JUDGMENT : HIS HONOUR JUDGE BEHRENS : High Court, Ch.D. Leeds. 7th April 1999

1. This is an application for a determination of whether the leave of this Court is needed by A. Straume (UK) Limited to bring an application for an adjudication under the terms of clause 41 of a building contract.which was entered into between A. Straume (UK) Limited and Bradlor Developments. If the leave of the court is necessary, A. Straume applies under section 11(3)(d) of the Insolvency Act 1986 for leave to bring such proceedings.

2. In about June 1998 the parties entered into a contract for the carrying out of building works at a mill in Addingham, West Yorkshire. The works, according to an affidavit from Miss Spiller, comprised the redevelopment of the existing derelict mill buildings to provide office and production accommodation together with external works and drainage.

3. It is common ground that the contract incorporated the JCT Form of Contract, 1980 edition, Private Without Quantities, incorporating amendments 1 to 18. Under amendment 18 it is common ground that a new clause 41A was inserted into the contract which reflected the statutory scheme introduced pursuant to the Housing Grants Construction and Regeneration Act 1996. The new clause 41A, to which I shall have to refer later in this judgment, provides that parties to the contract may refer disputes and differences under the contract to adjudication. The date for practical completion under the contract was the 28th November 1998, and it is common ground that that date was subsequently extended to the 18th January 1999. Work was not completed by that date. On the 3rd March 1998 an Administration order was made against or in favour of Bradlor Developments Limited and Peter Fleschor together with Michael Saville were appointed as joint administrators. They took the view that substantial sums were due under the contract and have served notices for adjudications under clause 41A. The first such notice is dated the 12th March 1999. Under it, they claim £172,505.23 which is said to be due pursuant to interim certificate number 7, dated 8th February 1999. In fact, that certificate provided for a somewhat higher sum to be due but it is common ground that the applicant, A Straume, have paid some sum with the result that the sum claimed is the sum I have already indicated.

4. The second notice is dated the 1st April 1999. Under it, the Administrators claim £39,491. The claim is based on certificate number 8 dated the 4th March 1999. The applicants contend that no sum is in fact due until the job is complete. They contend that they have a right of set off in relation to those two certificates and that right of set off or abatement, as I think it was put to me in argument by Mr Royce, is in relation to three matters. Firstly, this is a liquidated damages claim of £24,000 because of the delay in completion; second is a substantial sum for rectification work in the sum of £202,419 and finally is a sum of £16,237 in relation to associated delays. If they have a right of set off in relation to those claims, it is common ground that it is a valid defence to the contractor's claims. However, there are substantial legal issues, which it is not necessary for me to determine today, as to whether there is in fact in the circumstances of this case a valid right of set off. I should perhaps say that Mr- Fleschor in his affidavit has cast doubt on what might be regarded as to the quantum of the claims that are being made. It is not necessary for me in these proceedings to go into the criticisms made by Mr Fleschor which in any event have been made relatively quickly because this matter has been brought for hearing quickly. But, in paragraphs 5 to 12 of his affidavit, he sets out a number of criticisms of the claims being made by the applicant.

5. The applicant served its own notice on the 25th March 1999 claiming in effect the self sane sums against Bradlor. It claims, as I have said, £24,000 liquidated damages, £202,419 in respect of rectification work and £16,000 in relation to associated delays- A cynical observer would be bound to note that the total of those claims just exceeds the sums claimed by Bradlor.

6. The question before me, as I have indicated, is whether the adjudication which the applicant seeks requires the leave of the court pursuant to Section 11(3) of the Insolvency Act and, if it does, whether I should grant that leave.

7. The first matter must be to consider the nature of the adjudication proceedings which are sought to be brought. The starting point, but only the starting point, is Section 108 of the Act to which I have referred. That Act provides that a party to a construction dispute has the right to refer a dispute

arising under the contract for adjudication under a procedure complying with this Section. Then in Section 108(2) there is what may be called case management provisions requiring a speedy determination by the adjudicator. For example, in 108(2)(c) the adjudicator is, subject to matters which come later, required to reach a decision within 28 days. He is entitled to take the initiative in ascertaining the facts and the law. The contract is required to provide under Section 108(3) that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings or by arbitration. If the contract does not comply with the requirements of those sub-sections, the adjudication provisions of a scheme do apply.

8. It is common ground that this contract contains detailed provisions which do comply with sub-sections (1) to (4) of Section 108. Those are to be found in clause 41. I have been referred to most of clause 41 during the course of argument. In particular, I have been referred to clause 41A.5.5 which sets out the obligations on the arbitrator. It provides that he must act impartially. He can set his own procedure and at his absolute discretion take the initiative in ascertaining the facts and the law as he considers necessary in respect of the referral. He can use his own knowledge and experience, he can visit the site of the works, he can obtain from others such information and advice as he considers necessary on technical and legal matters. Under, clause 41A.5.7 there is provision that the parties should meet their own costs of the adjudication except for tests required by the adjudicator. Clause 41A.7.1 provides that the decision of the adjudicator shall be binding on the parties until the dispute or difference is finally determined by arbitration. Clause 41A.7.3 provides that if either party does not comply with the decision of the arbitrator, the other party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference, pursuant to 41A.7.1.

9. The effect of such clauses or provisions has been considered by Mr Justice Dyson in ***Macob Civil Engineering v Morrison Construction*** in which judgment was given on the 12th February 1999. It is not my intention at this hour to set out in full the conclusions of the learned judge, but it is right to say that he accepted the submission that, even if there were a challenge to the validity of the adjudicator's decision, the decision was binding and enforceable until the challenge was finally determined and it was his view that it could be enforced primarily by means of an Order 14 summons. As he says in paragraph 37 of his judgment:

"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."

10. Therefore, this procedure - and Mr Justice Dyson went into the reasoning for the procedure in detail in his judgment - is a method of obtaining summarily an adjudication in relation to disputes, an adjudication which is enforceable in the courts although it is not a final adjudication in the sense that there can still be legal proceedings and/or arbitration in relation to the dispute. It does, however, provide a sum recoverable pending the arbitration or legal proceedings.

11. The first question, as I have indicated, is whether leave is necessary under Section 11(3) of the Act. As is well known, Section 11(3)(d) provides:

"During the period for which an Administration Order is in force no other proceedings and no execution or other legal process may be commenced or continued and no distress may be levied against the company or its property except with the consent of the administrator or the leave of the court and subject, where the court gives leave, to such terms as aforesaid"

12. I have been referred primarily to two authorities in relation to this clause. The first case is the decision of the Court of Appeal in **Re. Paramount Airways** [1990] BCC page 130 and in particular to the decision of the Vice-Chancellor Sir Nicholas Browne-Wilkinson, as he then was, at page 153C to H where he considers the meaning of the words "other proceedings" and he says that the natural meaning is that the proceedings in question are either legal proceedings or quasi legal proceedings such as arbitration. That case appears not to have been cited in the decision in **Carr v British International Helicopters,** a decision of the Employment Appeal Tribunal in Scotland where they held that an application or complaint on application to an Industrial Tribunal was "other proceedings"

within the meaning of Section 11(3)(d) The reasoning in that case appears to be very similar to the reasoning of the Vice-Chancellor in ***Re Paramount Airways***.

13. The question for me is whether the adjudication procedure which I have outlined is *"quasi legal proceedings such as arbitration or not"*. On behalf of the applicant it has been argued strongly that it is not. Mr Royce argued that it is the equivalent of some decision by an expert or a valuer giving a certificate. Decisions such as this, it seems to me, are largely matters of impression but I have come to the clear conclusion that the adjudication procedure under Section 108 of the Act and/or clause 41 is quasi legal proceedings such as an arbitration within the classification of Vice-Chancellor Browne-Wilkinson in Re. Paramount Airways. It seems to me that it is, in effect, a form of arbitration, albeit the arbitrator has a discretion as to the procedure that he uses, albeit that the full rules of natural justice do not apply. The fact that it needs to be enforced by means of a further application does not stop it from being an arbitration. It is the precursor to an enforceable award by the court. It seems to me that. it is "*other proceedings*" within Section 11(3) and in my judgment accordingly leave is required.

14. More difficult as it seems to me is the question of whether leave should be granted at all. The first point that I bear in mind is that I do not have to consider whether there is in fact a valid set off in relation to the applicant's claims. If there is a valid set off that valid set off will be determined rightly or wrongly in the adjudication on the notices served by the administrator. What is clearly unnecessary is two sets of adjudication proceedings raising the same point. So I have to approach the question, as it seems to me, of whether to grant leave on the footing that there is no valid set-off because, as I have said, if there is a valid set-off it could be dealt with in the administrator's adjudication. If there is no valid set off then, at best, the applicant has a cross-claim or a counterclaim for liquidated damages, rectification work and damages for associated delays against an insolvent company which also has a claim against him. If there is no valid set off it is because of the contract terms between the parties under which the parties have expressly excluded a valid set off. In those circumstances it is submitted on behalf of the administrators, there is no point at all in permitting an adjudication. There is no point because, at best, the applicant will only achieve a right which is capable of proof in the insolvency. It is not a defence to any part of the respondent's claims. Thus, says the respondent, leave should be refused. It will only add to the costs. It may not add significantly but it will add to the costs and it will gain nothing. On behalf of the applicant it is said that this is not right because what will happen here is that even if there is no valid set off there will be a valid counterclaim. This is a factor in the Order 14 proceedings which the court will be able to take into account in deciding whether to give summary judgment in relation to the adjudication. It is to be remembered that the adjudication is not a final order but is an order which is enforceable pending the hearing of the final determination between the parties.

15. As I have said, I have not found the competing arguments with regard to leave easy. In the end, however, I prefer the arguments of the administrator. It does seem to me that what the applicant is trying to do here is, by a side door, get round the fact that he has contractually excluded a set off. If he has contractually excluded a set off he should not be entitled to it by a side door. In those circumstances, it seems to me to be right to refuse leave. As I have said more than once, if he has a set off that is catered for in the administrator's own proceedings, but I do not think it right to permit separate proceedings in relation to an unliquidated claim which can at best be a counterclaim. I accordingly refuse leave.

MR GOODISON: *My Lord, I am grateful. So the application is dismissed.*