JUDGMENT : HIS HONOUR JUDGE THORNTON QC. TCC. 21st July 2003.

1. Introduction

1. This is an appeal brought under section 69 (1) of the Arbitration Act 1996 from the award of an Arbitrator, Mr Peter Aeberli, a barrister, in a dispute arising out of a construction arbitration. The arbitrator published his award on two issues of law on 18 December 2002 and a corrected award, correcting matters of inconsequential detail, on 29 January 2003.

2. The appeal has been subject to an unfortunate procedural history. The claimant, the contractor under the contract and the respondent in the arbitration, wished to appeal a question of law arising out of the award. It issued and served on 15 January 2003 an arbitration claim form. This was placed before me and, without allowing the respondent, the employer under the contract and the claimant in the arbitration, the 21 days from the service of the arbitration claim form provided for by PDCPR Part 62 to file evidence in opposition, I granted the claimant permission to appeal pursuant to section 69(2) (c) (ii) of the Arbitration Act 1996. In other words, I concluded that the question of law raised by the appeal was of general public importance and the decision of the arbitrator raised a serious doubt as to its correctness. No objection was taken by the respondent that it had had no opportunity to serve evidence before that paper determination had been made.

3. The appeal was then heard on 7 March 2003 at which it became clear that the respondent wished to mount a significant challenge to the granting to the claimant of permission to appeal, in part based on evidence that it had filed before the hearing but long after my granting of permission had been communicated to the respondent. At my suggestion, given the denial of an opportunity to file that evidence and mount those objections before permission to appeal had been granted, I adjourned the hearing to allow the respondent to apply: (1) out of time, to set aside the permission to appeal granted to the claimant; (2) to set aside the permission to appeal granted to the claimant and, (3) if I set that permission aside, for the permission to appeal application to be reconsidered and dismissed.

4. The parties were ordered to exchange further submissions directed to these procedural questions after which I directed that I would hand down a written judgment dealing both with the procedural questions and, if the appeal survived these attacks on its being mounted, with the question of law. In addition to the service of the further submissions, I was provided for the first time with a complete set of the contract documents which included the JCT Intermediate Form of Contract, IFC 84, which had been incorporated into the contract. This contains within the arbitration clause a provision, clause 9.5, which reads as follows:
"The parties hereby agree and consent pursuant to sections 1 (3) (a) and 2 (1) (b) of the Arbitration Act 1979 that either 2 party (a) may appeal to the High Court on any question of law arising out of an award made in an arbitration under this Arbitration Agreement ... ".

5. Although the clause refers to the repealed Arbitration Act 1979, the replacement Arbitration Act 1996, in section 69(1), provides an equivalent section to the effect that permission to appeal any question of law arising out of an award is required "***unless otherwise agreed by the parties***", it has been held in a number of cases that this form of words, which is common to the JCT family of standard contracts, fulfils the necessary agreement referred to in section 69(1) even in cases where the contract refers to the Arbitration Act 1979 and the arbitration and subsequent appeal are subject to the replacement 1996 Act (see ***How Engineering & Services Ltd v Lindner Ceiling and Floors Plc***, unreported, 17 May 1995, Judge Thornton QC; ***Panatown Ltd v Alfred McAlpine Ltd*** 58 Con LR 46, Judge Thornton QC; ***Vatcroft (Contractors) Ltd v Seeboard Plc***, 78 BLR 138, Judge LLoyd QC; ***Taylor Woodrow Civil Engineering Ltd v Hutchinson Development Ltd*** *(1999)* ADRLJ 83, Clarke J. and ***Fence Gate Limited v NEL Construction Limited***, 82 Con LR 41, Judge Thornton QC) . The ***Fence Gate*** case involved the same JCT contract conditions as apply to this case.

6. It follows that permission to appeal is not required although both parties believed that permission was required and have sought to follow the procedure for obtaining, or resisting an application for, permission to appeal. Since there is such clear authority supporting my conclusion that permission to appeal is not required, I have decided to proceed to determine the appeal on the basis of the full submissions that I heard without adjourning the appeal for further procedural submissions and without affording an opportunity to the parties to consider whether permission to appeal was in fact required. However, I will

formally set aside the permission that I granted since this was a nullity and had been granted in error in the light of clause 9.5 of the contract conditions.

2. Question of Law

7. The question of law arises out of the determination of the employment of the claimant in disputed circumstances. The construction contract in question involved the refurbishment of two flats in Mayfair, London, W1. The arbitrator, in the second of the issues he decided, concluded that the contract between the parties crystallised in the copy of IFC 84 that the architects, JBA, had sent to the claimant on 11 July 1998. That contract required refurbishment work to be carried out in the Contract Sum of £281,580 between 5 May and 24 August 1998. The respondent determined that employment by a notice dated 2 September 1998 pursuant to clause 7.2.3. and the question of law that arises, being part of the third of the three issues determined by the arbitrator, is whether that determination was validly carried through in accordance with the terms of the contract.

8. The question of law being appealed, as formulated by the claimant, is: *"Whether, the respondent's architect having on 25 August 1998 given the claimant notice of default pursuant to clause 7.2.1. of the IFC 84 form of contract, the respondent was nevertheless able to determine the claimant's employment under the contract pursuant to clause 7.2.3 by a notice thereunder dated 2 September 1998?".*

9. The same question was raised and answered by the arbitrator. His answer was that the respondent was able to determine the claimant's employment as and when it did but to understand his reasoning, it is first necessary to summarise the relevant factual background and consider the relevant contractual terms.

3. Factual and Contractual Background

10. The relevant factual background can be shortly summarised and is helpfully and clearly set out in the arbitrator's reasons. The parties had not succeeded in entering into a signed contract and the lengthy history of the pre-contract exchanges between the parties and their representatives had to be examined in detail by the arbitrator who, in the light of his findings about these exchanges, concluded, as I have already stated, that a contract had come into being by 11 June incorporating the JCT IFC 84 form of contract. These exchanges and their aftermath led to a difficult and strained relationship between the parties and, on 22 July 1998, the claimant removed its labour from the site.

11. The response from the architect was to issue a default notice under clause 7.2.1. on 24 July 1998 informing the claimant that it had without reasonable cause wholly suspended the carrying out of, and had failed to proceed regularly and diligently with, the Works in that it had insufficient operatives on site at the relevant times.

12. This notice was the first of two notices envisaged by the default and determination clause 7 of JCT IFC 84 the relevant part of which reads as follows:

"DETERMINATION BY THE EMPLOYER

Default by Contractor

7.2.1. If, before the date of Practical Completion, the Contractor shall make a default in any one or more of the following respects:

(a) without reasonable cause he wholly or substantially suspends the carrying out of the Works, or

(b) he fails to proceed regularly and diligently with the Works, or ...

the Architect/the Contract Administrator may give to the Contractor a notice specifying the default or defaults (the ‚specified default or defaults').

7.2.2. If the Contractor continues a specified default for 14 days from the receipt of the notice under clause 7.2.1 then the Employer may on, or within 10 days from, the expiry of that 14 days by a further notice to the Contractor determine the employment of the Contractor under this Contract. Such determination shall take effect on the day of receipt of such further notice.

7.2.3. If the Contractor ends the specified default or defaults, or the Employer does not give the further notice referred to in clause 7.2.2. and the Contractor repeats a specified default (whether previously repeated or not) then, upon or within a reasonable time after such repetition, the Employer may by notice to the Contractor determine the employment of the Contractor under this Contract. Such determination shall take effect on the date of the receipt of such notice.

7.2.4. A notice of determination under clause 7.2.2. or clause 7.2.3 shall not be given unreasonably or vexatiously."

13. On receipt of this first default notice, the claimant restored its labour to site on 10 August 1998 and continued working. However, it removed its labour from site for the second time on 24 August 1998 and the architect served a second default notice on 24 August 1998 which read: *"I understand that you have withdrawn all labour from the site before the completion of the works.*
That being the case, I am bound under Clause 7.2.1. of the Conditions of Contract to issue a notice of default as follows:
I hereby give notice as architect/contract administrator under the Contract between Robin Ellis Ltd. and Vinexsa International, that, on 24 August 1998, the works at Flat 10, 12 Charles Street, London W1 were wholly suspended.
Signed
Julian Bichnell
If by the expiry of 14 days from today's date (15 September 1998) the work is not resumed the Contract entitles the Employer to determine the Contract."

14. On 27 August 1998, the architect sent a second letter to the claimant which stated: *"I refer to our letter of 24 August 1998 pursuant to clause 7.2.1 of the Conditions of Contract. It was sent erroneously and is hereby withdrawn."*

    The reason why this letter was sent and what the error was that is referred to that led to the letter being sent were not set out by the arbitrator in his reasons and may not have been the subject of evidence adduced at the hearing. No complaint is made about that potential omission and the appeal was conducted on the short and simple basis that the second default notice had been withdrawn.

15. Meanwhile, the parties' respective solicitors were in correspondence. Unrelated to the letter of 27 August 1998 sent by the architect, the respondent's solicitors wrote to the claimant's solicitors also on 27 August 1998 and stated*: "We draw your attention to clause 7.2.3 of the IFC 84. If your client has not returned to site by 12 noon on Tuesday 1 September 1998, then our client will, without prejudice to any other rights and remedies if may possess, give notice to your client determining its employment."*

    The claimant did not return its labour to site and, on 2 September 1998, the respondent sent this letter to the claimant: *"We hereby give you notice pursuant to clause 7.2.3 of IFD (sic) 1984 contract made between us that your employment thereunder has been determined, because you have repeated a specified default in that you have wholly suspended the carrying out of works at that above mentioned property as from 24 August 1998"*

16. Following the notice, disputes arising out of that determination arose, connected with each party's contention that the other was in breach of contract either by wrongly determining the claimant's employment or by the conduct giving rise to the default leading to the valid determination of the employment. That led to cross-notices to submit those disputes to arbitration, the appointment of the arbitrator and the formulation of issues to be determined before any other aspect of these disputes is resolved. The arbitrator, in determining the question of law raised on this appeal, concluded and determined that the claimant did not have reasonable grounds to withdraw its labour from site on either 22 July 1998 or on 24 August 1998 and that the notice of 2 September 1998 was not given unreasonably.

17. The claimant contended before the arbitrator and again on the hearing of the appeal that a valid determination under clause 7 could only occur if the procedure provided for by that clause was complied with. Following the service of a valid default notice, the remedying of that default and a repeat default, there were two options open to the respondent. Firstly, it could unilaterally exercise its right to determine under clause 7.2.3. Secondly, if the architect served a second default notice, the respondent could, if the second default remained unremedied for 14 further days, then determine under clause 7.2.2.

18. However, if a second default notice was served, the employer lost its right to determine under clause 7.2.3. and was confined to its alternative but circumscribed right to determine the contractor's employment under clause 7.2.2. This situation was not altered even if the architect purported to withdraw the second default clause 7.2.2 notice since, firstly, he had no power to withdraw it once he had issued it and, secondly, the architect in issuing it, removed the employer's underlying entitlement to rely on clause 7.2.3. for that second default.

19. Overall, the claimant contended that, since the architect had served a second default notice, the respondent could not thereafter be acting reasonably if it ignored that notice and the fact of its service and instead

served a determination notice under clause 7.2.3 which was not dependent on the second default notice at all. In those circumstances, once the second default notice had been served, the only reasonable way of determining the claimant's employment would have been to rely on both the second clause 7.2.1. notice and upon clause 7.2.2.

20. These contentions raise four discrete questions: (1) does the architect have the power to issue a second default notice; (2) if so, does he have the power to withdraw it once it has been issued; (3) in the light of the answers to the first two questions, can the employer rely on clause 7.2.3. once a second default notice has been served; and (4) in the light of all three answers, was the respondent reasonable in serving the determination notice under clause 7.2.3. on 2 September 1998?

4. Arbitrator's Reasons

21. In deciding that the claimant's employment under the contract was validly determined by the respondent in accordance with the terms of IFC 84, the arbitrator concluded that the second clause 7.2.1. notice could be withdrawn by the architect and that the contractor did not have a contractual right to maintain the default specified in the second 7.2.1. notice for 14 days which could not be taken away by the architect withdrawing that notice. Since the respondent warned the claimant, once the second default notice had been withdrawn, that it would exercise its powers under clause 7.3.3. to determine its employment unless the claimant returned to site by 1 September 1998, it was not open to the claimant to contend that, following the service of the second default notice, the respondent was estopped from thereafter relying on its rights to determine the claimant's employment under clause 7.3.3.

5. Discussion of Clause 7.3.

5.1. General Consideration of Clause 7.3.

22. The general rule of construction applicable to determination clauses is that they, and the procedure for determination they provide for, should be construed and applied strictly. Thus, in Hudson on Building Contracts, 11th edition, paragraph 12.004, it is stated: *"Exact and particular compliance by the determining party with any formal or procedural requirements laid down in the termination clause, for example, as to notices or time limits, will usually be required if a contractual determination is to be successful."*

    Similar sentiments are to be found in Keating on Building Contracts, 7th editions, paragraph 10.03: *"The requirements of the contract must be properly complied with, for the courts construe forfeiture clauses [including such clauses as clause 7 of the IFC 84 form: see 10-02] strictly, and a wrongful forfeiture by the employer or his agent normally amounts to a repudiation on the part of the employer."*

23. The IFC 84 standard form determination procedure involves the participation of the architect at the first stage and the employer at the second stage where there has been a default. The architect has a discretion whether or not to issue the first default notice and must exercise that discretion without any interference from the employer and the employer has a discretion, not to be exercised unreasonably or vexatiously, whether or not to issue the second determination notice which can only be exercised if the default has not been corrected for 14 days after service of the default notice and only then if the discretion is exercised within 10 days after the expiry of the first 14 days.

24. It is clearly material that each of these two stages are operated by two separate parties who are neither acting in unison nor collaborating with each other. Indeed, it is clearly possible that the employer will be unaware of the architect's intention to issue the first default notice until it is received by him following its issue.

5.2. Does the Architect Have the Power to Issue a Second Default Notice?

25. The most natural construction of clauses 7.2.l., 7.2.2. and 7.2.3. taken together is that the default or defaults giving rise to the first default notice, which clause 7.2.1. defines with precision as "the specified default or defaults". may not be made the subject of a second default notice served by the architect if they are repeated at any time thereafter but before practical completion. Instead, for any repeat specified default, clause 7.2.3. becomes applicable and is the only applicable clause since this provides: *"If the contractor ends the specified default or defaults, or the employer does not give the further notice referred to in clause 7.2.2. and the contractor repeats a specified default or default (whether previously repeated or not) then, upon a reasonable time after such repetition, the employer may determine the employment of the contractor under the contract."*

26. Two features of the language of clause 7.2. suggest that a second default notice in connection with a specified default may not be and is not to be served.

27. Firstly, the three clauses read together provide a continuum. The first default or set of defaults may lead to a default notice which, if served, may lead to a determination notice if the specified default is continued for 14 days but which, if repeated without a determination notice being served, may lead to a determination notice being under clause 7.2.3. by the employer. These three clauses, therefore, when read together, suggest a natural progression involving only one possible default notice from the architect in a situation where a specified default occurs, is notified to the contractor, does not lead to a determination and is then repeated.

28. Secondly, clause 7.2.3. may be operated either if the specified default has ended or if a determination notice under clause 7.2.2. has not been served and whether or not the specified default had previously been repeated. The first two possibilities are stated to be disjunctive, as shown by the use of the word "or" rather than the word "and" between the first and second possible eventuality.

29. In consequence, clause 7.2.3. caters for all possible situations that could follow the service of a first default notice where the contractor's employment has continued undetermined. Any repeat default may be the subject of a clause 7.2.3. notice but that notice is not stated to be linked to any second architect's default notice.

30. The language that is used more naturally shuts out the possibility of a second default notice altogether rather than allowing in parallel the alternative possibilities of a clause 7.2.2. and a clause 7.2.3. determination notice. Had the parties, by the language of clause 7.2., intended that the possibility of a second default notice could survive alongside the possible use of clause 7.2.3., it would have been more natural for clause 7.2.3. to have read: *"Additionally, if the contractor repeats a specified default or default), the employer may also determine the employment of the contractor under this clause"*.

31. The claimant contended that clause 7.2.1. could be the subject of a second default notice served by the architect and that, if such a notice was served, its service would then preclude the use by the employer of the alternative clause 7.2.3. procedure. This submission faces the difficulty that no such effect is expressly provided for in clause 7.2. Moreover, it is not clear whether a second default notice would preclude any use of clause 7. 2. 3. by the employer in relation to that repeat specified default or would only preclude its use for the 14 days allowed to the contractor to remedy the repeat default. A further difficulty would arise if the second default notice specified both repeat specified defaults and additional first time defaults. Would any suspension or removal of the employer's right to exercise his clause 7.2.3. powers in relation to the repeat defaults also extend to the new defaults or could he still exercise those powers for the new defaults whilst the parallel clause 7.2.1. procedure was running in relation to the repeat defaults?

32. These difficulties and the need to imply into a determination clause of a type which must be construed strictly additional words that would have the effect of cutting down the employer's express rights point to the more natural construction of clause 7.2. that I have already summarised. Thus, once a clause 7.2.1. default notice has been served in relation to a specified default, no further default notice can be served if and when it is repeated.

5.3. Does He Have the Power to Withdraw a Second Default Notice Once it Has Been Issued?

33. Clearly, if the architect had no express power to issue a second clause 7.2.1. notice for the specified default of withdrawing all labour from the site, there can be no question as to whether or not this notice may be withdrawn since it had no contractual validity in the first place. The arbitrator held that such a notice could be withdrawn. He was addressed on the basis that there remained a power for the architect to issue a second default notice and decided the question of whether or not it could be withdrawn once issued on that basis. His reasoning was that the question of whether or not the architect had the power to withdraw a notice issued under the contract once it had been issued must be determined by reference to the nature of the rights, if any, that the notice created. In this contract, no right was created by the notice since the contractor did not have an accrued right to maintain his withdrawal of labour for 14 days once the default clause 7.2.1. notice had been served. Thus, since no rights were granted by the notice in the first place, it could be withdrawn by the architect at will.

34. This reasoning highlights the nature of the notice and, although it relates to a notice which I have already concluded was invalid, shows that the respondent's arguments are correct. The arbitrator's reasoning shows that a clause 7.2.1. notice has no contractual validity save to provide the contractor with a warning that, unless the specified default be immediately remedied, its employment may be determined by the employer. This is the effect that I have already held that a default notice has, albeit that that notice may only be served on the first occasion of a specified default. The notice amounts, therefore, to no more than a warning shot across the contractor's bows. This limited effect of a default notice is in stark contrast to the effect contended for by the claimant who maintained that such a notice, if issued for a second time, would rob the employer of its contractual right to determine the contractor's employment for that repeat default without further ado.

35. Thus, had a second default notice been a contractual possibility, I would have agreed with the arbitrator that it could have been withdrawn.

5.4. Can the Employer Rely on Clause 7.2.3. Once a Second Default Notice Has Been Served?

36. It still remains pertinent to ask whether the respondent could determine the claimant's employment under clause 7.2.3. even though the second default notice was invalid. The arbitrator explained why the question had validity and then asked and answered that question in this way: *"Was the [respondent's] right to issue a notice of determination pursuant to clause 7.2.3. because the [claimant's] withdrawal of labour from site on the 24th August 1998 was a repeat of the default that had occurred on the 22nd July 1998 affected by the issue by [the architect] of a clause 7.2.1. notice in respect of the repeated default?*

If [the architect) had not advised that its notice of the 24th August 1989 was withdrawn, the [claimant] might well have been able to argue an estoppel based on its legitimate expectation that it would have 14 days to remedy the default notified to it be [the architect's] letter of the 24th August 1998. Since, however, [the architect] advised that this notice was withdrawn, and the [claimant] was warned by [the respondent's solicitors'] letter of the 27th August 1998 that the [respondent] would determine the [claimant's] employment under clause 7.2.3. it did not return to site by the 1st September 1998, the [claimant] has not put its case this way, nor could it."

37. I agree with that reasoning. Any representation or indication created by the service of the second invalid clause 7.2.1. that the claimant had 14 days to remedy the repeat specified default was removed and destroyed by the withdrawal of that notice. Another way of dealing with the possible effect of the service of this invalid notice is by reference to clause 7.2.4 which provides that no determination clause may be given unreasonably or vexatiously. Once the architect had served the second default notice, however invalid it might have been, it might well have been unreasonable or vexatious for the respondent to ignore the notice and immediately serve a clause 7.2.3. notice. However, once the architect had withdrawn the notice, any unreasonableness or vexatiousness that might possibly have been involved in serving a clause 7.2.3. notice disappeared.

5.5. In the Light of All Three Answers, Was the Respondent Entitled to Served a Determination Notice Under Clause 7.2.3. on 2 September 1998?

38. Since the second clause 7.2.1. notice was invalid and had, in any case been withdrawn and since, as found by the arbitrator, the claimant had defaulted in the specified manner and had then repeated that default, the respondent was entitled to serve the determination notice as it did on 2nd September 1998.

6. Conclusion

39. It follows that, for different reasons, the answer to the question of law posed by the appeal is: **"Yes"** and that the appeal must be dismissed.

40. Since both parties were responsible for what turned out to be an unnecessary application for permission to appeal, the subsequent adjournment of the hearing and the further submissions that followed, each party should bear its own costs of those particular phases of the appeal procedure.

41. Save for these abortive costs, the claimant must pay the respondent's costs which I will summarily assess.

42. I will not give leave for a further appeal pursuant to section 69(8) of the Arbitration Act 1996.

William Godwin (instructed by Clarks, Reading) for the claimant.
Timothy Higginson (instructed by Mischon de Reya) for the defendant.