JUDGMENT : HIS HONOUR JUDGE DAVID WILCOX: TCC. 8th March 2006.

1. The claimants under Part 24 of the Civil Procedure Rules seek summary judgment of the amount adjudicated as award of interest arising out of a settlement agreement between the parties. The defendant resists the claim on the basis that the adjudicator had no jurisdiction since the agreement was as a result of economic duress by the claimant and the terms of the settlement agreement, including the adjudication provision, had been avoided before the adjudicator assumed jurisdiction.

2. I turn to the background. The claimant acted as subcontractor to the defendant main contractor in respect of the supply delivery, and installation of structural steelwork and cladding at a project known as 30 Calderwood Street, Woolwich S.E.18. The claimant was also the suppliers of labour and plant only in respect of pre-cast flooring erection, that is the subcontract works. The employer was Kerrington, whose managing director I believe was a Mr. Lee.

3. Work commenced with the subcontract works in or about January of 2003. On the 3rd June 2003 the defendant issued a subcontract order to the claimant in the sum of £1.109 million, excluding VAT, for the design, fabrication and erection of the structural steelworks and cladding and the supply of labour.

4. On the 30th January 2004 the defendant issued a supplementary subcontract order for the supply, delivery and erection of balconies, juliettes and four staircases, in the sum of £153,733, exclusive of VAT. The claimant did not sign the subcontract orders.

5. During the autumn of 2003 and spring of 2004 the parties were at loggerheads as to the valuations and interim payments. In March 2004 the claimant took their labour off site. In late March the claimant's cladding subcontractors were taken on directly as subcontractors by the defendants. By this stage the eighth floor was exposed to weather conditions and the cladding subcontractors, it is alleged, had not been paid.

6. On the 24th March 2004 the defendant gave notice under 4.5 of DOM.1 asserting that the orders for the balconies and juliettes had been issued as a variation instruction and under clause 4.2 of DOM1, and stated that: *"We write to instruct:*

   (a) That others are to be employed to comply with the 30th January 2004 direction insofar as it relates to the staircases, with the costs consequences set out in clause 4.5.

   (b) The consequential immediate omission of the four metal staircases (recited as having a value of £44,500 in the addendum order) from the works instructed by the addendum order and … subcontract works as from the date of this letter.

   This instruction is issued pursuant to clause 4.5 following the notice under that clause in our letter of the 24th March 2004. We are prepared as a gesture of goodwill, subject to your not challenging our entitlement to issue the omission instructions and to your providing the information requested below by the 14th April 2004, effectively to treat the instruction as a clause 4.2 variation amending the January variation instruction addendum order, and to value and pay for design work in respect of the staircases.

   To that end we therefore request the issue of all design information in relation to the immediate element of the work referred to above to our site address, along with your cost for the completion of the design and drawings and all substantiating backup so as to allow an assessment to be made and values to be agreed for payment to Capital Structures Ltd. for the same.

   Please forward all of the above requested information by 14th April 2004. Please note that we have not yet instructed others to carry out work in respect of the balconies, juliettes and other undelivered elements. Given the fact of their fabrication obviously others will have to be so instructed if a further termination notice has to be issued under clause 29.2.2."

7. On the 29th March 2004 there was a meeting between the employer and the defendant. In consequence, it appears that Mr. Lee of Kerringtons contacted Allway Associates Construction & Commercial Consultants, representing the claimant, informing it that its failure to deliver the balcony materials would force Kerringtons to step in and take over the development from the defendant. According to Mr. Perry Gamby of the defendants, the consequences of being thrown off the site would have been

disastrous, leading to significant loss on the other JLC projects too, and causing such financial difficulty as might lead to liquidation.

8. The pressure brought to bear by the defendant and the employer prompted a bout of settlement discussions between the parties, evidenced by the letter of the 30th March 2004 by Allways, the consultants, to the defendants, referring to the settlement discussions between the parties that day, and culminating eventually in the signed settlement agreement on the 20th April 2004. During that period, in fact on the 8th April 2004, the defendant served a notice pursuant to clause 29.2 of DOM.1, in these terms: *"We write to give you notice pursuant to clause 29.2.1 that you have –*

(i) without reasonable cause wholly or substantially suspended the carrying out of the subcontract works and/or

(ii) without reasonable cause failed to proceed regularly and diligently with the subcontract works in that you have withheld or delayed the delivery of fabricated balustrading, balconies and juliettes to the site or otherwise progress your subcontract works."

And then going on into greater detail to show what default there was. It continues: *"If you continue the above default for ten days from receipt of this notice, which is being delivered by hand delivery, then we may, in accordance with 29.2.1 on or within 10 days from the expiry of that 10 days by further notice determine the employment of your company under the subcontract."*

The defendant also in that letter reserved the right to rely upon repudiatory breach in addition should a clause 29.2.2 notice have to be served.

9. Between the 8th April and the 20th April 2004 it is evident that there were detailed and hard negotiations between the parties as to settlement, both on an interim basis and a final basis, and encompassing the extent of retentions. Mr. Perry Gamby was on holiday between the 9th and the 19th April 2004 but remained in close contact with his colleagues and his solicitor, who advised him throughout on the terms of settlement. Mr. Gamby secured a further extension from the employers of their deadline to resolve the situation with the claimant until the 19th April, his return from holiday.

10. The pressure placed upon Mr. Gamby the employer doubtless was real. The settlement agreement of the 20th April 2004 contained, amongst other things, the following relevant provisions:

"1. JL Construction is to make payment of £108,000, plus VAT, by CHAPS transfer to Capital Structures in respect of the material stored at Capital Structure's yard as jointly inspected on the 1st April 2004. Without derogating from paragraphs 6 and 7 below, both parties agree that the above stated sum is not and cannot be varied after payment.

2. Prior to making the above CHAPS transfer Capital Structures will provide the vesting certificate in favour of JL Construction for the whole of the above material and the vesting certificate will contain a list of those materials. The vesting certificate will also incorporate agreed delivery dates.

3. The property in the above noted material will pass from Capital Structures to JL Construction immediately upon receipt of the CHAPS payment referred to under paragraph 1 and delivery will be made, as far as possible, in line with the agreed delivery dates.

4. Providing that access is allowed on or before the 30th April 2004 Capital Structures will return to site and ensure that all bolted connections comply with specification and that they are to the reasonable satisfaction of the building control officer.

5. When Capital Structures have complied with the requirements of 4 above, and when the building control officer has confirmed verbally or in writing that he is satisfied with the bolted connections then JL Construction are to immediately make payment to Capital Structures of £20,000 plus VAT by CHAPS transfer, this sum being part of the retention fund that is currently held by JL Construction. If the building control officer is not prepared to provide his confirmation that he is reasonably satisfied then the above payment is to be made immediately after the bolted connections have been completed in line with the requirements of the specification.

6. Capital Structures will remain liable for any defects in any work that they have executed and which arises from their faulty workmanship or materials for a period of 12 months following the date for the payment in paragraph 5 above."

Assuming any defects from faulty workmanship or materials, whether of defective works within the 12 month liability period, and whether the material works/remedial works are performed by the claimants or others, the alleged direct costs are not to exceed the balance of the retention held. There is a similar provision in relation to the carrying out of works to remedy latent defects in materials supplied only and not arising out of defective workmanship.

The caps therefore are modest and the period of liability very substantially truncated.

I go to para.10: *"In consideration of the above and save as set out above both parties acknowledge the above payments will be in full and final settlement of all and existing and/or future claims by Capital Structures, their servants, agents or any of them against JL Construction Ltd. in relation to or arising out of the works carried out at the above project and of all and any existing and/or future claims by JL Construction Ltd., servants, agents or against any of them against Capital Structures in relation to or arising out of the works carried out by Capital Structures at the above project.*

It provides that: *"For the avoidance of doubt it is confirmed that if for any reason either party defaults on the terms of this agreement the parties are free to take any dispute to adjudication using the scheme rules under the Housing Grants Construction and Regeneration Act 1996."*

11. The defendant's dilemma was described by Mr. Gamby: *"I agreed to the terms of the settlement letter as drafted by Allway, as slightly amended [he says] by JLC as I had no reason to believe that the balcony materials would not be fit for the purpose. Further, whilst I was aware of a problem with bolted connections with Capital I believed that bolted connections could be tightened for less than the sum of £20,000. I was concerned at the time of entering into the settlement letter about paragraph 10 of the letter, which stated that this letter was to be in full and final settlement of all claims, but due to the pressure I was under I had no choice but to accept this. In any event, it had not been possible to get Capital to accept a settlement without such a term."*

12. Pursuant to clause 1 of the settlement agreement the defendant in fact paid the sum of £108,000 to the claimants. It failed to pay the remaining £20,000, plus VAT and interest, as required by para.5 when requested on the 4th June and 5th July 2004 respectively.

13. Materials were delivered to site on the 21st, 23rd and 28th April 2004.

14. On the 21st September 2004 a notice of adjudication was issued. The defendant received the referral on the 23rd September 2004, and a response was made by the claimant. There was a rejoinder and a reply to the rejoinder. The amount in dispute was, in comparative terms, very modest a mere £20,000.

15. On the 21st October 2004 the adjudicator gave his decision, rejecting the plea of economic duress and going on to award the claimant £29,000-odd, made up of fees, the initial sum and interest.

16. I turn briefly now to the law. The ingredients of actual duress are that there must be pressure (a) whose practical effect is that there is compulsion on or a lack of practical choice for the victim; (b) which is illegitimate; and (c) which is a significant cause in inducing the claimant to enter into the contract. See **Universe Tankships Inc. of Monrovia v. International Transport Workers Federation** 1983 AC 366,400 b-L and **Dimskol Shipping 6 S.A v. ITWF** 1992 AC 152, 165G.

In determining whether there has been illegitimate pressure the court takes account of a range of factors. These include whether there has been actual or threatened breach of contract, whether the person allegedly exerting pressure has acted in good or bad faith, whether the victim has any realistic practical alternative but to submit to the pressure, whether the victim protested at the time, and whether he affirmed and sought to rely on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining.

See **DSND Sub-Sea v. Petroleum Geoservices** [2000] B.L.R.530, at p.545, and **Carrillion Construction Ltd. v. Felix UK Ltd.** [2001] B.L.R.1, in the judgments of Dyson J at p.6.

17. The essence of the plea is compulsion and a negation of practical choice. *"In determining whether there was a coercion of will such that there was no true consent it is material to inquire whether the person alleged to have been coerced did or did not protest whether at the time he was alleged coerced into making the contract he*

did or did not have an alternative course open to him such as an adequate legal remedy, whether independently advised or whether after entering into the contract he took steps to avoid it."

That is derived from **Pas On v. Lau Yin Lon** [1980] A.C.614, in the speech of Lord Scarman at p.635. There is a further helpful passage at p.634, where the observation is made that: *"Commercial pressure without coercion is insufficient. If there is no sufficient coercion a threat to a pre-existing contractual obligation or an unfair use of a dominant bargaining position is insufficient to invalidate the consideration for the agreement."*

18. The passage in the 28th edition of **Chitty** at para.7.045 is an accurate statement of the law as to the effect of duress upon a contract. *"It now seems clearly established that a contract entered into under duress is voidable and not void. Consequently a person who has entered into a contact under duress may either affirm or avoid such contract after the duress has ceased and if he has voluntarily acted under it in full knowledge of all the circumstances he may be held bound on the ground of ratification, or if after escaping from duress he takes no steps to set aside the transaction he may be found to have affirmed it."*

19. The claimants contend that the facts relied upon by the defendants cannot support a plea of economic duress even put at their highest. Further, if the defendants were compelled to enter into the agreement by economic duress such compulsion renders the agreement voidable only and that the defendants did not seek to argue that the agreement was avoidable for duress once free of it or at all. Thus until the agreement is avoided all provisions survive the agreement even if it could have been avoided for duress. It is contended that the defendants affirmed the agreement by making payment pursuant to it and have since waived the right to avoid it by failing to take steps to avoid, in fact by doing nothing in relation to payment or getting in touch with the party seeking payment.

20. This is an application for summary judgment. Thus if there is an arguable case that there was economic duress and that once appreciated the defendants avoided the settlement agreement, such dividend prior to the adjudicator completing his adjudication or award, summary judgment should be refused.

21. A court must be wary of encouraging complex satellite litigation where summary judgment is sought in the context of the enforcement of adjudication awards under the Housing Grants and Construction Act of 1996 scheme, which themselves are essentially provisional and summary. Imaginative and strange interpretation of facts and events arising in the commercial rough and tumble of the construction industry should not be allowed to found weak challenges of the adjudicator's jurisdiction.

22. The following matters derive from the defendants evidence, and, in particular, the detailed statements of Mr. Perry Gamby. Firstly, throughout the negotiations as to the overpayment to the claimants between February and April of 2004 he had access to professional legal advice. Secondly, during the negotiation period in April 2004 he was advised by a solicitor, and clearly the defendants had significant input into the drafting process. The defendants were alive to legal remedies available to them, and indeed purported to serve notices under clause 4.5 and clause 29 of DON.1 on the 29th March and the 8th April respectively. Further, there was a genuine dispute about the value of work done and the level of interim payments, and the resolution of that dispute and the provision for the supply and fixing of the balconies, juliettes and stairs gave rise to the settlement agreement which eventually released the balconies and juliettes and property payments of £108,000 to the claimants.

23. The non-payment of the additional £20,000 does not give rise to any sensible inference of withholding evidencing avoidance, neither does the payment of £108,000 connote affirmation because without it the balconies, juliettes and stairs would not have been released, and the pressure would have continued.

24. There were contemporaneous assertions, both inter partes and internally, that the claimants' conducted amounted to commercial blackmail, but there was no attempt in formal correspondence, or by seeking a declaration in court prior to the adjudication, or by any other unequivocal means, to communicate to the claimants that the defendants sought to avoid the contract. Evidence of a refusal to pay and non-communication in this context does not assist in relation to the issue of avoidance.

25. Mr. Hargreaves, on behalf of the defendants, contends that there was avoidance unequivocally evinced in the response to the referral notice in the adjudication procedure. The response is dated the 4th October 2004 and contains the following matters: (b) Jurisdiction, and underneath 1: *"At all times in connection with this adjudication JLC challenges the jurisdiction of the adjudicator to determine the matters in the referral notice. In particular, jurisdiction is disputed on the following bases:*

1.1. JLC was forced to enter into the settlement letter under economic duress, the details of which are set out in section A of the response above."

That contains many of the matters I have already made reference to:-. *"JLC therefore elects to have the settlement letter set aside and invite the adjudicator to conclude that for these reasons the settlement letter is voidable for JLC."*

26. The claimants contend that even if the agreement had been avoided for duress the adjudication provisions would have survived. Miss Franklin relies on a passage in **Mustill & Boyd**, 2nd edition, at p.10, and a passage in **Hayman v. Darwin** [1942] A.C.356, as authority for the proposition that it is well established that an arbitration agreement survives the termination of the contract. So it does where there has been a repudiation or a total breach of the contract. A passage in **Hayman v. Darwin** in the speech of Lord McMillan at p.374 states: *"I am accordingly of the option that is what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate the contract thought it may relieve the injured party of the duty of further forfeiting the obligations which he has by the contract undertaken to the repudiated party. The contract is not put out of existence though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach and the arbitration clause survives for determining the mode of their settlement."*

Similarly, in **A & D Maintenance & Construction v. Pagehurst Construction**, reported in 1999, Construction Law Journal at p.199, where I held that an adjudication provision similarly in those circumstances survives the termination of the contract.

27. Miss Franklin submits that the adjudication provisions do not survive the termination of the contract as would arbitration provisions post repudiation. And then I make mention of the terms at s.108(1) of the Housing Grants Construction Repudiation Act, and particularly at sub-section (2), which states that the contract: *"(a) enabled the parties to give notice at any time of its intention to refer a dispute to adjudication …"*

And then going on to say: *"Even if the contract had been terminated the matters referred to the adjudicator remain disputes under the contract. Where there is a contract to which the Act applies, as in this case, and there are disputes arising out of the contract to be adjudicated, the adjudication provisions clearly remain operative just as much as an arbitration clause would remain operative. Had it been the intention of Parliament to limit the time wherein a party could give notice of intention to refer a matter to adjudication, in the exercise of his right under section 108(1) it could have imposed a clear limit."*

28. But where there has never been a contract because it has been avoided on the ground of duress, it logically follows that any arbitration or adjudication provision also becomes void. There is support for that view to be found in the 2001 Companion to the second edition of **Mustill & Boyd** on Commercial Arbitration at p.137. *"It must now be accepted as a possibility that circumstances which render the main contract voidable may also affect the agreement to arbitrate, and that in such cases the arbitrator may be deprived of the jurisdiction which he had at the outset ..."* And these are words that receive my emphasis: *"**… if proper steps are taken to avoid the agreement from which his jurisdiction derives.**"*

29. One goes back to **Hayman v. Darwin** in the speech of Lord MacMillan at p.371: *"If there has never been a contract at all there has never been as part of it an agreement to arbitrate. The greater includes the less. Further, a claim to set aside a contract on such grounds as fraud, duress or essential error, cannot be the subject-matter of a reference under an arbitration clause in the contract sought to be set aside."*

In my judgment, that would apply equally to the adjudication provision.

30. I have come to the following conclusions. (1) There is an arguable, albeit shadowy, case as to economic duress. (2) There is an arguable case that the plea in para.1.1 of the response, supported by the lengthy documentary evidence adduced, could be effective to evidence that the defendants were properly avoiding the settlement agreement. (3) Were (1) and (2) established, the adjudicator would have had no jurisdiction. (4) I give leave to defend on terms, and on terms that there is a payment into court of £29,000, the amount of the award, to abide events. (5) My provisional view is that costs will be reserved to the trial judge.

30. I direct that there be a transcription of this judgment provided to the parties free of cost as soon as possible.

31. I will hear any submissions arising out of it, such as leave to appeal and the like, should this very modest case give rise to such an exciting prospect once you have received and had to chance to reflect upon the written judgment and consider the economics of this interesting situation.

MISS K. FRANKLIN (instructed by Shemmings) appeared on behalf of the Claimant.
MR. S. HARGREAVES (instructed by Hewitsons) appeared on behalf of the Defendant.