PDF supplied by adjudication.co.uk

LOVELL PROJECTS LTD -V- LEGG AND CARVER

JUDGMENT

1. This is an application under CPR Part 24 for summary judgment on a claim to enforce an adjudication under a building contract between the parties Lovell Projects Ltd ("the contractor") and Mr Legg and Ms Carver (the employers). Under the adjudication the employers were ordered to pay the contractor £85,873.59 plus VAT.

Procedural irregularities

2. The application under CPR Part 24 was issued on 4 April 2003 and a date for hearing was allocated by the court registry on the erroneous assumption that the application was a pre-action application. The action itself was not commenced until 21 May 2003, the day before the hearing. That is not in compliance with the requirements of Part 24, but at the hearing counsel for the employers elected not to object to the irregularity and since under CPR Part 24.4(1)(i) the court may allow the application to proceed notwithstanding any such irregularity the hearing of the application proceeded with the consent of all parties and the court.

The contract

3. The contract between the employers and the contractor was for the refurbishment of a dwelling house at 188A Sutherland Avenue, Maida Vale, London, a dwelling house in which the employers intended to live. The employers were consequently residential occupiers for the purposes of the Housing Grants Construction and Regeneration Act 1996 Section 106(2), with the consequence that the Act is inapplicable to the contract. However, the contract entered into by the parties incorporated the terms of the JCT Agreement for Minor Building Works, 1998 edition incorporating amendments MW1-11. That form of contract includes, particularly at supplemental condition D, provisions for adjudication which are similar to the provisions contained in the 1996 Act. So although the Act does not apply, the parties agreed contractual terms to similar effect.

4. **Contract formation**

The main defence raised by counsel for the employers to the application for summary judgment to enforce the adjudication is that the employers are not bound by the adjudication provisions in the contract by reason of the Unfair Terms in Consumer Contracts Regulations 1999 made pursuant to the European Communities Act 1972. Under Regulation 6 of those regulations (which are referred to more fully below) the court must inter alia have regard to "the circumstances attending the conclusion of the contract". So somewhat unusually in this type of case the narrative must begin with a description of the events surrounding the conclusion of the contract.

5. By 20 May 2002 at the latest the employers had instructed Nigel Bird Architects to prepare drawings and a specification for the proposed refurbishment works. The

specification drawn up by the architect is dated March 2002 (page 236 of the bundle). It includes at paragraph 1.10 the following provision:

> *"The work shall be carried out under the current addition of the Agreement for Minor Building Works issued by the Joint Contracts Tribunal. The contractor shall include in his tender for all costs of complying with the Agreement for Minor Building Works".*

A practice note which I understand forms part of the contractual document states that the agreement is designed for use where minor building works are to be carried out for an agreed lump sum and where an architect or contract administrator has been appointed on behalf of the employer and it also states that the form is generally suitable for contracts up to the value of £70,000.00. As appears below the contract price was greatly in excess of that sum; so it follows that the form was not an ideal choice. The events leading to the conclusion of the contract are described in the witness statement of Mr Mark Lovell, a director of the contractor, dated 21 May 2003 (the day before the hearing). His description of the negotiations leading to the conclusion of the contract is uncontradicted. It is not entirely clear from his statement whether or not the document at page 243 of the bundle (the tender breakdown dated 20 May 2002) accompanied his letter of the same date but it was known to the architect by 27 June 2002, the date of a pre-contract meeting. The tender breakdown states that the tender is based on there being fortnightly valuations (the minor works contract provides for monthly certificates) and on the form of contract being the JCT IFC 98 contract, implicitly instead of the Minor Works form of contract. Mr Mark Lovell's statement then relates that shortly after 12 June 2002:

> *"The architect informed me that Legg and Carver accepted the revised tender [there had been a revised tender on 12 June 2002] subject to the works being executed under their originally proposed JCT MW 98 terms. I discussed alternative forms of contract with the architect but he said that Legg and Carver were insistent that JCT MW98 was used ..... In order to get the work I agreed to the terms offered by Legg and Carver".*

Those assertions are not contradicted by any evidence on behalf of the employers. In the witness statement dated 20 May 2003 of Mr Shawdon, the solicitor acting for the employers in this litigation, it is however stated that no one brought the adjudication clause in the minor works contract to the attention of either of the employers. The evidence therefore appears to be that the employers by their architect insisted, notwithstanding attempts by the contractor to adopt another standard form of contract, on adopting the Minor Works form of contract but without having had the adjudication provisions in it drawn to their attention.

6. There followed a pre-contract meeting of which minutes were drawn up by the architect. The minutes provide at paragraph 7 that the contract documentation is to include the original and revised tender and they also record at paragraph 14 a reminder by Mr Mark Lovell that valuation claims were to be every 2 weeks. The Minor Works form of contract makes no reference to the incorporation of tender breakdowns in the contract and as already mentioned provides for monthly interim certificates, but in my judgment it is clear that the parties were in agreement that notwithstanding the standard form there would be valuations every 2 weeks. The minor works contract was therefore varied to that extent. It is moreover in my view implicit that there would be certificates every two weeks: there would be no point in valuations every two weeks without certificates at the same interval. The argument

that there was no such variation was canvassed before the adjudicator, but counsel for the employers, rightly in my view, did not take the point before me.

The contract

7. The contract, adopting the Minor Building Works standard form (see above) is dated 12 July 2002 and was signed by Mr Legg on behalf of the employers and Mr Mark Lovell on behalf of the contractor. It nominates Nigel Bird Architects as the architect/ contract administrator, specifies a contract price of £231,995.34, provides a starting date of 1 July 2002 (ie 12 days earlier) and a completion date of 29 November 2002 with liquidated damages for non completion by the completion date of £1,220.00 per week. As already mentioned the Minor Works form includes a practice note to the effect that it is designed for use where an architect or contract administrator has been appointed and there is a prominent box both on the back sheet and on the first page of the contract stating that the agreement is only intended for use where the employer has engaged a professional consultant to advise on and to administer its terms, a provision which was satisfied by the appointment of the architect. The standard form is not entirely satisfactorily completed in that various deletions which were required were not carried out (see in particular articles 7(a) and 7(b), one of which should have been deleted and clause 5.2 of the conditions which provides for a deletion of one alternative). Nothing however in my view turns on these deficiencies notwithstanding that they were raised in argument before the adjudicator. Again they were rightly not raised before me.

8. So far as material to the adjudication the contract provides at article 6 that:

> *"If any dispute or difference arises under this agreement either party may refer it to adjudication in accordance with the procedures set out in supplemental condition D. If under clause D2 the parties have not agreed a person as the adjudicator the nominator of the adjudicator shall be [the President or a Vice President of the Royal Institute of British Architects].*

Clause 8.1 also provides that pursuant to article 6 the procedures for adjudication are set out in supplemental condition D. Those supplemental conditions provide at clause D1 that part D applies where *"either party (ie the employer or the contractor) refers any dispute or difference arising under this agreement to adjudication"*.

Clause D4.1 provides:

> *"Where pursuant to article 6 a party requires a dispute or difference to be referred to adjudication then that party shall give notice to the other party of his intention to refer the dispute or difference, briefly identified in the notice, to adjudication"*.

As appears below that requirement was complied with by a notice by the contractor to the employers dated 16 January 2003. Clause D4.1 then continues:

> *"If an adjudicator is agreed or appointed within 7 days of the notice then the party giving the notice shall refer the dispute or difference to the adjudicator ("the referral") within 7 days of the notice"*.

That requirement was not complied with. An adjudicator (Mr Dearman) was appointed on 17 January 2003 ie within 7 days of the notice, but the referral to him did not occur until 28 January 2003, outside the 7 day period. That point was not relied on by the employers at the adjudication and has not been taken before me. Clause D4.1 then continues:

> *"The said party [ie the party referring the dispute or difference to adjudication] shall include with that referral particulars of the dispute or difference together with a summary of the contentions on which he relies, a statement of the relief or remedy which is sought and any material he wishes the adjudicator to consider".*

That indicates that the jurisdiction of the adjudicator is to rule on "the dispute or difference" described in the referral document.

9. Clause D7.1 provides that:

> *"The decision of the adjudicator shall be binding on the parties until the dispute or difference is finally determined …. by legal proceedings".*

Clause D7.2 provides that:

> *"The parties shall, without prejudice to their other rights under this agreement, comply with the decision of the adjudicator; and the employer and the contractor shall ensure that the decision of the adjudicator is given effect".*

Clause D7.3 provides:

> *"If either party does not comply with the decision of the adjudicator 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 Clause D7.1".*

10. The contract contains at Clause 4 important provisions concerning certificates and their payment, which I will attempt to summarise. Clause 4.2 provides that the architect at intervals of 4 weeks was to certify progress payments (ie interim certificates) due to the contractor. The certificate was to state to what the progress payment relates and the basis on which it was calculated, and the amount certified was to be paid within 14 days. As already mentioned it was agreed at the time of contracting that "valuations" were to be at fortnightly intervals. In my judgment that means that certificates were to be at fortnightly intervals and Clause 4.2 must in the circumstances be read subject to that variation. Under Clause 4.2.2 interest was payable on sums remaining unpaid. Clause 4.4 contains terms similar to those provided for under the Act. If the employer wishes to withhold any amount from the sum due under the interim certificate he must not later than 5 days before the final date for payment (ie within 9 days after the date of the certificate) serve a withholding notice with reasons on the contractor and in default of such a notice he must under Clause 4.4.3 pay the amount certified. It is common ground that no withholding notices were served by or on behalf of the employers.

Extension of time

11. Clause 2.2 of the contract contains provisions enabling the architect to extend time. It provides:

> *"If it becomes apparent that the works will not be completed by the date for completion [29 November 2002].... for reasons beyond the control of the contractor .... then the contractor shall thereupon in writing so notify the architect/the contract administrator who shall make in writing such extension of time for completion as may be reasonable ....".*

Before the adjudicator, but not before me, the argument was raised that because the contractor had not notified the architect in writing in accordance with Clause 2.2 the architect had no jurisdiction to extend the contract period. In my judgment that argument is no longer viable after the decision in <u>London Borough of Merton -v- Stanley Hugh Leach Ltd</u> (1985) 32 BLR 51 (Vinelott J): the intention of the contractors notice is simply to warn the architect of the current situation regarding current progress. It is then up to the architect to monitor the position in order to form his opinion: see the headnote at page 55. In other words a contractor's notice is not a condition precedent.

<u>Events between contract and adjudication</u>

12. Relations between the parties were amicable until 21 October 2002. On that day the contractor wrote to the architect drawing the architect's attention to possible causes of delay in carrying on the works. There was no reference in the letter to Clause 2.2 and the letter does not comply with the requirements of the clause, but as already mentioned a notice in writing by the contractor under the clause is not a condition precedent to the architects powers to extend time and the architect fully understood the import of the letter. The following day (22 October 2002) the architect sent an email to the employers. Part only of the email is included in the bundle but the part which is included contains a paragraph stating (incorrectly) that the contractor had formally asked for an extension of time in its letter dated 21 October and (correctly) that the letter does not indicate the extension they believe they require though that would be discussed. That part of the email which is copied into the bundle states (at paragraph 4) that "*my view is that the delay is likely to be in excess of 3 weeks possibly 4 or 5".* That email from the architect to the employer gave rise to an intemperate reply from Mr Legg later the same day. He stated that such a delay was "*totally unacceptable*", asserted that the delay was the fault of the architect and threatened to hold the architect "*fully accountable*". There was a meeting between the architect and the contractor the following day and some time between that meeting and a further meeting between the contractor and Mr Legg on 28 October 2002 the employers terminated the architect's retainer and under the terms of the Minor Works contract appointed a contract administrator, Mr Tim Cotter, to exercise the function of contract administrator. His appointment was formally notified to the contractor in an email from Mr Legg on 29 October 2002. By a letter of the same date the contractor wrote inter alia that "*as you are aware due to the delays we have requested an extension of time to the contract and now that the drawings have been approved and when the outstanding information regarding the doors has been agreed with the district surveyor we will issue you next week with a revised finishing programme to inform you of when the works will be completed*". Payment (presumably of interim certificate 9) was made on 24 November 2002 and on 27 November 2002 the contractor sent the employers a progress report indicating that they hoped to complete the work in the new year.

13. On 5 December 2002 Mr Mark Lovell, Mr Lloyd Whittaker the site manager employed by the contractor and Mr Tim Cotter the new contract administrator visited Hills of Shoeburyness Ltd, who were the sub contractors who were to manufacture the joinery for the works. What occurred at that meeting is in dispute and so for the purposes of the Part 24 claim the employers' version can be taken as arguable. Mr Lovell, backed by a site diary note kept by Mr Whittaker, asserts that Mr Cotter on behalf of the employers made a proposal that the employers pay Hills direct with a view to avoiding having to pay VAT (presumably unlawfully) and that Mr Lovell rejected the proposal. The employers' case is that the contractor asked for the payment to be made direct because they had no money to make the payment. Clearly that discrepancy can only be resolved at trial. What matters for present purposes is that a payment was subsequently made direct by the employers to Hills of Shoeburyness Ltd. The employers contend that at the very least credit should be given to them by way of set-off against the amount ordered by the adjudicator in respect of that payment. That is dealt with below.

14. By a document dated 14 November 2002 headed "valuation number 10" the contractor submitted to the contract administrator its fortnightly valuation with a view to the contract administrator certifying that progress payment under Clause 4.2.1 of the Minor Works contract. Under Clause 4.2.1 Mr Cotter as the contract administrator was then to draw up a certificate stating the value of the contract works, deducting the retention and sums already paid and stating the total amount due. Mr Cotter however favoured an informal approach to his functions. He simply signed the valuation, treating it as a certificate. I accept the argument on behalf of the contractor that employers are not entitled to rely on their own procedural deficiencies and thereby treat the informal certificate as invalid. In my judgement Mr Cotter's signature on valuation number 10 transformed it into a certificate and the employers are not entitled to contend otherwise. The certificate was due for payment 14 days later (on 19 December 2002) and since there was no withholding notice from the employers it was payable in full. It has not been paid at all.

15. In the meantime, on 14 December 2002 the contractor submitted to Mr Cotter its valuation number 11. Again Mr Cotter approached his functions informally. On 16 December 2002 he signed his name on every page of the valuation and added on the last page the words '*subject to adjustments valuation agreed revised total £262,575.33'*. In my judgment this was another certificate, which became payable 14 days after 16 December (ie on 30 December 2002). The employers' failure to pay certificate number 10 by 19 December 2002 galvanised the contractor into action. On 19 December 2002 it sent Mr Legg an email expressing concern at non payment and about Mr Legg's failure to respond to messages. That provoked another intemperate reply from Mr Legg, dated the same day. In that email he asserts that the contractor had failed to comply with "*persistent requests for documentation to support your valuations"*, and asserts that "*for this reason alone I am not therefore in a position to consider making any further payments to you until such time as you supply the requested documentation to Tim"*. The email concludes with an irate paragraph threatening to consult "*my lawyers"*. The assertion that there had been a failure by the contractor to provide documentation did not form a plank in the argument of counsel for the employers at the hearing before me. In any event whatever be the rights or wrongs of the allegation, Mr Cotter clearly had sufficient information to enable him to certify both valuations 10 and 11 and any failure to provide information does not cancel the employers contractual obligation to pay the amount certified.

16. A further irate email from Mr Legg followed on 20 December 2002, asserting that a telephone call from Mr Mark Lovell's brother John amounted to demanding money with menaces. It is implicit in the final paragraph of that email that Mr Legg intended to make no further payment until Mr Cotter had been supplied with the documentation he had requested. The same observations as before apply to this email: in the light of the unpaid certificate number 10 the employers had no excuse for requiring documentation before making a payment under the certificate.

17. The contractor thereupon consulted a construction consultant Mr Alan Wilson who then conducted correspondence on the contractor's behalf. On 20 December 2002 he served on the employers a written notice entitled "notice of suspension" and "notice of dispute" giving the 7 days notice of intention to suspend performance required by Clause 4.8 of the contract. The notice, incidentally, seeks an 11week extension of time for completion (page 45 of the bundle) and also reminds the employers that in the event of their failure to make future payments a dispute will exist between the parties (page 46 of the bundle). A copy of this letter does not appear to have been sent to the contract administrator as required by Clause 4.8 of the contract, but counsel for the employers has not relied upon that deficiency in argument before me. It would not I think be arguable that a copy notice to the contract administrator was a condition precedent to the right to suspend the works under Clause 4.8. There appears to have been no response to the letter and no payment was forthcoming. Consequently on 6 January 2003 Mr Wilson served a further notice informing the employers that the suspension was now in effect. I understand that in fact the site had closed down for the Christmas holiday on or about 20 December 2002 and had not reopened.

18. The letter dated 6 January 2003 performed another function also, though in the circumstances that has no repercussions. By 30 December 2002 certificate number 11 dated 16 December 2002 (see above) had become payable. The letter dated 6 January 2003 gives a further 7 day notice of intention to suspend performance for this further non payment.

19. On 7 January 2003 Mr Legg sent a further intemperate email to the contractor. It appears from that email that Mr Legg had been away from both the addresses to which Mr Wilson's letters had been sent and had not received those letters until that day. The important issue raised by this email is Mr Legg's contention that he had terminated the contract on 20 December 2002 by reason of a repudiation of the contract by the contractor. He asserts in the second paragraph of the email that

> *"As indicated by my email to you of 20 December 2002 I am simply not prepared to continue doing business with any one who (as you did on 19 December 2002) has resorted to threats and intimidation".*

That assertion is in my judgement clearly misconceived. Mr Legg's email of 20 December 2002 does not purport to accept a repudiation by the contractor and there appears to me to be no grounds for asserting that the contract was terminated on 20 December 2002.

20. Mr Legg's email appears to have been the last straw for the contractor. Mr Wilson on the contractor's behalf on 8 January 2003 gave notice of default under Clause 7.3, entitling the contractor to determine the contract 7 days thereafter. The letter brings

to the employers attention their default in failing to make payment under the certificates dated 5 and 16 December and inter alia asserts that the employers had purported to terminate the employment of the contractor without proper cause or notice. In response to that notice Mr Legg sent the contractor an email dated 9 January in which he writes

> *"I stand by the contents of my email to you dated 7 January 2003 including the termination of our contract with effect from 20 December 2002 …."*.

On 14 January 2003 Mr Wilson sent the employers a further letter stating that the contractor "*will be obliged to determine the contract on or about 15 January 2003"* and by a letter dated 16 January 2003 he determined the contract on the contractor's behalf under the provisions of Clause 7.3.

21. In the meantime (on 10 January 2003, 6 days before the determination of the contract by Mr Wilson on the contractors behalf) the contractor sent to the employers a further valuation (valuation number 12) calculated as at 20 December 2002. Unlike valuations numbers 10 and 11, this was not countersigned by the contract administrator; so it cannot I think be taken as a certificate.

The adjudication

22. Mr Wilson then set in motion the procedure for adjudication. On 16 January 2003 he did two things:

    (1) He applied to the RIBA under Article 6 of the contract for the nomination of an adjudicator and

    (2) He gave the employers notice under supplemental condition D4.1 of the contractor's intention to refer a dispute or difference to adjudication. The RIBA nominated Mr Dearman the following day (17 January). Under supplementary condition D4.1 the contractor should then have referred the dispute or difference to the adjudicator by 23 January 2003. In fact the referral was not made until 28 January 2003. So it was 5 days late. That point was not taken on the employers' behalf by counsel at the hearing before me and in my view rightly so: there is nothing in the clause indicating that time was of the essence.

23. Supplemental condition D4.1 requires that the notice to the employer should briefly identify the dispute or difference. The referral itself is to include more detail:

> *"Particulars of the dispute or difference together with a summary of the contentions on which [the contractor] relies a statement of the relief or remedy which is sought and any material he wishes the adjudicator to consider"*.

Both notices in my judgment amply satisfy those requirements. Both of them identify 3 disputes or differences between the parties:

(1) The failure of the contract administrator to grant an extension of time

(2) The alleged wrongful termination of the contract by the employer and the determination of the contract by the contractor on 16 January 2003 under Clause 7.2.

(3) The non payment of valuations 10, 11 and 12, the failure to pay upon determination, and interest.

In due course after hearing representations by both parties the adjudicator gave his adjudication on 21 March 2003 by which he ordered the employers to pay to the contractor £85,873.59.

<u>The Unfair Terms in Consumer Contracts Regulations 1999</u>

24. Regulation 4(1) of the regulations provides that the regulations apply "*in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer*". Regulation 3(1) defines a "*seller or supplier*" as "*any .... legal person who, in contracts covered by these regulations, is acting for purposes relating to his trade"* It is conceded by the contractor that the contractor is a seller or supplier for the purposes of the regulations. In the same regulation "*consumer*" means "*any natural person who in contracts covered by these regulations is acting for purposes which are outside his trade, business or profession"*. There is no doubt that in the present case the employers were consumers for the purposes of the regulations.

25. Regulation 5(1) provides:

> *"A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer".*

26. Regulation 8(1) provides:

> *"(1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer*
>
> *(2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term".*

The employers contend that the terms providing for adjudication are unfair and therefore not binding on them under this regulation.

27. Regulation 5(1) (supra) contains a number of different elements some of which are supplemented by other parts of the regulations. These include:

(1) The term must be one "*which has not been individually negotiated*". Regulation 5(2) provides that "*a term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term*". It is conceded by the contractor that the adjudication terms in the Minor Works contract were not in this case individually negotiated for the purposes of Regulation 5(1). That concession is clearly justified: the adjudication terms

agreed between the parties were in the standard form provided for in the Minor Works contract.

(2) Regulation 5(5) provides that "S*chedule 2 to these regulations contains an indicative and non exhaustive list of the terms which may be regarded as unfair*". Schedule 2 repeats those words as a heading and lists in a number of sub-paragraphs terms which may be regarded as unfair under the introductory words "*terms which have the object or effect of …*". The employers rely particularly on paragraph (q) of the schedule (Mr Stansfield's skeleton argument paragraph 26) which provides:

> *"Excluding or hindering the consumers right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract".*

I do not regard paragraph (q) as having any relevance to those terms in the minor works contract which provide for adjudication. Those terms do not exclude or hinder the consumer's right to take legal action or exercise any other legal remedy. On the contrary an adjudication only binds the parties until the dispute or difference is resolved by legal action arbitration or agreement (supplemental condition D7.1). The terms do not require the consumer to take disputes exclusively to arbitration. Nor do they restrict the evidence available to him or alter the burden of proof. In any case schedule 2 simply sets out a list of examples of terms which "may" be regarded as unfair. In my judgement the word "may" does not confer any discretion. It simply introduces terms which may possibly qualify as unfair if the other requirements of Regulation 5(1) are satisfied.

(3) Regulation 6(1) refers to various matters which the court must take into account when assessing whether or not a term is unfair. It provides:

> *".... the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract ....".*

(4) Finally Regulation 5(1) (quoted in paragraph 25 above), a complex provision which contains numerous sub elements which it is difficult succinctly to disentangle. In my judgement these words set out a definition of what is or is not an unfair term for the purposes of the regulation. The *words "shall be regarded as unfair*" at first sight appears to give rise to 2 separate categories, those which the court may find to be "unfair terms" for reasons which are not listed in the regulation and those terms which the court must treat as unfair terms because they satisfy the requirements of the regulation. I do not think that there are two such classes of unfair terms. The regulations update earlier regulations (the Unfair Terms in Consumer Contracts Regulation 1994) in which the equivalent regulation (Regulation 4(1)) undoubtedly sets out a definition introduced by the words "*unfair term means*". It was so treated by

the House of Lords in Director General of Fair Trading -v- First National Bank [2002] 1 AC 481. There it is described by Lord Bingham as "the test" (at page 494) and by Lord Steyn (at page 499) as a regulation which implements article 3(1) of the relevant European Council Directive 93/13/EC (0J1993L95 page 29). It has not been argued that the 1999 Regulations alter the law so as to provide for two categories. It follows in my judgment that to be an unfair term a term must cause a significant imbalance in the parties rights and obligations arising under the contract to the detriment of the consumer, contrary to the requirement of good faith. The requirement of good faith in this context means the requirement

> *" of fair and open dealing. Openness requires that the term should be expressed fully, clearly and legibly containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not whether deliberately or unconsciously take advantage of the consumer's necessity indigence lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in schedule 2 to the regulations. Good faith in this context is not an artificial or technical concept; nor since Lord Mansfield was its champion is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice".*

(DG of Fair Trading -v- First National Bank (supra) per Lord Bingham at 494; see also Lord Steyn at 500 who refers to the purpose of the provision of good faith as being "to enforce community standards of decency, fairness and reasonableness in commercial transactions".)

Application of the regulations

28. In his very helpful argument on behalf of the employers Mr Stansfield listed the factors which he argued made the adjudication provisions in this contract unfair. For the present I list them without comment. They were:

(1) The adjudication terms do not provide for a final determination of the dispute: supplemental condition D7.1.

(2) In a case such as the present the sum awarded by the adjudication is payable to the contractor who can hold it pending final determination of the dispute even if in due course it is decided or agreed that the sum was not due; in such a case the contractor gains a cash flow advantage over the employer.

(3) They transfer the risk of the contractor's insolvency to the employer.

(4) The costs of adjudication are not recoverable even if the employer is ultimately proved right: supplemental condition D5.7.

(5) The costs of adjudication are considerable.

(6) The timescales under the adjudication provisions are very short and an employer is less likely to have the resources to deal with that timetable than the contractor.

(7) The adjudication provisions in the Minor Works contract do not exclude residential occupiers from their ambit as does the Act.

29. The propositions as propositions of fact are undoubtedly correct, but in my judgment they do not suffice to make the adjudication terms unfair under Regulation 5.1. To be unfair the terms must cause a significant imbalance in the parties rights and obligations under the contract to the detriment of the consumer. Any imbalance will not do: it must be a significant imbalance. Moreover that significant imbalance must be caused by the adjudication provisions contrary to the requirement of good faith. In my view neither requirement is satisfied in the present case. The adjudication terms apply equally both to contractor and employers: both are bound by the terms. It is undoubtedly true that the dispute between the contractor and employers in the present case has resulted in an adjudication in favour of the contractor whereby a sum of money is payable forthwith by the employers to the contractor. However, that is only because that dispute or difference concerns the non payment of sums payable under interim certificates. If the dispute or difference had concerned the payment of liquidated damages for delay payments may well have been ordered in the reverse direction. There is no limit on the kind of difference or dispute which can be the subject matter of adjudication under the contract and in my judgment no imbalance arises in the parties rights and obligations under the contract let alone a significant imbalance. Equally important however are the requirements of good faith. There has been no breach of the requirement of openness: the adjudication terms are fully clearly and legibly set out in the contract and contain no concealed pitfalls or traps. As for the requirement of fair dealing the contractor did not either deliberately or unconsciously take advantage of the consumers necessity indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in Schedule 2 to the regulations. On the contrary, the minor works form of contract was insisted upon by the architect on behalf of the employers; they were knowledgeable business people who had engaged successively an architect and a contract administrator and who apparently also had solicitors whom they had the opportunity to consult and whom they may have indeed consulted: see the emails referred to above. In my judgement there was no departure from *"good standards of commercial morality and practice"*.

30. Mr Stansfield cited to me two decisions in which the regulations or their predecessor regulations have been applied. <u>Zealander -v- Laing Homes</u> (unreported 19 March 1999: Judge Havery QC) resulted in a finding that an arbitration clause in an NHBC agreement was not binding on a purchaser of a house. The facts were however very different from the facts of the present case. The purchaser had no knowledge of the terms of the NHBC agreement until after contracting, because the document containing those terms was provided to him after exchange. The arbitration clause only concerned those matters which were covered by the NHBC agreement, with the consequence that the purchaser would have to pursue 2 sets of proceedings one in court and one before an arbitrator, in order to pursue all his complaints. The purchaser moreover did not have the benefit of advice concerning the dispute. He was represented by a solicitor but acting only as a conveyancer. I accept that Zealander v Laing Homes was correctly decided in the light of those factual circumstances, but it has no application to the present very different case. The second

decided case (Picardi -v- Cuniberti) [2002] EWHC 2923 (Judge Toulmin QC) is rather closer to the facts of the present case being concerned with a dispute between an architect and his client, but the facts nevertheless are significantly different. The adjudication provisions were those contained in the RIBA conditions of engagement incorporating the model adjudication procedure published by the Construction Industry Council. The client did not have the benefit of any advice concerning the adjudication terms in these provisions: his dispute was with the architect who should have provided that advice. The judge found as a fact that the architect had not, as he said he had, offered to go through the RIBA terms with the clients (paragraph 61). None of the relevant terms had been drawn to the client's attention let alone specifically negotiated (paragraph 40). I again accept entirely the correctness of that decision, but it has no application to a case where the form of contract was insisted on by the employers, who had available both advice from solicitors and from their nominated contract administrator.

31. For those reasons in my judgement the employers in the present case were bound by the adjudication terms in their contract with the contractor. Those terms are not struck down by the 1999 Regulations.

Dispute or difference

32. Mr Stansfield argues in the alternative that the adjudication is not binding on the parties because the adjudicator had no jurisdiction to act, there being no "dispute or difference" for him to resolve. I accept that the absence of a dispute or difference has that effect,: there being many decided cases concerned with that issue. As a matter of construction of the contract it appears to me that the dispute or difference must exist at the latest by the date of the notice of intention to refer to adjudication since the dispute or difference must be briefly identified in the notice (see above). Particulars of that dispute or difference must then be included in the referral. So the issue in the present case is whether there was a dispute or difference between the parties concerning the matters referred to the adjudicator at the date of the notice of intention to refer to adjudication dated 16 January 2003. As already mentioned the referral sought adjudication of 3 alleged disputes or differences under 3 separate heads: failure to extend time, termination and non payment of interim certificates. In my judgment the issue whether there was a dispute or difference must be resolved separately in relation to each of those alleged disputes or differences.

33. The cases cited on the meaning of "dispute or difference" in the arguments appear to indicate that there is a divergent stream of modern authority on the meaning of the term. Mr Newman on behalf of the contractor relied on my own judgment in Watkin Jones -v- Lidl (which is I think unreported, but Mr Newman was able to produce a copy from the internet) and the decision of Her Honour Judge Kirkham in Carling Construction -v- CFW Architects [2003] EWHC 60. Both those decisions purported to follow and apply the decision of the Court of Appeal in Halki Shipping Corporation -v- Soapex Oils Ltd [1998] 1 WLR 726, a decision concerning an arbitration agreement. In the Watkin Jones case I said "*in my judgement I am bound by Halki Shipping to find that it is not necessary either to refuse to answer or to reject a claim. Passive failure to admit suffices to constitute a dispute*". In the Carling Construction case Judge Kirkham said (at paragraph 88):

> *"In my judgement the approach in Halki is to be preferred. I am guided by the straightforward analysis in that case. In Halki (in the context of the*

Arbitration Act 1996) the Court of Appeal reminded us that the courts have generally construed widely the word dispute and they declined in that case to construe the word more narrowly in the context of an arbitration. While I accept that the adjudication process involves short timescales, and that there is a risk that a responding party may be ambushed, those are not in my judgment reasons to construe the word dispute more narrowly in the context of adjudications than in other contexts. I bear in mind the practical difficulties faced by an adjudicator whose jurisdiction is challenged on the ground that there is no dispute. The court should not add unnecessarily to those difficulties by giving a narrow meaning to the word dispute which would in turn permit a responding party to introduce uncertainties which might be difficult for an adjudicator to deal with. Otherwise there is a risk that the purpose of [the Act] may be defeated".

On the other hand Mr Stansfield for the employers relied on the decision in Nuttall -v- Carter [2002] BLR 312 (Judge Seymour QC) in which the Learned Judge said (at page 321):

"For there to be a dispute there must have been an opportunity for the protagonists each to consider the position adopted by the other and to formulate arguments of a reasoned kind. It may be that it can be said that there is a "dispute" in a case in which a party which has been afforded an opportunity to evaluate rationally the position of an opposite party has either chosen not to avail himself of that opportunity or has refused to communicate the results of his evaluation. However, where a party has had an opportunity to consider the position of the opposite party and to formulate arguments in relation to that position, what constitutes a "dispute" between the parties is not only a "claim" which has been rejected if that is what the dispute is about but the whole package of arguments advanced and facts relied upon by each side".

Later, on the same page, he said:

"It seems to me that considerations of practical policy favour giving to the word "dispute" the meaning which I have identified. The overall concept underlying adjudication is that the parties to an adjudication should first themselves have attempted to resolve their differences by open exchange of views and if they are unable to they should submit to an independent third party for decisions facts and arguments which they have previously rehearsed amongst themselves. If adjudication does not work in that way there is a risk of premature and unnecessary adjudication in cases in which if only one party had had a proper opportunity to consider the arguments of the other accommodation might have been possible. There is also the risk that a party to an adjudication might be ambushed by new arguments and assessments which have not featured in the dispute up to that point but which might have persuaded the party facing them if only he had had an opportunity to consider them. Although no doubt cheaper than litigation, as Mr Richards fees in the present case indicate adjudication is not necessarily cheap".

In his skeleton argument at page 36 Mr Stansfield sets out that second quotation in full but on a detailed reading of the judgment it seems to me that the definition is contained within the first of those quotations and that in the second quotation the

judge is simply setting out a course of conduct which sensible participants in an adjudication should adopt. I do not think that in that passage he is narrowing the concept of "dispute". It is of interest that the case before him was a clear cut case though complicated on its facts: the referral to the adjudicator contained a new case not previously canvassed at all in argument between the parties; so one party had no opportunity at all to consider the argument before the referral. It is also of interest that the judge cited Halki, apparently with approval.

34. These divergent lines of authority are not at present reconcilable, but in my judgement it makes no difference to the outcome of the argument in the present case which line of authority is correct because there was both a claim and a rejection or a failure to respond and an opportunity for the protagonists to consider their respective positions and to formulate arguments of a reasoned kind. More specifically:

    (1) A need for the architect and/or contract administrator to consider issues relating to the extension of time was first brought to the attention of the employer on 22 October 2002. The employers were reminded on 29 October 2002 that an extension of time had been requested. The argument was set out in some detail in Mr Wilson's letter dated 20 December 2002. There was consequently ample opportunity for the employers to consider the argument prior to the service of the notice of adjudication on 16 January 2003.

    (2) The non payment of the certificates became an issue on 19 December 2002. The employers responded to that issue on 19 December 2002 and subsequently on 20 December 2002. The issue was raised again by Mr Wilson in the notice of suspension dated 20 December 2002, in the notice of suspension dated 6 January 2003, and again was considered by the employers in the email on 7 January 2003. In respect of this issue the matter was again canvassed by Mr Wilson in the notice of intention to determine the contract on 8 January 2003. Consequently by 16 January 2003 the employers had had ample opportunity to consider the claim and to advance reasoned arguments on the matter.

    (3) Similarly the determination of the contract was canvassed initially by the employers in the email on 7 January 2003 to which there was a response in Mr Wilson's letter dated 8 January 2003. That in turn elicited the response by email of the employers dated 9 January 2003. So in respect of this issue also there was by 16 January 2003 a dispute or difference.

35. It follows in my judgment that there was at the material date (16 January 2003) a dispute or difference concerning the three issues which were referred to the adjudicator for determination. He therefore did not lack jurisdiction.

Set off

36. One of Mr Stansfield's fall-back arguments, advanced in relation to quantum in the event of both his main arguments failing, was that the employers were entitled to set off debts allegedly owed by the contractor to the employer against the amount ordered by the adjudicator. Two such alleged set-offs were identified namely

    (1) A payment of £25,243.00 plus VAT allegedly paid by the employers directly to the sub contractor Hills of Shoeburyness Ltd in or about December 2002 and

(2) Liquidated damages from the expiry of the extension of time allowed by the adjudicator (of 6 weeks) until the determination of the contract by the contractor on or about 16 January 2003.

Although different considerations apply to these 2 set offs, they are affected by one common issue namely whether the contract allows any set off at all in the absence of a withholding notice.

37. Mr Stansfield cited in support of his argument that a set off is permissible Modern Engineering -v- Gilbert Ash [1974] AC 689 in which Lord Diplock held (at 718E) that one starts with the presumption that each party is entitled to a set off and that to rebut that presumption one "*must be able to find in the contract clear, unequivocal words in which the parties have expressed their agreement that this remedy shall not be available in respect of breaches of that particular contract"*. He also cited Parsons Plastics -v- Purac [2002] BLR334 in which Pill LJ said "*it is open to the respondents to set off against the adjudicator's decision any other claim they have against the appellants which has not been determined by the adjudicator. The adjudicator's decision cannot be re-litigated in other proceedings but on the wording of this contract can be made subject to set off and counterclaim*". That case concerned a contract which was not subject to the Act and which contained no provision prohibiting a set off. On the other side of the dividing line there are cases in which the Act is applicable in which set offs are not permitted. Prominent amongst those cases is the decision in Bovis vTriangle Developments (Judge Thornton QC) where he said "*the decision of an adjudicator that money must be paid gives rise to a second contractual obligation on the paying party to comply with that decision within the stipulated period. This obligation will usually preclude the paying party from making withholdings, deductions, set offs or cross claims against that sum"*. His decision in that case was approved in Firson Contractors -v- Levolux [2003] BLR 118.

38. This is not a case to which the Act applies (see above) but it contains very similar provisions modelled upon the act. The provisions which appear to me to be relevant to the set off argument are:

(1) Clause 2.3 of the conditions, which is particularly relevant to the second alleged set off (of liquidated damages). The clause provides: "*the employer may either recover the liquidated damages from the contractor as a debt or deduct the liquidated damages from any monies due to the contractor under this contract provided that a notice of deduction pursuant to Clause 4.4.2 .... has been given*". (my italics)

(2) Clause 4.4.2 of the conditions provides for the service of a withholding notice and Clause 4.4.3 provides that "*where the employer does not give a written notice pursuant to Clause 4.4.2 the employer shall pay the amount stated as due in the certificate*". Clearly that means shall pay the full amount stated as due.

(3) Clause 4.8 of the conditions provides that "*if, subject to any notice issued pursuant to Clause 4.4.2 [a withholding notice] the employer shall fail to pay the amount due certified under ..... Clause 4.3 in full by the final date for payment as required by this agreement"* the contractors right of suspension comes into effect.

(4) Clause 7.3.1.1 provides that if the employer "*does not pay by the final date for payment the amount properly due to the contractor in respect of any certificate*" the employers rights of determination come into operation.

(5) Supplemental Condition D7.2 provides that "*the parties shall without prejudice to their other rights under this agreement comply with the decision of the adjudicator".*

39. In my judgment those contractual provisions rebut the presumption referred to by Lord Diplock. They amount in my view to clear unequivocal words whereby the parties agree that a set off will only be permitted when a withholding notice has been served. In my view therefore the principle in the Bovis case applies to this contract to the same extent as it applies to contracts falling within the ambit of the Act.

40. Even if I am wrong concerning that conclusion in my judgment neither set off is permissible in the present case. The payment to Hills of Shoeburyness was brought to the attention of the adjudicator by both parties. He must therefore have taken it into account in reaching his decision. In accordance with the principle explained by Pill LJ in the Parsons Plastics case that decision cannot be re-litigated. It is a claim which has been determined by the adjudicator. Moreover, as explained in <u>Bouygues -v- Dahl-Jensen</u> [2000] BLR 522, if the adjudicator has answered the right question his decision will be binding whether he answered the question correctly or not. In my view the adjudicator clearly did answer the right question and his decision is therefore binding and cannot be reopened in this litigation. It can of course be reopened when the dispute itself is resolved either by litigation or arbitration. As for the second alleged set off, Mr Stansfield asserts that the 6 week extension period expired on 10 January 2003. That appears to me wrong because during that period there were 3 bank holidays (Boxing Day, Christmas Day and New Years Day) which by virtue of Condition 1.6.1 are to be left out of account. The extended period therefore in my view expired on 13 January 2003, leaving only 2 days before the contract was terminated on 16 January 2003. Condition 2.3 provides for liquidated damages at a rate per week and does not make any provision for periods of less than a week. No authority was provided by either counsel on this issue. In my view no liquidated damages are payable, but if they were payable their amount would be only £348.57.

41. For those reasons neither of the set offs claimed is allowable.

<u>Stay of execution</u>

42. As a final fallback argument Mr Stansfield argued that I should grant a stay of execution because of the impecunious state of the contractor. I accept that if there were evidence of the contractor's inability to repay in the event of a final decision in favour of the employers there would be grounds for granting a stay. The evidence in support of Mr Stansfield's argument is however insubstantial. Mr Shawdon exhibits a search at Companies House carried out by him and analyses it in paragraph 5 of his witness statement. The search shows that the contractor has a share capital of only £2, tangible assets of £450.00, an overdrawn bank account of £1,226.00, creditors of £6,401.00 and debtors of £7,602.00. Mr Lovell in his witness statement however states (at paragraph 13) that the company results to June 2003 are likely to show a turnover of £1.2 million and that "*the main risk to the solvency of [the contractor] at present is the failure of [the employers] to pay approximately £85,000 for works carried out.*" In my judgment the information provided to me in those witness statements is insufficient to justify granting a stay of execution.

Conclusion

43. For those reasons in my judgment there is no defence to the claim to recover the full amount ordered by the adjudicator.

GH001189/DC