Cape Durasteel Ltd v Rosser & Russell Buildings Services Ltd [1995] Adj.L.R. 08/04

JUDGMENT : His Honour Judge Humphrey Lloyd QC. QBD. Official Referee. 4th August 1995.

1. This is an application pursuant to section 4 of the Arbitration Act 1950 made by summons issued on 25 April 1995. Amongst other matters it raises a new point of potential general interest and for that reason this judgment is given in open court.

2. The plaintiff is a sub-sub-contractor to the defendant who was engaged by Taylor Woodrow Management Limited (TWML) who are management contractors responsible for the refurbishment of the East Market Building at Smithfield in the City. The sub-contract incorporates the terms of the JCT Works Contract Conditions (Works Contract/2). The plaintiff made two sub-sub-contracts with the defendant - one for below ground fire rated ductwork and the other for above ground work. Each incorporated the defendant's standard subcontract order terms and conditions SC0/892.

3. This action was begun on 15 March 1995 to recover, as the unpaid balance of the sub-sub-contract prices (inclusive of the value of variations and claims), £175,702 for the below ground works and £52,090.85 for the above ground works.

4. The claims are disputed by the defendant for the following reasons which I shall set out briefly:
   1. There is no present liability to pay any sum as the defendant is only obliged to pay the plaintiff when it receives payment from TWML; the plaintiffs claim includes a total £20,774,39 for retention money on both contracts which is not yet due to be released and which has not been identified in any payment from T WML .
   2. The claim includes £84,383 in respect of insulation provided to meet a contractual requirement and which was incurred not as a variation to or change from the specification but in order to comply with the plaintiffs contractual obligations. Furthermore the amount has not been properly detailed.
   3. The claim includes £29,181 in respect of an alleged *"**loss and expense***" claim which has also not been properly detailed.
   4. The claim includes £78,729 in respect of unverified unagreed variations.
   5. There are contra charges of £8,368,
   6. Although the total of these specific amounts leaves a balance of £6,847.84 the defendant has a potential liability to TWML for liquidated damages some part of which may have to be borne by the plaintiff.

5. As its first line of resistance the plaintiff maintains that the application is misconceived as there is no arbitration agreement,

6. Clause 23 of the defendant's terms SCO/892 reads as follows:

   *"**23) Settlement of Disputes***

   23.1) In the event of any dispute arising out of or in connection with the Sub-Contract the parties agree to refer such dispute to adjudication to a person agreed upon or failing agreement to some person appointed by the President for the time being of the Chartered Institute of Building Services Engineers.

   23.2) Such reference to adjudication shall not (unless the Contractor decides and notifies otherwise) be opened until after Practical Completion or alleged completion of the Principal Contract Works.

   23.3) If the dispute or difference to be referred in sub-clause 23.1 above covers matters which in whole or in part the Contractor has or is contemplating referring to arbitration or adjudication under the Principal Contract and the Contractor so advises the Sub-Contractor within 20 working days of a request to refer under 23.1 or within 20 working days of Practical Completion of the Principal Contract whichever is the later then the Sub-Contractor shall join its disputes or differences to that of the Contractor and the matter shall be resolved in accordance with the adjudication or arbitration provisions of the Principal Contract."

7. In clause 1.1.3 *"**the Principal Contract***" is defined as *"the contract entered into between the Contractor and the Principal particulars of which are given in the Sub-Contract",* Clause 3 further states:

   *"**3) Principal Contract***

   3.1) The Sub-Contractor shall be deemed to have full knowledge of the provisions of the Principal Contract (other than details of the Contractor's prices thereunder) and the Contractor if so requested by the Sub-Contractor shall provide the Sub-Contractor with true copies of the said documents at the Sub-Contractor's expense."

8. Thus the plaintiff must be taken to know that the Principal Contract was on this project a contract incorporating the JCT Works Contract Conditions/2.

9. Mr Baatx for the plaintiff argued that clause 23.1 did not constitute an arbitration agreement since it was an agreement to refer disputes to adjudication and adjudication was not the same as arbitration but a species of alternative dispute resolution without the essential characteristics of an arbitration.

10. Miss Vaughan-Jones for the defendant relied on both clauses 23.1 and 23.3. She submitted that in clause 23.1 adjudication meant, as a matter of plain English, a process whereby a dispute was resolved in a judicial manner and that was an arbitration. She referred to the definitions in the Concise Oxford Dictionary [1]: *"1. v. t decide judicially regarding (claim) etc; pronounce (person to he bankrupt etc). 2. v. i. act as judge in court, tribunal, competition, etc."*

11. In addition she submitted that all the attributes listed in ***Mustill & Boyd on Commercial Arbitration***, 2nd ed, at pages 41 - 42 were present via:

> *"(i) The agreement pursuant to which the process is, or is to be, carried on ("the procedural agreement") must contemplate that the tribunal which carries on the process will make a decision which is binding on the parties to the procedural agreement.*
>
> *(ii) The procedural agreement must contemplate that the process will be carried on between those persons whose substantive rights are determined by the tribunal.*
>
> *(iii) The jurisdiction of the tribunal to carry on the process and to decide the rights of the parties must derive either from the consent of the parties, or from an order of the court or from a statute the terms of which make it clear that the process is to be an arbitration.*
>
> *(iv) The tribunal must be chosen, either by the parties, or by a method to which they have consented.*
>
> *(v) The procedural agreement must contemplate that the tribunal will determine the rights of the parties in an impartial manner, with the tribunal owing an equal obligation of fairness towards both sides,*
>
> *(vi) The agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law.*
>
> *(vii) The procedural agreement must contemplate a process whereby the tribunal will make a decision upon a dispute which is already formulated at the time when the tribunal is appointed."*

12. She also submitted that in any event there was an agreement to refer the dispute to whatever the parties might have agreed for the resolution of their disputes. In the course of her submissions in reply she applied to amend the summons so that, in the alternative, a stay was sought under the inherent jurisdiction of court on the basis of the decision of the House of Lords in **Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd** [1993] AC 334 see in particular at pages 452 - 453 per Lord Mustill.

13. As regards clause 23.3 Miss Vaughan Jones argued that although the time for invoking the clause had not arrived as practical completion had not taken place by 25 April it was nevertheless the defendant's firm intention to have the disputes linked and dealt with under the arbitration or adjudication provisions of the Principal Contract, as set out in its solicitors' letter of 22 March 1995. 5

14. Mr Baatz submitted that clause 23.3 was not an agreement to arbitrate as it would not result in an arbitration between the plaintiff and the defendant of their dispute but the submission of that dispute to the arbitrator appointed under the Principal Contract whose terms made no provision for the plaintiff to appear and argue its case which had to be presented by the defendant as part of its case against TWML. Only clauses 9.1 and 9.2 of clause 9 of the JCT Works Contract formed part of the Principal Contract. They read as follows;

> *"9.1 If a dispute or difference as referred to in Works Contract/1, Section 3 arises in regard to any matter or thing of whatsoever nature arising out of the Works Contract then such dispute or difference shall be referred to the arbitration and final decision of a person to be agreed between the parties to act as Arbitrator or, failing agreement within 14 days after either party has given to the other a written request*

[1] The Oxford English Dictionary, 2nd ed. gives as the meaning of "adjudication": 1. The act of adjudicating or adjudging; an awarding or settlement by judicial decree; 2. A judicial sentence or award. 3. A decree in bankruptcy, "Adjudicate" means (omitting 1. which is obs.): 2. To try and determine judicially; to pronounce by sentence of the court; 3. To sit in judgment and pronounce sentence; to act as a judge, or as a court of judgment.

to concur in the appointment of an Arbitrator, a person to be appointed on the request of either party by the person named in Works Contract/1 Section 1, item 16 or Section 2, item 5.

9.2.1 Provided that if the dispute or difference to be referred to arbitration under the Works Contract raises issues which are substantially the same as or connected with issues raised in a related dispute between
the Management Contractor and the Employer under the Management Contract, or
the Works Contractor and the Employer under the Employer/Works Contractor Agreement, or the Employer and any other Works Contractor under an Employer/Works Contractor Agreement, or
the Management Contractor and any other Works Contractor under a Works Contract, or
the Works Contractor and any Nominated Supplier whose contract of sale provides for the matters referred to in clause 8.3.2.8

and if the related dispute has already been referred for determination to an Arbitrator, the Management Contractor and the Works Contractor hereby agree that the dispute or difference under this Works Contract shall be referred to the Arbitrator appointed to determine the related dispute; that such Arbitrator shall have power to make such directions and all necessary awards in the same way as if the procedure of the High Court as to joining one or more defendants or joining co-defendants or third parties was available to the parties and to him; and that the agreement and consent referred to in clause 9.6 on appeals to the High Court on any question of law shall apply to any question of law arising out of the awards of such Arbitrator in respect of all related disputes referred to him or arising in the course of the reference of all the related disputes referred to him;

9.2.2 Save that the Management Contractor or the Works Contractor may require the dispute or difference under this Works Contract to he referred to a different Arbitrator (to be appointed under this Works Contract) if either of them reasonably considers that the Arbitrator appointed to determine the related dispute is not appropriately qualified to determine the dispute or difference under this Works Contract.

Clause 23.1 - Adjudication

15. Mr Baatz's arguments turned in part on the proposition that "***adjudication***" was not "***arbitration***", per se. I doubt if the plaintiff's case would have got off the ground but for clause 23.3 which refers to both adjudication and arbitration. If clause 23.1 stood alone 1 do not consider that it could have been seriously argued that in a contract of this kind a provision whereby any dispute is to be referred to the adjudication of a person agreed by the parties or appointed by the President of a professional institution is not an arbitration agreement. Nonetheless in deference to the full and careful arguments advanced by Mr Baatz I shall deal with each of his main grounds.

16. First, it has to be said that it is strange that "***arbitration***" does not appear to have been judicially defined and that ***Mustill & Boyd*** have to resort to listing attributes. However **In Re Carus-Wilson and Greene** (1886) 18 QBD 7 the Court of Appeal had to consider whether an agreement for the appointment of an umpire to make a valuation where the party-appointed valuers had disagreed was an arbitration agreement so that the decision was an award. Lord Esher MR said; *"The question here is, whether the umpire was merely a valuer substituted for the valuers originally appointed by the parties in a certain event, or an arbitrator. If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention of such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances."*

Lopes L.J said: *"Whether an umpire is to be regarded as an arbitrator or a valuer must, in my opinion, depend on the circumstances and the documents in each case. Having regard to the circumstances and documents in the present case, I feel clear that the umpire was to be a mere valuer. I cannot see how he could be in any different*

position from that of the two valuers appointed by the parties respectively. He is merely substituted for them upon their being unable to fix a price. He is not called in to settle judicially any matter in controversy between the parties. No such controversy in fact existed, He is by the exercise of his knowledge and skill to make a valuation of the timber, the object being to prevent disputes from arising, not to settle them after they have arisen. ..."

(Lindley LJ gave a concurring judgment.)

17. ***Russell on Arbitration***, 20th ed, is of little assistance. It commences by stating that the essence of the sort of arbitration with which it is concerned is that some dispute is referred by the parties for settlement to a tribunal of their own choosing, instead of to a court.

18. More help is to be derived from Chapter 8 of ***Keating on Building Contracts***, 6th ed by Sir Anthony May, which begins with the well known observations of Sir John Donaldson MR in **Northern Regional Health Authority v Derek Crouch Construction Ltd** [1984] QB 644 at page 670: *"Arbitration is usually no more and no less than litigation in the private sector. The arbitrator is called upon to find the facts, apply the law and grant relief to one or other or both of the parties,"*

At page 424 - 425 Sir Anthony May says: *"Where clear words are used referring disputes or differences to arbitration, the court will have little difficulty in deciding that there is an arbitration agreement. But sometimes a difficult question of construction arise. The intention of the parties is the test. If the intention is that differences should be settled by a judicial inquiry worked out in a judicial manner upon evidence submitted, the case is one of arbitration."*

In Re Carus-Wilson and Greene is cited and the contrasting position of a valuer is outlined, as is the intermediate case that had been mentioned by Lord Esher MR. 33

19. In **A. Cameron Ltd v John Mowlem & Co Ltd (**1990) 52 BLR 24 the Court of Appeal had to consider whether an adjudicator appointed under clause 24 of the standard subcontract form DOM/1 was an arbitrator so that his decision might be enforceable as an award under section 26 of the Arbitration Act 1950. The decision had been in favour of the sub-contractor, Cameron. His Honour Judge Esyr Lewis QC had dismissed its application and it had appealed. The judgment of the court was given by Mann LJ. At page 38 he turned to the argument of the sub-contractor that if the attributes set out ***in Mustill & Boyd*** were employed the procedure described in clause 24 qualified as an arbitration and said: *"Undoubtedly some at least of those factors are present in the adjudication process but rather than proceeding by reference to a list we prefer to focus upon the sub-contract. That does contain an undoubted arbitration provision (article 3) and it is by an arbitrator appointed under that article that a dispute as to set-off is to be ultimately resolved whatever an adjudicator may decide (see clauses 24.1.1.1 and clause 24.3.1). An adjudicator's decision is "binding ... until" determination by an arbitrator. The decision has an ephemeral and subordinate character which in our view makes it impossible for the decision to be described as an award on an arbitration agreement. The structure of the sub-contract is against that conclusion. We would dismiss the appeal."*

20. In my judgment that decision does not exclude the possibility that some one named as an adjudicator might not be an arbitrator, as it establishes only that you cannot have two successive arbitrators, one reviewing the decision of the other. The procedure set out in clause 24 of that sub-contract contained a few of the basic requirements of an arbitration, eg the necessity to give each side a very limited opportunity to present its case, but the principle of audi alteram Partem is not otherwise carried through as it is intended to be a swift and summary procedure, the utility of which is justifiable by the facts that it cannot be used without a notice of arbitration having first been given and that the decision of the adjudicator is thus capable of being varied or reversed and set aside. The procedure set out in the Principal Contract (in clauses 4.37 to 4.44 of JCT Works Contract/2) is indistinguishable from that in DOM/1 which was considered in **Cameron.** The adjudicator has to reach his decision on the basis of a single written submission from each party (and only if there is ambiguity can he ask for clarification or explanation). He is expressly prohibited from hearing either party in person and he is not to give reasons (see clause 4,39). Thus, as Mr Baatz submitted as regards clause 23.3, the essentials of an arbitration are absent, ie the right to be heard and to call evidence, together with many of the other attributes in the list in ***Mustill & Boyd***.

21. Mr Baatz produced other standard forms where provision is made for the appointment of an adjudicator.[2] In the ACA/BPF form the adjudicator is expressly deemed to be acting as an expert and not as an arbitrator and if a party is dissatisfied with an adjudicator's decision it is to be referred to arbitration. In supplementary provisions issued in 1988 for use with the JCT standard form with contractor's design (1981 edition) a similar procedure is set out whereby disputes about certain matters are to be referred to an adjudicator and not to arbitration. Again the adjudicator is acting expressly as an expert and not as arbitrator and if the decision is not acceptable to either party the underlying dispute may be referred to arbitration. This type of two-stage dispute resolution has long been found in civil engineering contracts and is exemplified by clause 66 of the ICE conditions, (although of course the dispute is there first referred not to an outsider but to the Engineer who is however to act impartially and independently of the employer.)

22. Mr Baatz also relied on Sir Michael Latham's suggestion in his recent report[3] that there should be more use of a system employing an adjudicator in order that disputes might be resolved quickly but his report recognises that the variety of procedures which employ an "***adjudicator***" or the like are of relatively recent origin and are still being tested and are at present only employed selectively at certain levels in the construction industry. His suggestions also expressly envisage that a party dissatisfied with the decision of an adjudicator would have the right to take the .issue to the courts or to arbitration for final decision in the usual way.

23. It was submitted that adjudication in clause 23.1 should be given the same meaning as "***adjudication***" in clause 23.3. 1 disagree. First, in clause 23.3 the wording is "*adjudication under the Principal Contract*". The defendant's terms are standard ones. I have already referred to clauses 1 and 3. Mr Baatz submitted that their effect was also that the sub-sub-contract should be read together with the Works Contract so that the terminology of the latter governed the terms of the former. (However clause 2.2 states *"In case of any conflict between the Sub-Contract Order and the Principal Contract then the former shall prevail".)*

24. The JCT Works Contract provides only for a limited number of matters to be referable to adjudication. Accordingly for the purposes of clause 23.3 *"adjudication under the Principal Contract*" is appropriate only for certain disputes and where there is dissatisfaction with the result the question may be referred to arbitration by the defendant or TWML and not by the plaintiff. Under clause 23.1 "***any dispute***" may be referred to adjudication and there is no provision for arbitration if the party is dissatisfied with the result. If "***adjudication"*** under clause 23.1 were to be of the same nature as that in the Works Contract but without the possibility of recourse by way of arbitration then it would in effect be a reference to an "**expert**"[4] and it would seriously affect the rights of the parties since not only would the adjudicator not be obliged to conduct the reference as if he were an arbitrator but also - and of considerable importance - the grounds upon which the decision could be challenged would be very limited.[5] Clauses which purport to oust the jurisdiction of the courts or otherwise to cut down the rights of parties are to be construed narrowly especially where, as here, they appear in one party's standard conditions. In my judgment "***adjudication***" in clause 23.1 is not to be given the same meaning as "***adjudication***" in clause 23.3 since the latter envisages a limited form of dispute resolution which will not give the parties the right to have their disputes resolved as fairly as would a reference to arbitration. Clear words are required to achieve such an end and they are not here present.

25. It is clear on the authorities that, as set out in Keating, the test to be applied is the customary one of ascertaining the presumed intention of the parties from their contract and its circumstances. It is plain that "***adjudication***" taken by itself means a process by which a dispute is resolved in a judicial manner. It is equally clear that "***adjudication***" has as yet no settled special meaning in the construction industry (which is not surprising since it is a creature of contract and contractual procedures utilizing an

[2] There is also a helpful historical account in "***Adjudicators, Experts and Keeping out of Court***" by Mark C. McGaw (1992) 8 Construction Law Journal 332 at pages 334 et seq.

[3] eg, in chapter 9 of "***Constructing the Team***" (HMSO, 1994).

[4] Although obviously, unlike the valuer in **In Re Carus-Wilson and Greene** one whose function is to resolve disputes and not to prevent them arising.

[5] See **Dean v Prince** [1954] Ch. 409; **Campbell v Edwards** [1976] 1 WLR 403

"***adjudicator***" vary as do forms of contract). Even if it were to have the special meaning accorded to it in some sections of the construction industry where it describes the initial determination of certain classes of dispute in a summary manner, the force[6] of which is tempered by its ephemeral status as there are concomitant provisions for the decision to be reviewed and if necessary reversed by an arbitrator, I would see no reason why it should have that meaning in this contract. Those provisions do not form part of clause 23.1 nor can they be read into it by some incorporation of the Works Contract whose terms are inappropriate for this sub-sub-contract (see also clause 2.2 of the defendant's terms). I can see no purpose in ascribing to these parties an intention that all their disputes should be submitted to such a procedure but without the possibility of review or reversal. In contrast arbitration is widely used throughout the construction industry and it would be natural to impute to the parties an intention to create an arbitration agreement. Although it might seem from this conclusion that "adjudication" in clause 23.1 is not the same as "adjudication" in clause 23.3 the latter is "under the Principal Contract" which is not the same as adjudication under clause 23.1. For these reasons I am unable to accept the submissions that "adjudication" is a procedure which cannot be arbitration or that it has an established meaning in construction contracts which precludes it being an arbitration. In clause 23.1 "adjudication" means an arbitration and the plaintiffs preliminary objection to the defendant's application is therefore rejected.

Clause 23.3

26. Although it is not therefore strictly necessary to express any conclusion on this issue I do so in view of the arguments of both counsel and because the issue is not uncommon. Miss Vaughan-Jones argued that the defendant was entitled to invoke clause 23.3. I do not here deal with whether the defendant had complied with the procedure set out in clause 23.3 but with Mr Baatz's argument that clause 23.3 was not an arbitration clause. He submitted that
    (1) the words "*then the subcontractor shall join its dispute or difference to that of the contractor*" were not a provision which provides for the arbitration as between the parties to this sub-sub-contract of the relevant dispute;
    (2) the reference to adjudication was not a reference to arbitration; and
    (3) the reference to arbitration under the principal contract would apply if the principal contract contained machinery for arbitration of disputes between the plaintiff and the defendant.

27. Submissions (1) and (3) cover virtually the same ground. As to submission (2) I have already held that in the context of the principal contract the reference to adjudication is not a reference to arbitration but to the form of dispute resolution conducted by the adjudicator under that the applicable clause of the JCT Works Contract which, like the sub-contract in Cameron, provides for a two-stage procedure, of which the first cannot be an arbitration for that is the second stage.

28. Mr Baatz submitted that since the sub-sub-contract was a domestic one and not "***back to back***" with the contract between the defendant and TWML problems could and would arise if the dispute or claim raised by the plaintiff were not identical to that raised by the defendant. He pointed out that clause 23.3 might be used by the defendant where there "*matters which in whole or in part the Contractor has or is contemplating referring....*" so that plaintiff would apparently be obliged to relinquish its dispute or claim except to the extent to which it was covered by the matters referable to adjudication or arbitration under the principal contract by the defendant. Furthermore what was to happen if the interests of the plaintiff and the defendant conflicted?

29. Miss Vaughan-Jones submitted such the problems could he overcome by an implied term eg that the defendant would use its best or its reasonable endeavours to advance the plaintiffs case. In my judgment the hurdles depicted by Mr Baatz and summarised above cannot be overcome by an implied term or at all. As Sir John Donaldson MR said (albeit in a different context) in **Northern Regional Health Authority v Derek Crouch Construction Ltd** [1984] 1 QB 644 at page 674 C-D; *"Every conceivable complication will arise if [the contractors] disagree with the case which [the subcontractor] wishes to submit in their name."*

[6] See **Drake & Scull Engineering Ltd v McLaughlin & Harvey plc** (1992) 60 BLR 102

30. Mr Baatz drew attention to the provisions of clause 9.2 of the Works Contract and submitted correctly, in my judgment, that there was no room in that scheme for the introduction of a party such as the plaintiff without the further agreement of at least TWML (and of the arbitrator). Reading the defendant's conditions in the light of the Works Contract I do not see how any term could be implied to make clause 23.3 work as an effective arbitration agreement if in turn it was dependent an the agreement of a third party whose own contract had been carefully drawn up with a view to multi-party arbitration but not with a party such as the plaintiff.

31. Mr Baatz fortified his submissions by demonstrating that, even if clause 23.3 could be read as if it might be an agreement to arbitrate certain selected disputes or certain parts of disputes, it failed to satisfy virtually all the attributes listed in ***Mustill & Boyd***. I agree. I take the plainest: (ii) the process would not carried on between those persons whose substantive rights would he determined by the tribunal; (iii) the jurisdiction of the tribunal did not derive from the consent of the parties to the sub-sub-contract; (v) the agreement did not contemplate that the tribunal would determine the rights of the parties to the sub-sub-contract in an impartial manner with an equal obligation of fairness towards both. In my judgment clause 23.3 may be an agreement whereby the plaintiff is bound to accept the determination of an adjudicator or arbitrator but it is not an arbitration agreement, still less is it a multi-party arbitration agreement.

32. In view of this conclusion it is not necessary to consider whether the defendant had complied with the procedural requirements of clause 23.3.

Whether a stay should be granted

33. First, are there disputes which go to the whole or part of the claim? Secondly, even if there are such disputes should the court's discretion under section 4 of the Arbitration Act 1950 be exercised in favour of the plaintiff? In considering the first question I shall adopt the usual practice (summarized in Keatiing at page 440 footnote 58). Since both contracts had been run together no material distinction was made in the course of argument between the two contracts. As regards the second question the onus is on the plaintiff: see eg ***Mustill & Boyd*** at pages 475 - 476.

1. **Pay when paid (includes retention**

34. Clause 7.4 of the defendant's terms provide for payment to be made to the plaintiff by the defendant "*by the second Monday.... following receipt from the Principal on account of the Works*". Clause 7.7 makes a similar provision for the payment of retention. The plaintiff claims £175,702 for the below ground works and £52,080.85 for the above ground works, inclusive of £20,274 on both contracts. Mr Collins who is the defendant's divisional director stated in his affidavit that TWML have not paid these amounts and that the sums claimed are disputed not least because details have been not provided. Mr Baatz invited me to hold that a term such as clause 7.4 is effective only for interim and not final payments (following American precedent). For the purposes of this application it is not necessary for me to decide that vexed point since in my judgment there is clearly a bona fide dispute as to whether the defendant is liable to make any further payments to the plaintiff on account of those claims which are questioned (to which I shall refer) and in any event the proper interpretation and application of clause 7.4 and 7.7 (where payment has not yet been made by TWML) is clearly in 25 dispute.

2. Thickness claim

35. Item 2119 in schedule I to the statement of claim is a claim for £84,383_20 pursuant to an unspecified verbal instruction for *"additional costs due to change from 50mm mineral wool to 80/100 conlit in construction of double skin ducts*." It is clear from the correspondence exhibited by Mr Collins (see TWML's letters of 27 September and 9 November 1994 and the defendant's letter of 12 October 1994) that TWML do not and did not accept liability for (and challenge the valuation of) this claim. The defendant's case was that the change was necessary to comply with the plaintiffs obligations under the contract. The evidence in opposition from the plaintiff was contained in an affidavit from its solicitor which did not deal with the defendant's detailed commentary on the plaintiffs claim and, although it stated that the plaintiff had not seen the letters of 27 September and 12 October, did not suggest that the plaintiff had been unaware of this dispute. In my Judgment there is a dispute as contended by the defendant.

3. Loss and Expense claim

36. Clause 6.3.2.1 of the defendant's conditions requires the plaintiff to provide particulars of any claim for loss and expense (for which express provision is made in clause 6.3.1). Items 2/16 and 2/17 in schedule I are also claims based on verbal instructions for "*additional prelims due to extended contract period*" (£23,745) and "*NPO costs incurred in working to revised programmes*" (.£5,436). Mr Collins exhibited a letter from TWML of 1 December 1994 which had been sent to the plaintiff and which established that these claims were being rejected by TWML on the grounds that the documentation submitted by the plaintiff did not support them. There is therefore a dispute between the parties to this action as to whether the requirements of clause 6.3.2,1 have been satisfied and even if they have been (as contended by the plaintiff) whether the plaintiff has an entitlement as claimed in the schedule to the statement of claim.

4. Unverified, unagreed variations

37. Mr Collins for the defendant disputes the plaintiffs claim to the extent of £78,729 representing the total of the sums claimed in items 2/1 to 2/8 and 2113 and 2114 of schedule 1 and certain daywork sheets listed in schedule 2 to the statement of claim on the grounds that the claims have not been substantiated in accordance with the requirements of the defendants' conditions, in particular clause 7.2 . The defendant also maintains that the plaintiffs valuation does not follow the contractual rates.

38. The defendant's case is not borne out by contemporary correspondence and I am not satisfied that there was any bona fide dispute as to these amounts prior to the issue of the writ (or indeed what the defendants' case on the merits is). The plaintiffs letter before action of 16 February enclosed the schedules setting out its final account and I would have expected the defendant to have written back immediately questioning those parts of the plaintiffs claim which had not previously been challenged. The defendant did not do so. But for the "pay when paid" issue no stay of these proceedings would have been ordered in respect of these claims.

5. Contra-Charges

39. On the other hand the defendant's claims for contra-charges amounting to £8,368 were the subject of its letters of 12 July 1993, 20 August 1993 and 25 October 1993 and thus they are clearly in dispute.

6. Liquidated Damages

40. The only dispute as to the balance of the plaintiff's claim is a set-off on the basis of the plaintiffs liability for liquidated damages. In paragraph 4 of his affidavit Mr Collins states that extensions of time have been granted for the works under both contracts (to October 1993 and October 1994 respectively); that TWML have deducted liquidated damages of £279,000 and that the defendant "*is still awaiting TWML's breakdown of this so as to apportion the liquidated damages accordingly. However some of the liquidated damages may relate to [the plaintiffs] work.*" No correspondence was exhibited evidencing any claim or dispute about the plaintiffs alleged liability for liquidated damages. It was not even mentioned in the defendant's solicitor's letter of 3 May 1995 as a matter which justified clause 23.3 being invoked. I am not satisfied that there is any real or -bona fide dispute. I note that Mr Collins says no more than some of the damages deducted "*may*" relate to the plaintiff. But for the "***pay when paid***" dispute there would be no stay as to the balance claimed by the plaintiff of £6,847.84.

41. Accordingly the defendant has established that there are disputes as to the whole of the claim and, subject to any further submissions, the action should be stayed in favour of an arbitration as provided by clause 23.1 of the sub-sub-contract conditions.

(After further submissions)

42. Three further points arise. First, Mr. Baatz has developed a submission, the foundations for which had earlier been laid, to the effect that, notwithstanding my decision that clause 23,1 is an arbitration agreement and that there are disputes as to the whole of the claim, nevertheless the action should not be stayed, because - and there are signs here of a *volte face* on the part of the plaintiff - the disputes are ones which involve TWML, and there is therefore a likelihood of multi-party proceedings and it would be undesirable for there to be multi-party proceedings before different tribunals, and that undesirability can be avoided if the action is not stayed.

43. That argument of course assumes (1) that if this action were not to be stayed the defendant would bring in TWML; (2) that TWML would oppose being brought in as a third party on the grounds that the disputes are referable to arbitration under Works Contract/2; and (3) that that ground o€ opposition would be rejected. These are matters for speculation. It is perfectly true that some of the events upon which the plaintiffs claim is based, and some of the evaluations of those events, are likely to be passed on by the defendant to TWML, and that the defendant wished to join the plaintiff in the dispute resolution procedure under Works Contract/2 via clause 23.3. All this is quite clear from the correspondence. But it is equally clear from the correspondence that the disputes between the plaintiff and the defendant even in those instances involves a question of whether or not the plaintiff has complied with its obligations under the contract as to providing proper particulars and details of its claim so as to entitle it to recover any money at all, That dispute and other disputes, such as those in relation to the claims or to the variations alleged, where also the valuation of the variations under the sub-sub-contracts may not be the same as under the sub-contract between the defendant and TWML, indicate to me that there are likely to be significant disputes between the plaintiff and the defendant which will not involve TWML. I do not therefore consider that the arguments advanced by Mr. Baatz provide a sufficient reason for me not to follow the normal course, which is to give effect to the arbitration agreements) and to stay the action as provided by clause 23.1 of the sub-sub contract conditions.

44. Secondly, Mr. Baatz asks for leave to appeal. I am in two minds about this. First, the word "***adjudication***" has not previously been considered by the courts other than in **Cameron** and, but incidentally, in **Drake & Scull Engineering Ltd v McLaughlin & Harvey** plc (1992) 60 BLR 102 and a few other cases. However, I cannot accept, as Mr. Baatz suggests, that there is a point of general public interest as to what might constitute an adjudication in the form which is currently the subject of public debate. I am here not concerned with that question but with a particular form of domestic sub-contract arising out of the use by the defendant of its own special conditions and whether the words in clause 23.1 are to be taken as a reference to arbitration or not. It did not appear that clause 23.1 was used elsewhere. In my view, although I take account of everything that Mr. Baatz has said, I do not consider that the point which I indicated at the outset was of potential general interest is actually of such interest that it would be right for me to grant leave to appeal, and therefore if the plaintiff wishes to pursue the matter further it must make its application elsewhere.

45. Thirdly, as regards costs, the plaintiff had certainly some substance in its submission that until quite late in the day, namely the service of Mr. Collins' affidavit in draft form on or about 9 June 1995, the defendant was pursuing a case under clause 23.3 which, as the plaintiff now says, was doomed to failure. However, Mr. Collins' affidavit makes it clear that a reference under clause 23.1 was also to be pursued, and I have upheld that submission, it seems to me that, looking at the matter overall, there is force in what Miss Vaughan-Jones has said, namely that if the plaintiff, faced with the defendant's clear desire to have the matter removed from the court, had said to the defendant, "*We do not agree to a multi-party procedure as envisaged by clause 23.3 because it will be ineffective as an arbitration, but we would agree to arbitration under clause 23.1",* then this application would not have been necessary. But instead the plaintiff, having commenced its action in breach of contract, pursued it, notwithstanding the defendant's intimation that it intended to insist upon its contractual rights. In such circumstances the costs must take their usual course and therefore the defendant is entitled to its costs against the plaintiff.

46. Accordingly the order will be that all further proceedings in this action are stayed pursuant to section 4 of the Arbitration Act, 1950 for there to be an arbitration (or arbitrations) pursuant to clause 23.1 of the sub-sub-contract conditions, and that the plaintiff shall pay the defendant its costs of this action, such costs to be taxed if not agreed.

Mr Nicholas Baatz appeared far the plaintiff, instructed by Greenwoods, Peterborough
Miss Sarah Vaughan-Jones appeared for the defendant, instructed by Greenwoods, London