preliminaries ... Representatives of the parties are to attend a meeting ... The purpose of the meeting is to agree matters of fact and narrow issues, with particular regard to identifying the degree of disruption, if any, caused by each delaying event identified in the schedule. The parties are to hold further meetings as necessary, prior to submission of the completed schedule containing their respective comments to me .... A meeting will be held between me and the parties at my offices ... for me to hear the parties' submissions in relation to the schedule of delaying/disrupting events and any other submissions that they may wish to make in relation to the dispute."

5. The Adjudicator's Decision

37. I have summarised the reasons extensively already. I will merely set out the Decision itself. I have underlined those passages which Joinery contends shows that the decision in its entirety was being made by reference to a subcontract which incorporated the standard Works Contract terms and which did not have incorporated the applicable amended DOM/2 standard conditions:

*"**The Decision***

26. In relation to the issues/remedies set out ... above [which had set out verbatim the remedies set out by Joinery in its referral notice], I decide as follows:

7a This is generally a statement of the position under the Works Contract. I accept that Joinery has suffered some delay/disruption.

7b I do not accept that failure to reach agreement can be a breach of the Works Contract. In any event I decide that Joinery contributed to the inability to reach agreement by its failure to give proper notices and submit the claims in good time and before this adjudication.

7c With particular regard to clause 4.51 of the Works Contract, I decide that the provisions of the Works Contract for loss and expense do not preclude a claim for common law damages.

7d/e I decide that Laing shall immediately pay to Joinery the sum of £58,107.15 plus VAT as applicable."

[7d sought 'a declaration as to she amount the debt that Joinery is entitled to recover from Laing in respect of the loss and/or expense as 7a above' and in '7a above' a declaration was sought that Joinery was entitled to have agreed by Laing what 'Joinery is entitled to pursuant to the subcontract for loss and expense. Thus, the adjudicator in this paragraph of his decision was deciding what sum he had decided was due under the Works Contract for loss and expense].

"7f Under clause 4.26.4 of the Works Contract, Joinery is entitled to interest on amounts due but unpaid at the rate of 5% over Base Rate of the Bank of England. However I decide that Laing did not have sufficient details of Joinery's claim to justify payment before this adjudication except in relation to the sure of £29,519.00 that I have decided is due for the extended contract period in relation to which I award interest in the further sum of £1,7965.00 to the date of this Decision and thereafter at the daily rate of £15.92 per day until payment is made.

7g/h see under 7d/e above.

7i/j The Works Contract provides that each party is to bear its own costs in any adjudication (clause 9A.5.7).

7k Without prejudice to the joint and several liability of the parties to me, I decide that my fees and expenses shall be borne and paid by Laing."

3.2. The Decision Analysed

3.2.1. The reasons, decision: and subsequent reasoning

38. The first matter to consider is the extent co which regard may be had to the arbitrator's reasons. This is because the arbitrator stated in his decision that: *"Under the terms of the Works Contract, I am not required to give reasons and do so only to the limited extent necessary to outline the basis of my Decision."*

    Of course, the adjudicator was not proceeding under the Works Contract, which in clause 9A.5.4 provided that the adjudicator was not obliged to give reasons for his decision, but was proceeding under adjudication rules which required him to give reasons if these were asked for and under an adjudication reference which included a request from the referring party for reasons. However, the adjudicator was obviously seeking to play down the status of his reasons in a situation in which he erroneously thought that he was not obliged to give reasons.

39. The statement by the arbitrator that he was only giving reasons for a limited purpose or was only giving limited reasons has little if any practical effect. If an adjudicator gives any reasons, they are to be read with the decision and may be used as a means of construing and understanding the decision and the reasons for that decision. There is no halfway house between giving reasons and publishing a silent or non speaking decision without any reasons. There is no way in which reasons may be given for a limited purpose and which are only capable of being used for that purpose.

40. Indeed, although adjudicators are, under some adjudication rules, permitted to issue a decision without reasons, it is usually preferable for the parties for reasons to be given so that they can understand what has been decided and why the decision has been taken and so as to assist in any judicial enforcement of the decision. A silent decision is more susceptible to attack in enforcement proceedings than a reasoned one. Moreover, judicial enforcement, being a mandatory and compulsory exercise imposed by the state, should only be ordered by a court once it has been satisfied that the underlying adjudication decision is valid, is in accordance with law and complies with all applicable contractual and statutory procedures. For that purpose, a court will always be greatly assisted by cogent, albeit succinct, reasons.

41. A further consideration is as to whether account should be taken of the adjudicator's post-decision reasoning. In his letter to the parties, the adjudicator informed them that he had revisited his decision and had reconsidered it in the light of the complaints made of the decision by Joinery. He then re-expressed his opinion that, despite those complaints, he was still satisfied that the necessary nexus between cause and effect had not been established, that Joinery had not established such a nexus to any significant extent on the balance of probabilities, that there was no relevant difference between the DOM/2 and JCT Works Contract standard forms of contract and that he was prepared to correct the errors in his decision if such a correction exercise was asked for. However, the adjudicator did not offer any indication as to the terms of any correction that he would be prepared to make if these were asked for.

42. An adjudicator has, once his decision has been issued to the parties, the status hitherto described as functus officio. I do not know the officially sanctioned replacement phrase that is to be used in a post-modernist world. What this means is that the adjudicator has no status or function in relation to the adjudication once his decision has been published and, subject to a limited power to correct errors in that decision, has no further role to play in the dispute or its adjudication.

43. it follows that the adjudicator's views as expressed in his post-decision letter, are irrelevant and should not be taken into account. They do, however, provide some guidance as to whether and to what extent his decision and reasoning were based on the subcontract documentation, including the amended conditions of contract, as opposed to different and non-contractual documentation. They also provide material which adds to the material needed in order to determine whether any error made by the adjudicator was sufficiently substantial as to affect, or to give a reasonable appearance of affecting, the substance and validity of his decision. For these purposes, but for no other, the contents of this letter are admissible and relevant.

44. I therefore conclude that I should have full regard to the contents of the decision and the accompanying reasons but should have only limited regard to the contents of the adjudicator's views as expressed in his subsequent letter to the parties and, in particular, should have no regard to his opinion that his earlier decision was in substance correct, particularly if both the decision and the accompanying reasons were corrected so as to eliminate the errors in the original decision that he referred to but did not fully identify.

3.2.2. The parties' submissions

45. Miss Barwise, on behalf of Joinery, in clear and cogent submissions, argued that the decision had been made by reference to, and by the application of, the wrong contract. The dispute required the adjudicator to consider and apply clause 13.1 of the DOM/2 conditions of contract and all relevant terms and documents relating to the programming and scope of work, the financial make up of the tender, the bills of quantities and the requirements for notifying claims and for the submission of accompanying details. Instead, the adjudicator considered and applied the JCT Works Contract conditions without, apparently, considering or applying the other relevant subcontract documents or, at the very least, without applying the correct conditions of contract to those other contract documents.

46. Miss Barwise also submitted that it was not necessary for Joinery to show that there had actually been a mistake or that the mistake actually affected the result. It was sufficient for the reasons of the adjudicator to give rise to a reasonable concern that the wrong question had been asked. Miss Barwise's submissions did, in fact, go further since she also submitted that the reasons showed conclusively that the adjudicator had asked and answered the wrong question.

47. It followed that the adjudicator had, therefore, failed to consider or decide the dispute referred to him, had failed to act in accordance wish the relevant terms of the contract referred to him and had failed to decide the relevant matters under that contract that had to be taken into account in consequence, the adjudicator had asked himself the wrong question and had not only then answered it but had answered it erroneously. These errors were fundamental and incapable of being corrected by the adjudicator. The decision was therefore outside his jurisdiction and a nullity.

48. Miss Rawley, with similar clarity and cogency, submitted that the adjudicator had made errors in his decision but that these were accidental and inconsequential. He had asked himself the question put to

him in the referred dispute and had answered it correctly. The question referred to the adjudicator was a factual question as to whether Joinery had been subject to breaches of contract, whether there was any causal connection between those breaches and the suggested additional labour and whether and to what extent any provable additional labour was covered by, or fell outside, the tendered rates and contract sum.

49. Miss Rawley submitted that the reference to the wrong form of contract in the decision did not show that there had been any incorrect application of the wrong contract terms to this dispute and, in any case, these errors were capable of correction by the adjudicator if Joinery had wished. Moreover, as the adjudicator had subsequently acknowledged, the errors he made in his reasons were of no material difference to the substance of his Decision since that was concerned with the obligation for Joinery to prove its case and because there were no material differences between the terms of the two standard forms.

50. In summary, the errors were within his jurisdiction since they were made whilst asking and answering the correct question referred to him, were correctable by him if Joinery requested him to correct them and they made no difference to the Decision itself.

3.2.3. The law

51. The effect of the relevant decisions relating to errors by an adjudicator is as follows:

1. The precise question giving rise to the dispute that has been referred to the adjudicator must be identified.
2. If the adjudicator has answered that referred question, even if erroneously or in the wrong way, the resulting decision is both valid and enforceable. If, on the other hand, the adjudicator has answered the wrong question, the resulting decision is a nullity.
3. In determining whether the error is within jurisdiction or is so great that it led to the wrong question being asked and to the decision being a nullity, the court should give a fair, natural and sensible interpretation to the decision and, where there are reasons, to the reasons in the light of the disputes that are the subject of the reference. The court should bear in mind the speedy nature of the adjudication process which means that mistakes will inevitably occur. Overall, the court should guard against characterising a mistaken answer to an issue that lies within the scope of the reference as an excess of jurisdiction.
4. A mistake which amounts to a slip in the drafting of the reasons may be corrected by the adjudicator within a reasonable time but this is a limited power that does not extend to jurisdictional errors or errors of law.
5. In deciding whether an error goes to jurisdiction, it is pertinent to ask whether the error was relevant to the decision and whether it caused any prejudice to either party.
6. A wrong decision as to whether certain contract clauses applied; or whether they had been superseded by the statutory Scheme for Adjudication; or as to whether a particular sum should be evaluated as part of, or should be included in the arithmetical computation of, the Final Contract Sum in a dispute as to what the Final Contract Sum was do not go to jurisdiction.
7. However, where the claim that was considered by the adjudicator was significantly different in its factual detail from the claim previously disputed and referred, the resulting decision was one made by reference to something not referred, was without jurisdiction and was unenforceable since the adjudicator had asked and answered the wrong question.

52. These principles have been distilled from the following cases, listed in chronological order, that were cited in argument: **Niko Hotels (UK) Ltd v MEPC plc** [1991] 2 EGLR 103, Ch Division, Knox J; **Bougues (UK) Limited v Dahl-Jensen (UK) Limited** [2000] BLR 522, CA, paragraphs 12 - 14 affirming [2000] BLR 49, Dyson J, paragraphs 19 and 35 - 36; **Bloor Construction (UK) Limited v Bowmer & Kirkland (London) Ltd** [2000] BLR 314, Judge Toulmin QC; **Discain Project Services Ltd v Opecprime Development Ltd** [2001] BLR 285, Judge Bowsher QC; **Shimizu Europe Ltd v Automajor Ltd** [2002] BLR 122, Judge Seymour QC; **C & B Scene Concept Design Ltd v Isobars Ltd** [2002] BLR 93, CA**; Edmund Nuttall Ltd v RG Carter Ltd** [2002] BLR 312, Judge Seymour QC and **Balfour Beatty Construction Ltd v The London Borough of Lambeth** (2002] BLR 288, Judge Lloyd QC.

53. These cases do not provide any clear guidance enabling it to be readily ascertained whether or not a mistake by an adjudicator is one which results in the decision being a nullity because the wrong question was asked and answered or is one within jurisdiction which he is at liberty to make without the resulting decision being either a nullity or unenforceable.

54. This type of jurisdictional error differs from two other types of jurisdictional error sometimes encountered in adjudication enforcement. These further types of error arise when the adjudicator embarks on a reference where there was no relevant construction contract or construction operation or where there was no construction contract in writing or where the referring party had purported to refer a dispute when the subject matter of that purported dispute had yet to crystallise into a dispute between the parties. In these cases, the statutory scheme is inapplicable because it only applies to existing disputes arising out of a written construction contract. When it is alleged that the resulting decision is without jurisdiction and a nullity, the court must investigate that allegation as a threshold issue of tribunal competence irrespective of the merits of the subject matter of the purported reference or of the procedural competence, performance or reasoning of the adjudicator.

55. The type of error with which I am concerned is not clear cut in the way that a threshold jurisdictional error is since its existence can only be determined by considering whether the question considered by the adjudicator was the one referred to him and whether the error was one which changed the nature of the question referred sufficiently or so profoundly that it turned itself into a different question.

56. Sometimes the alleged jurisdictional error occurring during the adjudication process itself will arise in a procedural sense when it is alleged that the procedural or information gathering process was so flawed or unfair as to turn the decision into a non-decision or nullity. That type of error is not in issue in this case, however.

57. The nature of the consideration of whether or not a "wrong question" type of jurisdictional error has occurred is to be seen in the two Court of Appeal cases in which this question has been considered, the **Bougues** and **C & B Scene Concept Design** cases. In the **Bougues** case, a mechanical services sub-contractor claimed in an adjudication various sums for breaches of the sub-contract, extra payment, the cost of delay, disruption and wrongful termination. The main contractor also claimed in the same adjudication sums for damages as a result of rightful termination, liquidated damages for delay and overpayment. The adjudicator found a net balance in favour of the sub-contractor but, in undertaking the arithmetical exercise needed to ascertain that sum, took a gross sum which included retention and deducted the sum already paid which did not include retention, thereby in effect directing the release of all retention when no such claim had been referred to him. The judge found that this was an arithmetical mistake by the adjudicator in arriving at his decision as to the net sum payable to the sub-contractor.

58. The main contractor contended that this was a jurisdictional error since the decision amounted to the release of retention when no claim for that release had been referred to the adjudicator or contended for in the adjudication nor had the adjudicator decided that there should be a release or referred to that in the decision. However, the judge found that since the error in the award, as was clear from the award itself, was derived from his miscalculation of the overpayment in a schedule to the decision and was not the product of any decision, express or implied, to award retention to the sub-contractor. That was, therefore, an obvious error that was within his jurisdiction.

59. It is not clear whether the judge would have declined to enforce that part of the decision relating to retention had it been argued that the mistake could and should have been corrected by the adjudicator under his implied power to correct and that the part of the decision relating to retention could and should be severed from the rest of the decision and not enforced. The adjudicator had declined to correct the decision both because he did not recognise any mistake and because he stated that he had no power to correct. However, since the **Bougues** case was decided at first instance, a doctrine that the adjudicator has an implied power to correct clerical and similar errors has been developed by the courts (see the **Bloor Construction (UK) Ltd** case). It certainly would appear to be Judge Toulmin's view, in deciding the **Bloor Construction** case, that the adjudicator could have corrected this error (see pages 319 - 310 of the judgment). It would seem to follow from that doctrine that if a party entitled to a correction applied for one which was declined by the adjudicator, a court should not enforce that erroneous part of the

decision since equity sees done what ought to be done and it would be inequitable to enforce that part of the award which was both erroneous and correctable.

60. In the **C & B Scene Concept Design** case, the adjudicator had had referred to him a dispute as to the entitlement of a main contractor to payment under 3 applications. No withholding notices had been served. The contract contained a payment clause with two alternative payment schemes and a provision requiring the parties to opt, and to identify that option in the contract document, for one or the other alternative schemes. No election was recorded in the contract. This clause also contained provisions as to withholding which had not been complied with, if they were applicable. The adjudicator held that a failure to opt still left the withholding provisions of the contract intact and, in deciding in favour of the contractor, upheld those withholding provisions. The judge declined to enforce the decision on the grounds that the adjudicator, in excess of jurisdiction, had applied a contractual term which did form part of the contract. The Court of Appeal overruled this decision. It held that the adjudicator's jurisdiction is derived from the dispute referred to him. That dispute referred to the entitlement to payment of three interim applications which involved the adjudicator in having to resolve two questions of law namely as to whether, on the true construction of the contract and in the absence of an election as to which payment option was applicable, the remaining provisions of the payment clause were effective and, if so, what was their true meaning and intent.

61. This decision is, in effect, that the construction of contractual terms, however erroneous, gives rise to a question of law within jurisdiction if that issue of construction arises as a necessary step along the route that the adjudicator must travel in order to determine the question that has been referred to adjudication. The clause in question formed part of the contract but its dismembered state gave rise to a question of construction as to what if any effect should be given to it. Thus, the decision as to that issue was one arising out of the contract and the underlying dispute that had been referred to adjudication. It must be said that this decision, which of course I must give effect to, goes near to the limits of errors of law within jurisdiction.

3.2.4. The Decision analysed

62. The question that had been referred to the adjudicator was a reference under a subcontract which incorporated the DOM/2 conditions. In a construction contract of any complexity, the conditions are the hub or engine room of a contractual wheel or vessel comprising a myriad of documents and contractual provisions. The conditions give life to, and allow to be focused and co-ordinated, the subcontract documents and the obligations that those documents give rise to. The referred question was narrowly defined and was, in effect, whether an overall loss and expense claim was recoverable for the delays imposed on Joinery to all or most parts of the work, whether that loss and expense was reflected in the totality of the hours worked in excess of those to be remunerated under the contract or some lesser proportion of those hours and whether this claim was recoverable under clause 13.1 or as damages for the same breaches of contract as gave rise to the claim for a contractual valuation. The claim was, in that sense, a global claim. It is to be observed that no additional claim was mounted under the second limb of clause 13.1, namely for loss caused by each or any of the relevant events listed in clause 13.3.

63. The adjudicator decided, at an early stage of his 28-day investigation period, that it was appropriate to direct Joinery to serve a schedule identifying the causes and effects of the delaying and disrupting events founding Joinery's claim. This decision was taken since Laing consented to and was in agreement with the principle that it was appropriate to calculate Joinery's quantum of loss or damages in relation to the delay and disruption on the basis of additional or wasted hours which was the basis upon which both Joinery's originally referred claim and the schedule of causes and effects were prepared. The resulting schedule allocated specific numbers of hours to each of the events and this schedule was then discussed by the parties who produced a composite schedule which identified which items and the hours attributed to them were accepted by Laing and which were disputed.

64. This direction and the manner in which it was complied with amounted to a direction under paragraph 20 of the Scheme that the adjudicator should take into account any other matters which the parties agreed should be within the scope of the adjudication or matters under the contract which he considered were necessarily connected with the dispute. The schedule identified claims based on both

the first and the second limb of clause 13.1 and on the relevant events linked to that second limb and also broke down Joinery's global claim into specific claims linked to specific breaches of contract rather than to all breaches linked together in a seamless web. As the adjudicator found, some of the individual items were new in the sense that they had not been detailed in the referral notice and could not be investigated properly by either Laing or himself. The resulting dispute was as to whether, and if so what, items of delay and disruption identified by Joinery were ones that Laing agreed gave rise to an agreed entitlement to, and basis of, recovery.

65. As to the global claim, the arbitrator decided, correctly, that he had to be satisfied of the essential links in Joinery's claim which he identified as meaning that the burden of proof lay with Joinery. He stated that this burden was lower than that required of a claimant in arbitration or litigation but, in his post-decision letter, he stated that he had applied a standard of the balance of probabilities. That is the correct standard but, given the summary, informal, investigative and speedy nature of adjudication, that standard must be applied in a different and less structured setting than when applied by an arbitrator or a judge. It is clear that the adjudicator both recognised and applied correctly the appropriate standard of proof.

66. The adjudicator, however, made a number of crucial decisions which led to the global claim succeeding to only a fraction of its claimed sum. These were that:
    1. *Joinery suffered some delay and disruption.*
    2. *The only evidence of this delay was to be found in a comparison of actual and tender costs.*
    3. *The adjudicator was not satisfied that the claim could only be put on a global basis.*
    4. *The adjudicator was not satisfied that the tender was adequate or that sufficient allowance had been made for the recovery already achieved for variations. He was also not satisfied that Joinery's records, particularly the labour allocation sheets, were adequate or that its management, supervision, output, workmanship or performance were satisfactory and had not contributed to the additional hours claimed.*
    5. *Joinery's claim could be maintained despite lack of contractual- notification but the absence of notices, written complaints or notices claiming extensions of time provided a further basis for his overall conclusion that Joinery had not established a nexus between the events allegedly causing loss and their effect by way of resultant delay and disruption.*

67. Despite this trenchant dismissal of Laing's claim, the adjudicator then, somewhat surprisingly in the light of his findings, nonetheless decided that Joinery had suffered at least to some degree, loss and expense from the claimed causes. He then found that he was unable to establish the amount of that loss and expense and was not prepared to speculate or "guestimate", Joinery's possible entitlement. He then, equally surprisingly, effectively did just that by deciding that Joinery was to be awarded a minimum sum that he was confident could not be too much but which he was prepared to allow at no more than £5,000.

68. What is significant, however, is that this whole exercise was stated to have been undertaken by reference to the Works Contract. In referring to "the Works Contract", the adjudicator did not confine that reference to the JCT Works Contract/2 standard form but, in context, appears to have been referring to the entire contract including the programme, bills of quantities and other material documents. The adjudicator did not identify what reliance he placed on the contractual documents other than the conditions, which contract documents and contractual provisions he relied on or his reasoning that led him to make his various findings that I have summarised.

69. There is therefore a significant omission from the available information about the adjudicator's thought processes since each of the stages that I have summarised required him to give careful thought to the conditions of contract and the contractual documents incorporated into the subcontract which needed to be considered in the light of the conditions. This can be seen from three examples:

    1. Joinery's claim involved a plea that there were significant and repeated breaches of contract involving the making available of many parts of the site which were to be given over to Joinery in a complex and inter-related sequence, the postponing and alteration of the programmed sequence of work and subsequent further delays in making available parts of the site from the postponed dates resulting from the initial delays. It was this complex inter-related series of breaches that led to the impossibility

of separating out the individual causes of delay and to the necessity of making a global claim. These allegations would have involved a detailed consideration of the programming and other contractual documents and of the clauses of the conditions concerned with programming, scope of work, valuation, notification, extensions of time and the breakdown of the contract sum.

2. Joinery's claim involved a plea that its tendered rates were sufficient for the work required of it by the original contract. This involved a detailed investigation of the tender, the scope of work and other documents concerned with valuation. This was the type of investigation of a detailed and difficult kind that involved consideration of the contract documents that was undertaken in the second adjudication concerned with a claim for further payment for the installation of doors and door frames that led to the decision of 12 November 2001.

3. Joinery contended that the scope and contents of the details provided for its claim were reasonable and that it would be unreasonable for it to provide any additional documents. The adjudicator was particularly critical of the form in which claim was presented, the lack of supporting documentation and the absence of contemporaneous notifications. Joinery's contentions necessitated a detailed consideration of the conditions of contract in their context in the particular sub-contract in question and the adjudicator's critical findings would have needed to have relied on those conditions of contract. This is because the DOM/2 conditions, unlike the JCT Works contract conditions, only required Joinery to supply such details as were reasonably necessary. The corresponding JCT Works Contract conditions appear to impose a different requirement by leaving it to Laing to identify what details it reasonably required.

3.2.5. The validity of the Decision

70. The adjudicator suggested that his Decision could be corrected so that, by inference, the erroneous references to the JCT Works Contract were slips which affected neither the reasoning nor the result. However, these errors are much more significant than that.

71. Overall, the adjudicator did not assert that he used the correct conditions in reaching his decision and did not indicate what, if any, parts of the correct contractual documentation he used. All he did was to state that the first two paragraphs of the decision were mistakenly copied from the earlier decision given in relation to the old Admiralty Building. He also stated that he could correct the errors in his decision if asked to do so, thereby implying that these errors are insubstantial. However, he gave no explanation for the errors in the decision itself which, in every paragraph of paragraph 26 of the decision, stated or inferred reliance on the JCT Works Contract conditions. Overall, he did not seek to correct unilaterally nor to explain in any detail how he came to make his erroneous statement in the decision that that decision had been made in respect of the JCT Works Contract at Old Admiralty Building. Furthermore, he did not seek to assure the parties that the documents he actually used were the DOM/2 conditions, he did not explain that he had relied on the accompanying bible of contractual documents nor how he had relied on them, he did not explain how the operative findings in paragraph 26 of his decision were each made by reference to the DOM/2 conditions nor how or why, in particular, he appears to have relied on and given effect to the JCT Works Contract conditions in relation to the giving of reasons and to the award of costs and interest to Joinery nor why the parties could be confident that that reliance on the JCT Conditions had nor filtered through to the other operative parts of his decision.

72. Procedurally, the adjudicator applied and gave effect to various provisions of the JCT Works Contract conditions which were not applicable to this adjudication and were not contained in the DOM/2 conditions. As a result, several errors occurred. Firstly, the adjudicator believed that he had no duty to provide reasons and, unsuccessfully, attempted to down play his reasons to the status of a document whose sole purpose was to *"outline the basis for my Decision"* in reliance on a provision found in the JCT Works Contract conditions which is not found in the DOM/2 conditions. Secondly, he applied a term of the JCT Works Contract conditions to the effect that each party should pay their own costs. No such provision is contained in the statutory Scheme and, in some situations, a successful party to a Scheme adjudication is able to recover its costs from the unsuccessful party. Thirdly, the adjudicator purported to apply a provision for the award of interest that is found in the JCT Works Contract conditions but

which does not appear in the applicable DOM/2 conditions. That part of the decision is, on any view, made without jurisdiction.

73. The adjudicator contended that there was no difference between the DOM/2 conditions and the JCT Works Contract conditions. However, there is one potentially significant difference. In clause 13.2 of the DOM/2 conditions, the subcontractor is required to submit such information in support of the application as is *"reasonably necessary to show that the regular progress of the works [was affected]" and "such details of such loss and/or expense as the contractor requests in order reasonably to enable that direct loss and/or expense to be agreed"* whereas, in the JCT Works Contract conditions, the equivalent requirement was a differently worded composite requirement that the subcontractor should submit "such information including details of the loss and/or expense as the Management Contractor may reasonably require". It is not appropriate for me to consider what difference, if any, there is in their respective contractual contexts between these two contractual formulae. It is merely sufficient to know that the adjudicator appears to have resorted to the wrong contract conditions when considering significant parts of the question referred to him.

74. It follows that the decision has every appearance of having been decided by reference to the wrong conditions of contract and without recourse to the correct contractual documentation. Indeed, the adjudicator appears to have applied the wrong conditions of contract in reaching his decision and either not to have considered the other contractual documents at all or, even more seriously, to have considered the entirety of the Works Contract Old Admiralty Building documentation during his decision-making process.

75. It follows that the adjudicator's errors went to the heart of his jurisdiction which was to decide the referred dispute under the actual contract between the parties. The errors were fundamental, not capable of being corrected under his implied power to correct accidental slips and were not merely errors of law within his jurisdiction. Unlike the **C & B Scene Concept Design** case, where the correct contract provisions were misconstrued by the adjudicator, the adjudicator construed and applied the wrong conditions and, in conjunction with that error, either failed to consider and apply the correct contractual documentation at all or considered the wrong documentation.

76. The same considerations apply to the dispute added to the reference by the adjudicator. Without being apparently conscious of it, the adjudicator was within his jurisdiction by virtue of paragraph 20 of the Scheme that related to agreed items within the causes and effects schedule. Some of these items were "other matters which the parties to the dispute agree should be within the scope of the adjudication" but these were so inter-twined with those which were "necessarily connected with the dispute" that, if the underlying decision concerning the question referred is a nullity, so to must be the decision as to these ancillary and related matters.

3.2.6. Conclusion

77. It must follow that the Decision in its entirety is a nullity and made without jurisdiction. The question referred was not answered and the errors were fundamental, went to the root of his jurisdiction and were incapable of correction.

78. Since the adjudicator asked the wrong question and thereby embarked on an exercise for which he had no jurisdiction, in is inappropriate for the court to embark on its own determination of whether or not the adjudicator could or would have reached the same conclusion had he asked the correct question under the correct contract by the application of the correct contractual documentation. The court is not able to undertake a "safe and satisfactory" exercise of a kind that used to be undertaken by the Court of Criminal Appeal in relation to appeals on procedural points which were well-founded but which failed because the court determined that the relevant conviction was nonetheless safe and satisfactory. In a situation in which an inferior tribunal has exceeded its jurisdiction, the resulting decision is a nullity irrespective of what decision might have resulted from that tribunal correctly addressing the referred question.

4. Affirmation

79. Laing contended that, if the decision was a nullity, it was no longer open for Joinery to contend that it was a nullity since it had affirmed the decision by accepting Laing's cheque sent in order to comply with

its obligation to honour the decision. In so contending, Laing relied on the obiter dicta to that effect by Judge Seymour in the **Shimizu** case.

80. The chronology of events following the adjudicator's delivery of his decision to the parties is important. On 6 August 2001, the adjudicator issued his decision which the parties received soon afterwards. On 8 August 2001, Mr Plank, the managing director of Joinery wrote a letter of complaint to the RICS, as the nominating body who had nominated the adjudicator, essentially no the effect that the adjudicator had not answered the questions put to him and had based his decision on the wrong contract. No copy of this letter was sent to Laing at that time. On 9 August 2001, Laing drew a cheque for £70,424.80, being the sum directed by the adjudicator to be paid immediately and sent it by post that day to Joinery who received it on 13 August 2001. Meanwhile, the RICS's manager of dispute resolution services replied to Joinery's letter on 10 August stating that only an arbitrator or a court could investigate the merits of an adjudicator's decision so long as he had jurisdiction and answered the questions put to him. The RICS would, however initiate an investigation into the performance of the adjudicator but needed Joinery's permission to send to the adjudicator its letter of complaint.

81. Joinery, immediately it received Laing's cheque, wrote to Laing a letter in these terms dated 13 August 2001:

"We acknowledge receipt of your cheque in the sum of £70,424.80.
We intend to bank this cheque on the basis that it represents an on account payment towards our entitlement to loss and expense in relation to this project.
Having read Mr Hough's decision we consider, as is clear from the face of the decision itself, that it does not decide the questions that we referred to Mr Hough. Accordingly, all our rights in this respect are fully reserved.
We confirm that our Mr Plank and [a quantity surveyor] have arranged to meet with your [representatives] on 22 August 2002 ... in order to consider the status of our account generally. We hope that that meeting will be productive in resolving the accounting differences that remain outstanding between us."

Later that day, Joinery banked Laing's cheque. Laing replied on 17 August 2001 by stating that the payment was not an on account payment but was made in settlement of the issues referred by Joinery to adjudication which it considered had been decided upon by the adjudicator. The letter also confirmed the meeting to he held on 22 August 2001.

82. On 22 August 2001, the proposed meeting took place but little productive agreement occurred. Laing was only prepared to discuss the final account for measured work, taking the position that Joinery's claim for loss and expense had been dealt with and resolved by the adjudicator's decision. Also on 22 August 2001, Joinery, having only received the RICS's letter that day, replied to the RICS by setting out its complaints about the adjudicator's decision in full and intimating than it would probably have to refer the matter to the court for a declaration that Mr Hough had not decided upon the questions asked. The letter made it clear that Joinery was happy for the adjudicator to be sent a copy of both its letters to the RICS and asked that this should take place and that it should receive a copy of his reply.

83. On the next day, Joinery wrote to Laing reiterating its belief that Mr Hough's purported decision was not a decision since he made, throughout his decision, reference to an 'alien' contract and to specific conditions within that 'alien' contract. The letter invited Laing to agree that the questions referred to Mr Hough had not been answered by him and that it would have no objection to a further referral being made raising the same questions. Laing replied on 31 August 2001 stating that the cheque it had sent was sent in full and final settlement of Mr Hough's decision and that that decision did, it believed, fully address the questions referred to him. Laing was not, therefore, prepared to consent to a further referral being made which raised the same questions.

84. Meanwhile, the RICS had sent copies of the exchange of correspondence to the adjudicator and asked him for a response. This was forthcoming on 10 September 2001 by way of a letter to both parties and, as already indicated, the adjudicator accepted that the decision contained several erroneous references to the JCT Works Contract and concluding with an offer, if either party requested it, to correct the errors referred to in the letter. On 12 September 2001, Laing replied cc the adjudicator stating that it had complied with the terms of his decision and paid Joinery £70,000. The letter then concluded with the statement *"We have no objection to your making whatever amendments you deem appropriate to your decision"*.

85. On the same day, Joinery wrote to Laing setting out fully and clearly its position as to the decision of the adjudicator. The letter explained why the decision was a nullity for failing to ask or answer the question referred and by applying, and not merely referring to, the wrong conditions of contract. The letter, indicated that there were no mistakes in the decision capable of correction by the adjudicator and concluded by stating that since Laing had declined to agree that the decision was a nullity, Joinery would have no option but to take the matter further. Laing faxed back an acknowledgement the same day which merely noted the contents of the letter.

86. The adjudicator then wrote to Joinery on 13 September 2001 enclosing a copy of Laing's letter to him and stating: *"You will note that Laing does not object to my correcting my Decision, but does not request me to do so. As you are aware, I accept that I have made an error in drafting my Decision and am willing to correct it (for which I would not charge a fee). However, I will do so only if requested by either party. Please would you let me know if you wish me to correct my error."*

87. Joinery did not reply to that letter and correspondence with the RICS then ceased. In consequence of neither party requesting the adjudicator to amend and correct his decision, the decision stands in the form in which it was originally issued to the parties. Joinery then initiated the limited doors valuation adjudication and, four days after the decision in that adjudication was issued, administrators were appointed. Some months later, these proceedings were issued seeking a declaration as to the validity of the decision.

88. Notwithstanding that history, Laing contends that Joinery has accepted the validity of the adjudicator's decision by banking the cheque that it had sent in full and final settlement of the decision and of the obligation that that decision created for it to pay the sum in question. Laing contends that the payment was not an on account payment and it was not open to Joinery to convert unilaterally the payment into an on account payment towards Laing's contractual liabilities to make payment. As a result, Joinery may not approbate the decision by accepting payment and then seek to reprobate its validity in subsequent proceedings.

89. Joinery contends that the mere banking of the cheque did not amount to an affirmation of the decision. Only if it unequivocally represented to Laing that it accepted the validity of the decision whilst accepting the sum tendered or otherwise agreed with Laing that the cheque was being accepted in settlement of Laing's obligation to honour the decision would it have affirmed and approbated that decision so as to preclude it from subsequently challenging its validity.

90. Both parties referred to a passage taken from the second part of Judge Seymour's judgment in the **Shimizu** case which is worth setting out in full:

> *"29. In my judgment it cannot be right that it is open to a party to an adjudication simultaneously to approbate an to reprobate a decision of the adjudicator. Assuming that good grounds exist on which a decision may be subject to objection, either the whole of the relevant decision must be accepted or the whole of it must be contested. ... It seems to me that the option available to a party who otherwise has good grounds for objecting to a decision that a particular sum is payable is to accept it in its entirety or not at all. He does not have the option of declining to accept the decision in its entirety, but to accept the reasoning which led to particular items being included in the overall total. Similarly with an evaluation of a period of extension of time. The overall period must be accepted or none.*
>
> *30. In the present case, [the adjudicator's] error, if such it was, was committed in the course of reaching a conclusion as to how much was due to [the contractor]. It was not a decision on a separate question that had been referred to him. In my judgment by inviting [the adjudicator] to correct the Award (sic) under the slip rule [the employer's solicitors] accepted that the Award was valid. ... I accept the submission [of the contractor's counsel] that the invitation to [the adjudicator] to correct the Award under the slip rule is only consistent with recognizing it as valid. I also accept the submission [of the contractor's counsel] that by paying part of the sum the subject of the Award [the employer] elected to treat the Award as valid. Otherwise there was no need to pay [the contractor] anything and it was not appropriate to do so. Consequently, had it been necessary to do so, I should have held that [the employer] had elected to forgo any opportunity which it might otherwise have had to object to the Award."*

It is to be noted that the judge had held that the mistake of the adjudicator, if it had been a mistake, was one within the jurisdiction of the adjudicator so that the decision was valid in its entirety. The employer

had sought a correction and had then paid that part of the decision relating to items in the claim which did not form part of its validity challenge. The contractor then started proceedings claiming the balance of the sum directed to be paid and the employer unsuccessfully defended those proceedings by alleging that the part of the decision which it challenged was invalid. The judge held that the nature of the referral was such that the decision could not be split up into component parts and that the decision was either wholly valid or invalid but that in any case there had been no jurisdictional error in the decision. The passage in his judgment concerned with approbation and reprobation, in consequence, consisted of obiter dicta.

91. It is clear from Judge Seymour's judgment, and in accordance with principle, that the mere payment of money and its acceptance is not sufficient to characterise a party's acts as amounting to an acceptance of, or an agreement to settle, an underlying obligation to pay or to settle a dispute. Judge Seymour was considering whether one of the parties had unequivocally accepted an adjudicator's decision in the circumstances of that case. These were that the party challenging the validity of part of a decision had requested the adjudicator to correct it and had made a part payment towards that decision to meet the unchallenged parts. Those acts were not sufficiently qualified by an appropriate reservation of that party's position to the effect that the challenged part of the decision was a nullity and the decision was one which the judge decided could not be severed or split into the allegedly good and the allegedly bad parts. It was as a result of all these circumstances that Judge Seymour would have understandably held, had it been necessary for him to do so, that the employer's conduct amounted to an acceptance or approbation of the underlying adjudicator's decision.

92. A party does not, merely by accepting a cheque, accept that the debt, obligation or dispute underlying the payment of that cheque has been discharged or settled. Whether or not a discharge or settlement results will depend on the intention of the party accepting the cheque, as determined objectively from the surrounding circumstances of that acceptance. If the acceptance is intended to be qualified so that the payment is accepted generally on account of that party's entitlement to payment, and it is clear from the surrounding circumstance objectively determined that the acceptance of the cheque was qualified in that way, the accepting party will not be taken to have fully and finally accepted or approbated or settled the underlying obligation or the situation giving rise to that obligation.

93. This principle may be seen from the well-known and long established case of **Day v McLea** (1899) 22 QBD 610. This case was approved and followed by the Court of Appeal in **Stour Valley Builders v Stuart**, The Independent, 9 February 1993 and by Jacob J in **Inland Revenue Commissioners v Barbara Fry**, Lawtel, 30 November 2001. It is both surprising and regrettable that neither of the modern authorities have yet been reported since the principle established by **Day v McLea** is not as well known to modern litigants as it should be. That principle is clearly explained by Lloyd LJ in the **Stour Valley Builders** case as follows: *"Cashing the cheque is always strong evidence of acceptance, especially if not accompanied by immediate rejection of the offer. Retention of the cheque without rejection is also strong evidence of acceptance depending on the length of the delay. But neither of these factors are conclusive, and it would, I think, be artificial to draw a hard and fast line between the cases where the payment is accompanied by immediate rejection of the offer and cases where objection comes within a day or within a few days."*

94. In this case, Joinery had already challenged the validity of the decision before it received Laing's cheque, albeit in a letter to the RICS which it did not copy to Laing. On receipt of Laing's cheque, it wrote to inform Laing that it was only accepting the cheque, which it had only just received and which it had not solicited, generally on account of Laing's obligations under the subcontract since the adjudicator's decision had failed to answer the question referred to him. This was as clear a challenge to the validity of that decision as could be expected or sought. Only after it had sent off its challenge to Laing did it bank the cheque. Joinery also immediately invited Laing to agree to a "rerun" of the adjudication before a different adjudicator but Laing declined that invitation on the erroneous grounds chat the first decision was valid. Finally, Joinery declined to invite the adjudicator to correct his decision since it was invalid and, therefore, incapable of mere correction.

95. This shows clearly and unequivocally that Joinery was neither approbating the decision nor accepting the money proffered by Lang on any other basis than generally on account of Laing' s contractual

obligations to pay Joinery. Contrary to Laing's submission, a receiving party such as Joinery can accept a cheque on that basis even if it is offered on a different basis. If Laing did not approve of that basis of acceptance, its choice was either to take its chance in any subsequent challenge to the validity of the adjudicator's decision and seek to uphold affirm that decision or to ask for the return of the money as soon as it had been notified by Joinery of the terms of Joinery's qualified acceptance of Laing's cheque.

96. It follows that Joinery has not accepted or approbated the adjudicator's decision so that that decision remains invalid, a nullity and one issued without jurisdiction.

5. May Joinery Start a Fresh Adjudication in Relation to the Disputes Covered by the Referral Notice dated 20 June 2001?

97. There can be no doubt that Joinery may still start a fresh adjudication on the same basis as it could have started that adjudication had there been no referral notice 20 June 2001 or purported adjudication by Mr Hough at all. Since any fresh adjudication would be governed by the statutory Scheme, paragraph 9(2) of the Scheme would not be applicable. This requires an adjudicator to resign where the dispute that has been referred is the same or substantially the same as one which has previously been referred and a decision has been taken in that adjudication. Although there was a referral, there had been no decision on the referral.

6. Should Any Fresh Referral be Subject to a Precondition that Joinery Should Repay Laing £70,424.00?

98. Laing claims an entitlement to the repayment of the sum it paid Joinery to settle its obligation to honour the adjudicator's decision which I have now determined was a nullity. The basis of its suggested entitlement is restitutionary, namely that the payment was made under mistake of fact. If the payment was made under a mistake, however, that mistake would have been one of law. However, it cannot be said that there was a mistake in the circumstances of the payment. If there is a restitutionary entitlement to the repayment of the money, it is because there was a total failure of consideration, the payment having been made by Laing in consideration of the obligation to meet an adjudicator's decision which was invalid.

99. Laing would be entitled to reclaim the money on this ground if there is no basis for Joinery to assert a cross-claim, in the nature of an equitable set off, for any or all of the sum paid. The money was accepted by Joinery, and was appropriated by it to, the overall liability of Laing to pay Joinery money under the subcontract. Joinery asserts that Laing accepted during the adjudication process a liability to pay the component parts of the overall sum that was identified as being due and which was paid by Laing. In so far as Laing did not accept that sum, the adjudicator's view that that sum was due is good evidence of Laing's indebtedness under the subcontract, particularly since Laing has not put forward in these proceedings any reason for disputing or challenging Joinery's underlying entitlement to these sums even if these are not supported by a valid adjudicator's decision.

100. I have already set out the circumstances under which the parties prepared and then discussed the causes and effects schedule and the decision based on that schedule. In essence, the adjudicator took all amounts that Laing accepted were due and adjusted them to account for overheads and profit. He also took four items which Laing accepted in principle and produced a revised valuation using the contract rates or by making a reasonable assessment, The only item which is not subject to this process of consensual acceptance was the estimation that £5,000 was due for loss and expense claimed globally by Joinery and the award of interest. In these proceedings, Laing does not challenge the merits of Joinery's underlying entitlement to £5,000 as an entitlement under the subcontract irrespective of the adjudication or to interest payable under the relevant statutory provisions for payment of interest. Moreover, the adjudicator's views as to the value of disruption caused to Joinery must carry some weight even though they were given by reference to the wrong contract conditions and did not form part of a valid adjudication decision. I therefore regard these two items, particularly since they are minimal in amount, as being in the same category and subject to the same considerations as the other items totalling £70,424,80 which made up the overall sum paid by Laing to Joinery.

101. Since, for the reasons I have given, Joinery has made out a sufficiently cogent case for summary judgment for £70,424.00, Laing is not entitled to recover that sum as a total failure of consideration since

Joinery has a set-off and equitable cross-claim in the same amount which it is reasonable to allow as a means of defeating Laing's claim.

7. The Relevance of Joinery's Administration and Alleged Inability to Repay

102. The consequences of Joinery having administrators appointed by the High Court on 16 November 2001 are significant.

103. Firstly, no proceedings may be commenced or continued against the company without the consent of the administrators or the leave of the court and subject to such terms as the court imposes in granting leave (section 11 (3) (d) of the Insolvency Act 1986). In the context of this case, this requirement would appear to cover an application by Laing for summary judgment, an application or contention by Laing that Joinery should be restrained from starting a fresh adjudication or should have imposed on it a condition of repayment prior to starting that adjudication and any application by Laing that a declaration of rights that might otherwise be made in favour of Joinery should be deferred until after repayment has been made or should have added to it a requirement of repayment. All these options have been raise by Laing and it is clear that if permission is granted, each will be pursued.

104. It is therefore clear that any order, judgment or condition for the repayment of £70,424.80 would have to be preceded by the administrators agreeing to that course or for an order of the court.

105. Secondly, the application for leave to commence or continue its claim may be made to the TCC by Laing and may be made in these proceedings. This is because the Insolvency Act 1986 requires the leave of the court to be obtained without specifying which court is to grant that leave. The Chancery Guide states than that court should be the Companies Court. This is a statement of practice which, although usually to be followed, is not mandatory and can be overridden if the overriding objective suggests that another court is appropriate. Clearly, in this case, it would be disproportionate in costs to require the parties to apply to the Companies Court during these ongoing adjudication proceedings for leave and I will accede to Laing's application for leave to apply under section 11 (3) (d) of the IA.

106. Thirdly, the discretion as to whether or not to grant Laing leave to commence or continue its claim for repayment should be exercised in accordance with the principles identified by the Court of Appeal in **Re Atlantic Computers Plc** [1992] Ch 505.

107. Fourthly, an order for repayment cannot be made against the administrators personally since the sum that would be ordered to be repaid had been paid to and mixed with Joinery's general funds prior to the start of the administration and no default is alleged against the administrators. Moreover, the administrators are entitled to exercise a wide discretion in undertaking their administrative duties (see **MTI Trading Systems Ltd v Winter** (1998) BCC 591, Neuberger J) and this discretion would be severely circumscribed if they were to be susceptible to a personal application by a creditor of the company to discharge the company's indebtedness save in cases of personal default.

108. The guidelines set out the **Re Atlantic Computers** case are formulated for cases where proprietary rights, including security rights, such as those held by landlords, lessors or mortgagors, are sought to be exercised under the immediately preceding section 11(3) (c) of the IA (see page 542). However, with appropriate modifications, these guidelines are clearly helpful in considering whether a creditor should be granted leave to enforce a trade debt under section 11(3) (d) of the IA. The relevant guidelines are:

(1) It is in every case for the person who seeks leave to make out a case for him to be given leave.

(2) The prohibition in section 11(3) (d) is intended to assist the company, under the management of the administrators, to achieve the purpose for which the administration order was made. If granting leave to a creditor to exercise his contractual or restitutionary rights and sue for the payment of his debt is unlikely to impede the achievement of that purpose, leave should normally be given.

(3) In other cases the court has to carry out a balancing exercise, balancing the legitimate interests of the creditor and the legitimate interests of the other creditors of the company. This is to enable a balance to be struck between the statutory objective of enforcing the prohibition to assist the company to achieve the object for which the administration order was made and the statutory power to relax the prohibition where it would be inequitable for the prohibition to apply.

(4) Greater importance is given to those with proprietary interests than to those who are mere unsecured creditors. The underlying principle is that an administration for the benefit of unsecured creditors generally should not be conducted at their expense or at the expense of secured or preferential creditors save where this may be unavoidable and, even then, only to a limited extent.

(5) It will normally be a sufficient ground for the grant of leave if significant loss would be caused to the creditor by the refusal. However, that loss should not prevail if substantially greater loss would be caused to others by the grant of leave.

(6) In assessing these matters the court will have regard to matters such as: the financial position of the company, its ability to pay the debt, the administrators, proposals, the period for which the administration order has been in force and is expected to remain in force, the effect on the administration if leave were given, the effect on the applicant if leave were refused, the end result sought to be obtained by the administration, the prospects of that result being achieved, and the history of the administration so far.

(7) In considering these matters it will often be necessary to assess how probable the suggested consequences are. Thus if loss to the applicant is virtually certain if leave is refused, and loss to others a remote possibility if leave is granted, that will be a powerful factor in favour of granting leave.

(8) The conduct of the parties may also be a material consideration.

(9) The court will not decide a dispute as to whether the debt in question is due unless it is a short point that must be decided.

109. It is therefore necessary to consider the objectives and history of the administration. The application to the court by the prospective administrator in October 2001 explained that the company's financial difficulties as a specialist joinery contractor were caused by having taken on large contracts which had caused difficulty in collecting money. The company had significant PAYE and VAT debts with an un-invoiced order book of £980,000. The estimated realisation was about £574,000 and the liabilities were about £840,000. Thus, the objective of the administration was to seek maximum recovery to meet as much of that indebtedness as possible in a situation in which liquidation would yield little if any of the potential realisation.

110. The principal assets were the unpaid monies on three contracts, two of which were the Metropole and Old Admiralty Building contracts with Laing. The Metropole contract adjudication was reported and the report included this passage: *"The adjudicator did find that in his opinion the company had suffered delays and disruption which were likely to lead to loss and expense but would not decide, in the absence of further evidence, to award any significant sum in the company's favour The company believes that the adjudicator erred in reaching his decision and has taken counsel's advice to appeal against the decision. Nonetheless, it is the absence of the certainty of any reasonable and immediate recovery of these monies which have put the company is its present predicament."*

Overall, the view of the prospective administrator was that the outstanding monies would be uncollectible in a liquidation and the ongoing adjudication proceedings (including the Metropole proceedings) would not be able to be continued.

111. In his report to the court dated 13 December 2001, one of the joint administrators reported that the best opportunity to secure a positive recovery from the Metropole contract would be to continue with the administration and that he had been advised by the company's quantity surveyor that this recovery could be as much as £300,000. That recovery would amount to about one half of the estimated realisation of the administration.

112. I will now apply the guidelines summarise above to this application.

113. The principal objective of the administration is to gather in the money owed to Joinery and a significant part of the outstanding unrecovered sums is only realistically capable of being realised if firstly the administration continues and secondly if the current adjudication in train against Laing continues. On advice received by the administrators, that realisation could be substantial.

114. Laing has made out a weak case for leave. It contends that the administrators have not explained why the money has not yet been repaid or why it cannot be repaid. Further, Joinery has obviously raised money to fund this litigation and at least two other pieces of litigation and the goodwill of the company is being traded through Joinery's parent company.

115. However, the debt was incurred before the administration started and no case is made as to why this creditor should be treated preferentially to other creditors. Furthermore, a principal objective of the administration is to recover as much as possible from this contract, so that Laing's claim to obtain repayment of a sum that Joinery has already allocated to unpaid recovery would help to undermine that objective. Overall, for reasons already given, Laing does not have a good case for recovering this sum, indeed it has already conceded that the greater part of it is due to Joinery and an adjudicator in admittedly abortive adjudication proceedings has formed the view that the balance is due to Joinery.

116. The granting of leave is likely to impede the administration since a large sum must be found to meet the proceedings needed to enforce the claim or to meet any order or condition that the sum should be repaid. It is unlikely that Joinery and its administrators could find the necessary sum and any further attempts to recover from Laing under the Metropole contract would founder.

117. Laing has made out no case for showing that it is prejudiced by being unable to recover the sum in question or to be able to prefer any claim it might have over the claims of other secured and unsecured creditors or that it would incur prejudice if it is unable to pursue a claim at this stage of the adjudication. Indeed, the ability to pursue a claim for the payment would be at the unjustifiable expense of secured, preferential or other unsecured creditors.

118. Joinery and the administrators have shown reasonable and justifiable grounds for deferring the initiation of these proceedings until August 2002 given the large and complex claim made against Joinery by a former director which had to be defended and which it was reasonable to dispose of prior to embarking on this litigation.

119. Overall, Laing never sought repayment of the money even after Joinery had apportioned it to its entitlement to recover under the subcontract generally, it declined to allow a further adjudication by taking its stand on the first adjudication decision which it asserted erroneously was a valid decision, it did not undertake meaningful negotiations although invited to do so by Joinery since it was only prepared to discuss the measured account and it now seeks recovery of a sum which it has largely admitted is due to Joinery.

120. For all these reasons, I decline to allow Laing leave to pursue any claim to recover the sum of £70,420.80 whether by counterclaim, or as a condition to be imposed on Joinery prior to starting a further adjudication, or as a condition of granting declaratory relief, or as a term of any declaration granted. Had leave been granted, as already determined, I would in any event not have granted Laing any relief since any claim or application it might have made would have failed on its merits.

8. What Declarations or Other Relief should the Court Grant Joinery?

121. In the light of my findings, Joinery is entitled to the following declarations and orders:

1. The Decision of the adjudicator (nominated to act pursuant to Joinery's Notice of Adjudication dated 13 June 2001 and its Referral Notice dated 20 June 2001) dated 6 August 2001 is a nullity and was given without jurisdiction.
2. For the purposes of paragraph 20 of the Scheme for Construction Contracts, and for all other purposes, Joinery is entitled to serve a Notice of Adjudication hereafter in connection with the Stakis London Metropole Hotel subcontract with Laing on the basis that the Decision dated 6 August 2001 had never been given.
3. In receiving and banking the cheque sent by Laing in the sum of £70,424.80, Joinery neither elected to affirm the Decision dated 6 August 2001 nor approbated it.
4. Laing has permission to apply for permission pursuant to section 11(3) (d) of the Insolvency Act 1986 to institute proceedings, execute or pursue other legal process in relation to the repayment to it of for the recovery, whether directly or indirectly, of the sum of £70,424.80 from Joinery. That application for permission as aforesaid is refused.

Miss Stephanie Barwise appeared for the claimant, instructed by Hewetts, 55 - 57 London Street, Reading, Berkshire, RG1 4PS, DX 4055 Reading 1, Ref: GAK/NBB/mlc/Bridgers.
Miss Dominique Rawley appeared for the defendant, instructed by Nicholson Graham & Jones, 110 Cannon Street, London, EC4N 6AR, DX: LDE 58 London/Chancery Lane, Ref: LAK/L607-13.