JUDGMENT : HIS HONOUR MR JUSTICE DYSON : TCC : 12th February 1999.

Introduction :

1. This is the first time that the court has had to consider the adjudication provisions of the Housing Grants, Construction and Regeneration Act 1996 ("the Act"). The plaintiff entered into a contract with the defendant to carry out groundwork's as sub-contractor at a retail development known as Greyfriars in Camarthen, South Wales. The plaintiff alleged that the defendant failed to make payment in accordance with its application number 6 and required the dispute to be referred to an adjudicator. Mr Eric Mouzer FRICS, FCIArb was duly appointed. On 6 January 1999, he published his decision. He directed that the defendant forthwith pay the plaintiff £302,366.34 plus VAT, accrued interest of £2849.70 continuing at the daily rate of &66.27 until payment, and fees of £2197.75. He purported to issue his decision peremptorily under paragraph 23(1) of the Scheme for Construction Contracts ("the Scheme"), adding that, in the event of non-compliance with his decision, he gave permission under s42 of the Arbitration Act 1996, as modified by para 24 of the Scheme, for either party to apply to the court for an order requiring such compliance.

2. The defendant has not complied with the adjudicator's decision. It contends inter alia that the decision is invalid and unenforceable on the grounds that the adjudicator was guilty of procedural error in conducting the adjudication in breach of the rules of natural justice. By a letter dated 13 January 1999, the defendant gave notice to the plaintiff requiring the reference to arbitration of disputes arising out of or in connection with the adjudicator's decision.

3. The plaintiff seeks to enforce the decision in this court. The defendant has issued a summons to stay the plaintiff's proceedings under s9 Arbitration Act 1996, on the grounds that the contract contains a valid arbitration clause which, properly construed, applies to all of the disputes that have been raised as to the decision of the adjudicator. These proceedings raise questions as to the enforceability in the courts of an adjudicator's decision in circumstances where the contract contains a clause by which the parties agree to refer to arbitration disputes about a decision. In short, it is submitted on behalf of the plaintiff that the existence of such a clause does not affect the enforceability of an adjudicator's decision. On behalf of the defendant, it is said that, if the dispute concerns the validity of the decision, (as opposed to the adjudicator's conclusion on the merits), the decision is not enforceable unless, and then only to the extent that, it is confirmed by the arbitrator following the reference to arbitration.

4 It is common ground that the contract was a construction contract within the meaning of the Act.

The contract :

5. It is unnecessary for me to set out the payment provisions in full. Suffice it to say that clause 13(ii) of the conditions provided that payment was due to the plaintiff 30 days after the value of the Sub-Contract Works was included in a Principal Contract Valuation, or the making of a claim by the plaintiff, whichever was the later, and that, subject to clause 13(v), the final date for payment was 15 days from the date that payment became due. Clause 13(v) dealt with set-off. It provided that any notice of intention to withhold payment should be given not later than 7 days before the final date for payment. Another contract document (Document No 4) provided that the period of payment was 13 days. The effect of the apparent inconsistency between clause 13(ii) of the conditions and the provision in Document No 4 was one of the issues that was before the adjudicator. This was because the defendant gave notice of its intention to withhold payment on 10 December 1998, and a critical question was whether this was within the 7 day period specified in clause 13 (v) or in paragraph 10 of Part II of the Scheme.

6. Clause 27 of the contract conditions was headed "*Adjudication and Arbitration*" and provided as follows:

> *"(i) In the event of any dispute arising between M.C.L. and the Sub-Contractor under or in connection with the Sub-Contract it is to be submitted to and settled by the Adjudicator. The appointment of an Adjudicator shall be agreed between the Parties or failing such agreement be appointed by the President for the time being of the Chartered Institute of Arbitrators on the application of either M.C.L. or the Sub-Contractor.*

The Adjudicator will settle the dispute by notifying M.C.L. and the Sub-Contractor of his decision together with his reasons within 28 days of submission of the dispute to him. Any dispute or difference must be submitted to the Adjudicator within 14 days of the subject matter of the dispute coming to the attention of the aggrieved party.

Unless and until there is a settlement by the Adjudicator, M.C.L. and the Sub-Contractor shall proceed as if the subject matter of the dispute were not disputed and the decision of the Adjudicator is final and binding unless and until revised by the Arbitrator in terms of Clause 27(ii) below.

In settling the dispute, the decision of the Adjudicator is enforceable as a matter of contractual obligation between M.C.L. and the Sub-Contractor and is not an arbitral award. If either M.C.L. or the Sub-Contractor is dissatisfied with the decision of, or any failure to make a decision by, the Adjudicator, he must notify the other party of his intention to refer the matter to arbitration within 4 weeks of the decision of, or failure to decide by, the Adjudicator provided always that the arbitral proceedings shall not commence before practical completion of the Sub-Contract works or earlier termination.

(ii) Should any question or dispute arise on any matter, out of or in connection with this Sub-Contract, including for the avoidance of doubt any matter arising out of dissatisfaction of either of the parties with the decision of, or failure to provide a decision by, the Adjudicator in terms of Clause 27(i) above, the same shall (except where the Principal Contract provides for such to be subject to the final decision of the Architect or the Engineer) be referred for arbitration to some person agreed upon, or failing agreement, to a person appointed by the President for the time being of the Chartered Institute of Arbitrators or as otherwise provided in the Principal Contract within 14 days after either party has given to the other written notice to concur in the appointment of such a person.
No arbitration proceedings are to be commenced unless M.C.L. decides otherwise in writing until after the date of the certification of final completion of the Principal Works."

The Act :

7. It is common ground that the contract did not comply with all of the requirements of section 108(1) to (4) of the Act. Accordingly, the adjudication provisions of the Scheme applied (section 108(5)). Section 108(3) provides that the contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings or arbitration or by agreement. The only other provision of the Act to which I need refer is section 1 14(4) which states that where any provisions of the Scheme apply in default of contractual provision agreed by the parties, they have effect as implied terms of the contract.

The Scheme :

8. The only material provisions that I need to set out are the following to be found in Part I.

23(1) In his decision, the adjudicator may, if he thinks fit, order any of the parties to comply peremptorily with his decision or any part of it.

23(2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties.

24 Section 42 of the Arbitration Act 1996 shall apply to this Scheme subject to the following modifications....

Section 42 as modified so far as material provides:

42(1) Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by an adjudicator.

42(2) An application for an order under this section may be made--
(b) by a party to adjudication with the permission of the adjudicator (and upon notice to the other parties)

The disputes about the adjudicator's decision :

9. The adjudicator had received written evidence from the parties as to what had been agreed in relation to the dates for payment. He decided that he was unable to determine what agreement, if any, had been concluded. He therefore found that the parties failed to provide an adequate mechanism for determining the dates when payments became due and the final date for payment. Accordingly, in

accordance with section 1 10(3) of the Act, the provisions of the Scheme applied. Applying the relevant paragraphs of the Scheme, he decided that payment in respect of Valuation No 6 became due on 7 November and the final date for payment was 24 November, In the result, he held that the defendant's notice of intention to withhold payment was out of time.

10. The defendant challenges this decision on the merits. Additionally, it contends that the decision was invalid. The validity challenge is based on alleged breaches of the rules of natural justice in 2 respects. First, it is argued that the adjudicator should have given the parties the opportunity to make representations on the question whether a mechanism for payment and final payment which was ambiguous was inadequate within the meaning of section 1 10(1) of the Act. Secondly, it is said that the adjudicator acted in breach of the rules of natural justice because he decided to invoke section 42 of the Arbitration Act 1996 without giving the parties the opportunity to make representations on this point either.

11. In addition to the natural justice challenge, the defendant disputes the decision to invoke section 42 on the grounds that the adjudicator had no power to make a peremptory decision at all. This argument is based on the definition of "peremptory order" to be found in section 82(1) of the Arbitration Act 1996, which is: *"an order made under section 41(5) or made in exercise of any corresponding power conferred by the parties"*. It is submitted by Mr Furst QC that the purported exercise of jurisdiction under paragraph 23 of the Scheme was not pursuant to a "power conferred by the parties", but a power imposed on the parties by statute by reason of the fact that the contract did not comply with the requirements of section 108 of the Act.

Is there a binding and enforceable decision? :

12. Miss Dumaresq submits that, even if there is a challenge to the validity of an adjudicator's decision, the decision is binding and enforceable until the challenge is finally determined. For reasons that I will attempt to explain, I accept this argument.

13. Mr Furst submits that the word "decision," where it appears in clause 27, and where it appears in paragraph 23 of Part 1 of the Scheme, means a lawful and valid decision. Accordingly, where there is a decision whose validity is challenged, that is not a decision which is binding or enforceable as a contractual obligation until it has been determined or agreed that the decision is valid.

14. It will be seen at once that, if this argument is correct, it substantially undermines the effectiveness of the scheme for adjudication. The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement: see section 108(3) of the Act and paragraph 23 (2) of Part 1 of the Scheme. The timetable for adjudication's is very tight (see section 108 of the Act). Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. So far as procedure is concerned, the adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially (section 108(2)(e) of the Act and paragraph 12 (a) of Part 1 of the Scheme). He is, however, permitted to take the initiative in ascertaining the facts and the law (section 108(2)(f) of the Act and paragraph 13 of Part 1 of the Scheme). He may, therefore, conduct an entirely inquisitorial process, or he may, as in the present case, invite representations from the parties. It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.

15. It is well known that many, if not most, construction contracts contain arbitration clauses It is by no means uncommon for such clauses in subcontracts to state that the arbitration between main contractor and sub-contractor may not be commenced until the main contract works have been completed, at any rate unless the main contractor decides otherwise. The sub-contract in the present case provides an example of this. In such a case, the groundwork's subcontractor to a major

development may have to wait years before he can even start to arbitrate his dispute with the main contractor. This was the mischief at which the Act was aimed. In the light of ***Halki Shipping Corporation v Sopex Oils Ltd*** [1998] 1 WLR 726, the problem from the sub-contractor's point of view in such a situation is even more pressing than it was previously thought to be, since he cannot even seek summary judgment for a sum as to which there is no arguable defence.

16. Mr Furst's answer to this is that it is open to parties to draft their arbitration clauses in such a way as to exclude disputes arising from adjudicators' decisions. This would require careful drafting, since he accepts that standard arbitration clauses expressed in terms of "any dispute arising out of or in connection with" the contract in question might well be wide enough to embrace any dispute arising out of or in connection with an adjudicator's decision in relation to that contract. Mr Furst also makes the point that arbitration can itself be a swift procedure.

17. I accept that arbitration can be swift, but often it is not, and, as already explained, in some cases cannot even be started until long after the dispute has arisen. More fundamentally, if Parliament had thought that resolution by arbitration was a swift and effective procedure, it would surely not have seen the need to enact the Act at all.

18. For all these reasons, I ought to view with considerable care the suggestion that the word "decision" where it appears in section 108(3) of the Act, paragraph 23(2) of Part 1 of the Scheme and clause 27 of the contract, means only a decision whose validity is not under challenge The present case shows how easy it is to mount a challenge based on an alleged breach of natural justice. I formed the strong provisional view that the challenge is hopeless. But the fact is that the challenge has been made, and a dispute therefore exists between the parties in relation to it. Thus on Mr Furst's argument, the party who is unsuccessful before the adjudicator has to do no more than assert a breach of the rules of natural justice, or allege that the adjudicator acted partially, and he will be able to say that there has been no "decision".

19. At first sight, it is difficult to see why a decision purportedly made by an adjudicator on the dispute that has been referred to him should not be a binding decision within the meaning of section 108(3) of the Act, paragraph 23(1) of the Scheme and clause 27 of the contract. If it had been intended to qualify the word "decision" in some way, then this could have been done. Why not give the word its plain and ordinary meaning? I confess that I can think of no good reason for not so doing, and none was suggested to me in argument. If his decision on the issue referred to him is wrong, whether because he erred on the facts or the law, or because in reaching his decision he made a procedural error which invalidates the decision, it is still a decision on the issue. Different considerations may well apply if he purports to decide a dispute which was not referred to him at all.

20. Since the conclusion of the argument, I have considered the analogous position that arises in public law, where a public law act is done, and a question is then raised as to the lawfulness of that act. What is its status pending a decision by the court to quash it? I emphasise that the situation is no more than analogous to the situation that arises in the present case. But I think that the analogy is helpful.

21. A good example of the problem is to be found in *R v Wicks* [1998] AC 92. The appellant was served with an enforcement notice after carrying out building work without planning permission He was tried with the offence of failing to comply with the notice. His defence was that, in deciding to serve the notice, the planning authority had acted in bad faith and was motivated by immaterial considerations. No challenge to the lawfulness of the enforcement notice had been made before the criminal trial took place. The appellant argued that he was able to raise the lawfulness of the notice as a defence to the criminal charge. The House of lords held that, upon the true construction of the statute, an "enforcement notice" meant simply a notice issued by the authority that was formally valid, and had not been set aside on appeal or quashed on judicial review. Accordingly, since the appellant had failed to comply with the notice, he had been guilty of the offence charged. Lord Hoffmann reviewed some of the authorities in which the court considered the legal effect of an act which is later declared to have been unlawful. The House of lords concluded that there is no all-embracing rule as to the effect of such an act: see p108H-109A, and 117A-D. The following passage in the speech of Lord Hoffmann is, I think, particularly illuminating for present purposes. At page 119 he said:

"In my view the question in this case is likewise one of construction. What is meant by "enforcement notice" in section 179(1) of the Act of 1990? Does it mean a notice which is not liable to be quashed on any of the standard grounds in public law? Or does it mean a notice issued by the planning authority which complies with the formal requirements of the Act and has not actually been quashed on appeal or judicial review The words "enforcement notice" are in my view capable of either meaning. The correct one must be ascertained from the Scheme of the Act and the public law background against which it was passed.

He then went on to consider the scheme of the Act and the background against which it was passed, and decided in the way that I have already stated.

22. So too in the present case, the question of the meaning of the word "decision" is one of construction, both statutory and contractual. Neither party suggested that there was any difference between the meaning of the word as it appears in the Act and the Scheme on the one hand, and clause 27 of the contract on the other. As I have already indicated, I do not find any difficulty in giving the word "decision" what I conceive to be its plain and ordinary meaning. It may, however, be possible to argue that it is ambiguous in the same way as Lord Hoffmann thought that "enforcement notice" was ambiguous. I emphasise that no such argument was addressed to me. In that event, it would be necessary to ascertain the correct meaning from the scheme of the Act and the Scheme, and the background against which it was passed. Adopting that purposive approach to the construction of the word "decision", 1 am in no doubt that it should not be qualified in the way suggested by Mr Furst. The plain purpose of the statutory scheme is as I have earlier described. Mr Furst would not accept that his construction would drive a coach and horses through the scheme. On any view, it would substantially undermine it, and enable a party who was dissatisfied with the decision of an adjudicator to keep the successful party out of his money for longer than envisaged by the scheme.

23. I would hold, therefore, that a decision whose validity is challenged is nevertheless a decision within the meaning of the Act, the Scheme and clause 27 of the contract.

Should there be a stay under section 9 of the Arbitration Act 1996? :

24. Miss Dumaresq submits that clause 27 of the contract does not apply to disputes as to the validity of an adjudicator's decision. Thus, she argues, a dispute as to whether a decision should be set aside on grounds that it was made ultra vires or in breach of natural justice is not amenable to arbitration. The jurisdiction of the arbitrator is limited to disputes as to the substantive content of the decision itself. The basis for this submission is not that an arbitrator can never have jurisdiction to decide questions as to the lawfulness of an adjudicator's decision. In my judgment, there can be no objection in principle to the parties to a construction contract giving an arbitrator the power to decide such questions. Rather, Miss Dumaresq submits that, upon the true construction of clause 27, the parties to this contract did not give the arbitrator that power.

25. She draws attention to the words in clause 27(i) "the decision of the Adjudicator is final and binding unless and until revised by the Arbitrator" (my emphasis). She submits that if a decision is held to be invalid on grounds of excess of jurisdiction or breach of the rules of natural justice, it is a nullity. The clause assumes that the decision is not a nullity, but is valid, since otherwise there is nothing for the arbitrator to revise. Accordingly, the power of the arbitrator is to determine disputes relating to valid decisions.

26. I cannot accept this argument. It is not a misuse of language to speak of an arbitrator who sets aside an adjudicator's decision as "revising" that decision. The arbitrator might set the decision aside for different reasons. He might decide that the plaintiff was entitled to no money at all for reasons wholly unconnected with the manner in which the adjudication was conducted. It is plain that the parties intended that the decision of the adjudicator would be "revised" whenever the arbitrator disagreed with it, and for whatever reason.

27. Mr Furst submits that even if (as I have held) the adjudicator's decision was a decision within the meaning of clause 27, the defendant is entitled to a stay of these enforcement proceedings under section 9 of the Arbitration Act 1996 because there is a dispute as to whether it was a decision. He argues that this is the conclusion to which I am driven by Halki. He relies on the fact that by letter

dated 13 January 1999 the defendant gave the plaintiff notice of arbitration in respect of 7 disputes relating to the adjudicator's decision. These included: "Was the purported Adjudicator's Decision dated 6 January 1999 of any force or effect?" Thus, he submits that the dispute as to the validity of the decision has been the subject of a notice of arbitration, and the current proceedings must be stayed. Mr Furst accepts that, where there is a dispute as to the merits of a decision, the effect of section 108(3) of the Act, paragraph 23(1) of the Scheme and clause 27(i) of the contract is that it is binding and enforceable pending the final resolution of the dispute by arbitration or otherwise. But if the dispute is as to the validity of the decision, the position is otherwise where the defendant to the enforcement proceedings has referred that dispute to arbitration and seeks a stay under section 9.

28. This is an ingenious argument, but I cannot accept it. In my view, if the defendant wished to challenge the validity of the decision, it had an election. One course open to it was (as it did) to treat it as a decision within the meaning of clause 27, and refer the dispute to arbitration. The other was to contend that it was not a decision at all within the meaning of clause 27, and to seek to defend the enforcement proceedings on the basis that the purported decision was not binding or enforceable because it was a nullity. For the reasons stated earlier in this judgment, this second course would not have availed the defendant.

29. But what the defendant could not do was to assert that the decision was a decision for the purposes of being the subject of a reference to arbitration, but was not a decision for the purposes of being binding and enforceable pending any revision by the arbitrator. In so holding, I am doing no more than applying the doctrine of approbation and reprobation, or election. A person cannot blow hot and cold: see *Lissenden v CAV Bosch Ltd* [1940] AC 412, and Halsbury's Laws 4th Edition Volume 16, paragraphs 957 and 958. Once the defendant elected to treat the decision as one capable of being referred to arbitration, he was bound also to treat it as a decision which was binding and enforceable unless revised by the arbitrator.

30. I should add that in my view there is nothing in Halki which prevents the court from deciding that the defendant is precluded by its election from seeking a stay under section 9.

Enforcement of the Adjudicator's decision :

31. Mr Furst submits that there is no power in the court to make an order under section 42 of the Arbitration Act 1996 (as modified by paragraph 24 of Part 1 of the Scheme). His argument is that the power given by section 42 is exercisable "unless otherwise agreed by the parties". He says that the parties have otherwise agreed in the present case by agreeing to refer to arbitration disputes arising out of the decision of an adjudicator. In my view, the arbitration clause is not an agreement of the kind envisaged by section 42(1). What that subsection contemplates is an agreement expressly directed to the section 42 power. Ordinarily, this would be an agreement expressly excluding that power, although I accept that there may be other ways of achieving the same object. A general reference of disputes to arbitration is surely insufficient.

32. In my view, therefore, the court can enforce this decision under section 42.

33. There was some limited discussion as to whether, section 42 apart, the appropriate procedure was by way of writ and an application for summary judgment, or by way of a claim for a mandatory injunction. Miss Dumaresq submits that an injunction is more appropriate. She suggests that summary judgment is not suitable in the context of a provisional decision, which may be revised by an arbitrator at a later stage. Mr Furst submits that the summary judgment route is the correct route to follow.

34. I do not consider that the mere fact that the decision may later be revised is a good reason for saying that summary judgment is inappropriate. The grant of summary judgment does not pre-empt any later decision that an arbitrator may make. It merely reflects the fact that there is no defence to a claim to enforce the decision of the adjudicator **at the time of judgment.**

35. I am in no doubt that the court has jurisdiction to grant a mandatory injunction to enforce an adjudicator's decision, but it would rarely be appropriate to grant injunctive relief to enforce an obligation on one contracting party to pay the other. Clearly, different considerations apply where the adjudicator decides that a party should perform some other obligation, e.g. return to site, provide

access or inspection facilities, open up work, carry out specified work etc. Nor do I intend to cast any doubt on decisions where mandatory judgments have been ordered requiring payment of money to a third party, e.g. to a trustee stakeholder as in ***Drake and Scull Engineering Ltd v McLaughlin and Harvey plc*** 60 BLR 102.

36. The words of section 37 of the Supreme Court Act 1981 are widely expressed viz: *"the High Court may by order (whether interlocutory or final) grant an injunction....in all cases in which it appears just and convenient to do so"*. But a mandatory injunction to enforce a payment obligation carries with it the potential for contempt proceedings. It is difficult to see why the sanction for failure to pay in accordance with an adjudicator's decision should be more draconian than for failure to honour a money judgment entered by the court.

37. Thus, section 42 apart, the usual remedy for failure to pay in accordance with an adjudicator's decision will be to issue proceedings claiming the sum due, followed by an application for summary judgment.

38. It is not at all clear why section 42 of the Arbitration Act 1996 was incorporated into the Scheme. It may be that Parliament intended that the court should be more willing to grant a mandatory injunction in cases where the adjudicator has made a peremptory order than where he has not. Where an adjudicator has made a peremptory order, this is a factor that should be taken into account by the court in deciding whether to grant an injunction. But it seems to me that it is for the court to decide whether to grant a mandatory injunction, and, for the reasons already given, the court should be slow to grant a mandatory injunction to enforce a decision requiring the payment of money by one contracting party to another.

39. The adjudicator did not explain why he thought it appropriate to make a peremptory order. Miss Dumaresq was unable to suggest any reason why an injunction should be granted (other than the one which I have already referred to and rejected). In these circumstances, I am not persuaded that I ought to exercise my discretion in favour of granting an injunction.

40. The plaintiff has not claimed a money judgment in these proceedings. In the result, I think that the relief that I ought to grant is a declaration that (i) the decision of the adjudicator is binding on the defendant until the dispute arising from the decision is finally determined by arbitration, legal proceedings or agreement; and (ii) the defendant was required by the decision to pay the sums identified by the adjudicator forthwith in accordance with the Scheme, and is now in default.

Delia Dumaresq instructed by Morgan Cole for the Plaintiff
Stephen Furst QC and Michael Bowsher instructed by Wragge and Co for the Defendant