JUDGMENT : MR. JUSTICE COULSON: TCC. 9th December 2008

1. This is an application by the claimant to enforce the adjudicator's first decision ("Decision 1") dated 6th June 2008 in the total sum of £49,583.31 inclusive of VAT, interest and fees. The application is opposed by the defendant, who raises an issue as to the claimant's entitlement to be paid any further sums following the defendant's determination of the claimant's employment under the contract.

2. That contract was made in about May 2006. Pursuant to its terms, the defendant employed the claimant to carry out works at Blyth Wood Park, Blyth Road, Bromley in Kent. The contract incorporated the JCT Minor Works Form, 1998 edition.

3. Clause D7 of the Minor Works Form is concerned with the effect of an adjudicator's decision. It contained what might be called the standard JCT provisions as to compliance with such decisions, in these terms:

   "D7.1 The decision of the Adjudicator shall be binding on the parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the parties made after the decision of the Adjudicator has been given.

   D7.2 The parties shall, without prejudice to their other rights under this agreement, comply with the decision of the Adjudicator; and the Employer and the Contractor shall ensure that the decision of the Adjudicator is given effect.

   D7.3 If either party does not comply with the decision of the Adjudicator the other party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to Clause D7.1."

4. Clause 7.2.3 of the Minor Works Form was the other term relevant to this dispute. It dealt with the payment position following determination by the employer. It provided:

   "Upon determination of the employment of the Contractor under Clause 7.2.1 or Clause 7.2.2, the Contractor shall immediately cease to occupy the site of the Works and the Employer shall not be bound to make any further payment to the Contractor that may be due under this Agreement until after completion of the Works and the making good of any defects therein. The Employer may recover from the Contractor the additional cost to him of completing the Works and any expenses properly incurred by the Employer as a result of, and any direct loss and/or damage caused to the Employer by, the determination."

5. The relevant chronology is quite straightforward. The claimant contended that the works under the contract were practically complete on 15th January 2008 and relied on a letter from the Contract Administrator of that date as evidence of such practical completion. Two days later, on 17th January 2008, the Contract Administrator notified the claimant that there were concerns regarding the efficacy of the claimant's works and that an investigation was underway. In the meantime the Contract Administrator told the claimant not to carry out any further works. Curiously, the claims consultants acting on behalf of the claimant alleged that this letter amounted to a repudiation of the contact and the claimant thereafter left site.

6. On 16th April 2008 the claimant commenced adjudication proceedings seeking declarations that practical completion had been achieved on 15th January, and that the letter of 17th January was a repudiatory breach of contract. The claimant also sought the sums due for the balance of the works carried out as at 15th January 2008.

7. On 25th April the defendant's Contract Administrator sent to the claimant a letter purporting to determine the claimant's employment under the contract. The defendant then sought to defend the claim in the adjudication by reference to clause 7.2.3, on the basis that no further sum was due until completion of what, by then, were called remedial works. However, the adjudicator properly decided that since the determination had occurred after the commencement of the adjudication, he did not have the jurisdiction to address it.

8. Thus, in Decision 1, dated 6th June 2008, the adjudicator decided that:

   (a) although the Contract Administrator's letter of 15th January was not a practical completion certificate, practical completion had indeed been achieved on that date;

   (b) the defendant did not repudiate the contract by the Contract Administrator's letter of 17th January;

   (c) the sum of £40,000-odd plus VAT and fees was owing to the claimant in respect of work carried out up to 15th January, and should be paid by the defendant to the claimant by noon on 13th June 2008 (i.e. 7 days later).

9. In dealing with the claim for interest, the adjudicator said this:

   "2.1.32 In this adjudication the claimant makes no claim for interest in respect of the late payment of its invoices 1, 2 and 4 which total £539.62.

   2.1.33 Clause 4.3 requires the Contract Administrator to issue his penultimate certificate within 14 days of the date of practical completion and that the final date for the payment is 14 days thereafter. Thus, the final date for payment of the amount due in the penultimate certificate is 12th February 2008.

   2.1.34 I consider that the claimant is entitled to simple interest on the amount I have determined as properly due to it at the rate of 5% over the base rate of the Bank of England from the date the payment became overdue until the date of this, my decision.

   2.1.35 Payment became overdue on 13th February 2008 on which date the base rate of the Bank of England was 5.25%."

10. The defendant commenced a second adjudication in front of the same adjudicator to deal with its determination claim and the argument pursuant to clause 7.2.3. Amongst other things, the defendant sought a decision that it was under no obligation to make any further payment to the claimant (including any sum found due in the first adjudication) unless and until the works had been completed by an alternative contractor. The claimant, on the other hand, argued that clause 7.2.3 was irrelevant because the clause dealt with sums which were due but not payable at the time of determination, whilst any sum due to the claimant pursuant to the first decision was both due and payable by the time of the service of the notice of determination on 25th April 2008.

11. In his second decision dated 11th June 2008 ("Decision 2"), the adjudicator found that:

(a) the defendant had validly determined the claimant's employment under the contract on 25th April;

(b) clause 7.2.3 "did not bite when the payment in question arose out of an adjudicator's decision";

(c) the expression "further payment" in clause 7.2.3 meant future payment, and did not apply to any payment that became due before the determination.

For these reasons the adjudicator rejected the defendant's argument that the defendant was not bound to pay the sums identified in Decision 1 as a result of the operation of clause 7.2.3.

12. Notwithstanding the results of both Decision 1 and Decision 2, the defendant has failed to pay the sums found due by the adjudicator. Accordingly, the claimant seeks to recover those sums in these proceedings by way of summary judgment in accordance with CPR Part 24.

13. The principles as to enforcement of adjudicators' decisions are well known. They can be summarised as follows:

(a) "The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator": see paragraph 85 of the judgment of Chadwick LJ in ***Carillion Construction Limited v. Devonport Royal Dockyard Limited*** [2005] EWCA Civ 1358; [2006] BLR 18.

(b) An error of fact or law will not invalidate an adjudicator's decision. If the adjudicator has answered the right question in the wrong way, his decision will nevertheless be binding. It is only if he has answered the wrong question that his decision will be a nullity: see the Court of Appeal decisions in ***Bouygues (UK) Limited v. Dahl-Jensen (UK) Limited*** [2000] BLR 522 and ***C & B Scene Concept Design Limited v. Isobars Limited*** [2002] BLR 93.

14. The papers did not reveal any obvious reason why the defendant had failed to pay the sums ordered by the adjudicator. In her statement in defence of the claim, Ms. Davies, the Chair of the Board of Management of the defendant company, claims that:

"I understand that the issue before the court is whether or not Blyth Wood is entitled to rely on the finding by the adjudicator in adjudication number 2 that Westwood's contract was properly and justifiably determined by Blyth Wood and Blyth Wood, as a consequence, can rely upon clause 7.2.3 of the contract and defer consideration of any further payment to Westwood until the works of the project are finally completed."

This appears to suggest that the defendant can defeat the claim under CPR Part 24 by relying on clause 7.2.3. That, of course, was the very argument which the adjudicator rejected in Decision 2. It does not therefore seem to me that this paragraph properly identifies what (if any) issue arises on this application.

15. I derived much greater assistance from the helpful skeleton argument and concise oral submissions advanced today by Mr. Stevenson on behalf of the defendant. His principal argument comprised the following steps:

(a) Decision 1 was not a decision that sums were due to the claimant prior to 13th June 2008;

(b) By 13th June 2008, the claimant's employment under the contract had been validly determined, so that clause 7.2.3 applied;

(c) On a proper construction of that clause, the sum that was the subject matter of the Decision 1 was not due when the contract was determined and is therefore not due now.

Having been taken through the various constituent parts of that argument I have concluded that, on a proper analysis, it cannot succeed. My reasons are set out below.

16. It is clear to me on its face that Decision 1 *was* a decision that the sums should have been paid by 12th February 2008: see paragraphs 8 and 9 above. Indeed, the adjudicator expressly found that payment was "overdue" on 13th February 2008. Accordingly, contrary to Mr. Stevenson's submission, I have no doubt that in Decision 1 the adjudicator determined that a sum was due from the defendant to the claimant not later than 12th February 2008.

17. The adjudicator's determination of that issue may be right and it may be wrong, either in fact or in law, but that is his decision and, in accordance with the principles noted above, the parties are bound by it. In such circumstances, given that Mr. Stevenson properly accepts that no other jurisdiction point can arise out of Decision 1, it seems to me the sum set out there is due and payable.

18. As to the argument arising in connection with clause 7.2.3, there are I think two separate reasons why, so it seems to me, it cannot operate as a defence to the claim.

19. First, I accept Mr. Stansfield's submission that the adjudicator's decision in Decision 2 involved two separate findings in respect of clause 7.2.3, as set out above. The first was that sums due pursuant to an adjudicator's decision are not caught by the words "any further payment to the contractor that may be due" in clause 7.2.3. Effectively he was deciding that sums awarded by an adjudicator were due in any event. The adjudicator may be right or he may be wrong about that but, again, that was a decision which he was entitled to reach. It cannot be impugned on this application.

20. Further, that conclusion is unaffected by the defendant's argument as to whether or not the adjudicator decided that the sum was due before 13th June 2008. Whatever the outcome of that debate, the adjudicator's conclusion, that the sum that he ordered to be paid by Decision 1 essentially overrode the provisions of clause 7.2.3, is determinative of this application.

21. I should add on this topic, really by way of comment, that in my judgment the adjudicator may well have been right to reach that conclusion. As Mr. Stansfield pointed out, there have been a number of authorities dealing with the proposition that *'where other contractual terms clearly have the effect of superseding or providing for an entitlement to avoid or deduct from the payment directed to be paid by an adjudicator's decision those terms will prevail'*: see ***KNS Industrial Services (Birmingham) Limited v Sindall Ltd.*** [2000] EWHC 75 (TCC); ***Bovis Lend Lease v. Triangle Development Limited*** [2003] BLR 31; and ***Ferson Contractors Ltd. v. Levolux AT*** [2003] BLR 118. All of those decisions were considered by Ramsey J in ***Verry v. London Borough of Camden*** [2006] EWHC 761 (TCC) in which he noted that such a proposition was not accepted by the Court of Appeal in ***Levolux***. He too declined to accept that proposition in ***Verry***. It seems to me that depending, of course, on the terms of the contract and on the surrounding facts, an adjudicator's decision may have a different status to a certificate or an obligation to pay a specified sum under the contract.

22. The second complete answer to the point taken by the defendant is that the adjudicator has already ruled in Decision 2 against the defendant's submission that their determination occurred before this sum was due, and that therefore they were entitled to rely on clause 7.2.3 as a defence to the claim. He has expressly ruled that they cannot rely on clause 7.2.3 to get round their obligation to pay.

23. Again, although strictly speaking it is unnecessary for me to comment on that conclusion, I should add that I consider that the adjudicator may well have been right in reaching the conclusion that clause 7.2.3 was irrelevant on the facts of the case. After all, he found in Decision 1 that the final date for payment of the amount due in the penultimate certificate was 12th February 2008. That was two and a half months *before* the determination of the contract by the defendant. In my judgment, it would be contrary to the standard form of contract, and indeed to the **Housing Grants, Construction and Regeneration Act 1996**, to conclude that an employer was entitled to defeat a claim for sums due under the contract by reference to an event which occurred two and a half months after the money should have been paid.

24. In reaching that tentative conclusion I ought to comment on the two authorities drawn to my attention by Mr. Stevenson, namely the well-known House of Lords case of ***Melville Dundas v. Wimpey*** [2007] UKHL 18 and the subsequent decision in ***Pierce Design International v. Mark Johnson & Anr.*** [2007] EWHC 1691 (TCC). It seems to me that the circumstances in those cases were very different from those that arise here. They were concerned with a different contract and a different contractual provision. Moreover, they were focussed upon the difficulties (or otherwise) of serving withholding notices in circumstances where the contractor may be about to go into insolvent liquidation. I do not consider that those authorities are of any assistance to me in deciding the clause 7.2.3 point in the present case.

25. For those separate reasons, therefore, I have concluded that the claimant is entitled to summary judgment pursuant to CPR Part 24 in the sum of **£48,583.31** inclusive of interest. I so order.

MR. PIERS STANSFIELD (instructed by Wheelers LLP) for the Claimant
MR. ROBERT STEVENSON (instructed by Berrymans Lace Mawer) for the Defendant