

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (Technology & Construction Court)
SALFORD DISTRICT REGISTRY

Prince William House
Peel Cross Road, Salford

Friday 19th March 2004

Before:-

HIS HONOUR JUDGE GILLILAND, O.C.
(Sitting as a High Court Judge)

B E T W E E N :-

M.J. GLEESON GROUP PLC

Claimant

-and-

DEVONSHIRE GREEN HOLDING LIMITED

Defendant

(Transcribed from the official tape recording by
The Cater Walsh Partnership, LLP, Suite 410 Crown House
Bull Ring, Kidderminster, DY10 2DH. Official Reporters to
the Crown Court at Manchester)

J U D G M E N T
(As approved by the Court)

J U D G M E N T

JUDGE GILLILAND:

1. This is an application pursuant to C.P.R. 24 to enforce the decision of Mr. Philip Eyre, the duly appointed adjudicator, under a J.C.T. building contract. The decision is dated 18th February 2004 and directed that the Defendant should pay the Claimant the sum of £9,393,815.50p plus V.A.T. as applicable within seven days of his decision. He also directed that the Defendant should pay £96,833.51p interest pursuant to clause 38.3.7 of the contract, again within the seven days of the decision, and, finally, further daily interest at the rate of £2,251.94p until payment. The Defendant was also directed to bear the liability for the whole of the adjudicator's fees which were put at £4,104 plus V.A.T.
2. The contract in question was dated 5th November 2001 and was in the J.C.T. standard form of building contract with contractor's design, 1998 edition with amendments. Under the contract the Claimant agreed to design and construct some 480 private residential apartments with retail and leisure accommodation at a site in Sheffield. The contract price was £34,358,018.34p.
3. The dispute which was referred by the Claimant to the adjudicator was whether the Claimant was entitled to payment pursuant to interim application number 31 which was delivered to the Defendant's agent on, according to the adjudicator, on 28th November 2003. By clause 30.3.6 of the contract the final date for payment of an interim payment was 35 days from the receipt by the employer of the contractor's application for interim payment, and that would take one to either 6th or possibly 7th January 2004.
4. The contractual provisions for payment are to be found in clause 30 of the contract. By clause 30.1.1.1 interim payments were to be made in accordance with alternative B, that is monthly on the last calendar day in each month commencing in June 2001. The amount due as an interim payment was the gross valuation of the total value of the work properly carried out plus the value of goods and materials and other sums set out in clause 30.2B less the sums previously paid and a retention of three per cent and certain other monies. Under clause 30.3.2 each application for an interim payment was to be accompanied by such details as were stated in the employer's requirements. Clause 30.3.3 then continued: "Not less than five days after the receipt of an application for payment the employer shall give a written notice to the contractor specifying the amount of payment proposed to be made in respect of that application, the basis on which such amount is calculated and to what the amount relates and, subject to clause 30.3.4, shall pay the amount proposed no later than the final date for payment. 4. Not later than five days before the final date for payment of an amount due pursuant to clause 30.3.3, the employer may given a written notice to the contractor which shall specify any amount proposed to be withheld and/or deducted from that due amount, the ground or grounds for such withholding and/or deduction and the amount of

withholding and/or deduction attributable to each ground." Then .5, "Where the employer does not give any written notice pursuant to clause 30.3.3. and/or to clause 30.3.4, the employer shall pay the contractor the amount stated in the application for interim payment." In the present case the Defendant did not give any notice under clause 30.3.3 or 30.3.4 in relation to application number 31 and, accordingly, it became the obligation of the Defendant under clause 30.3.5 to pay the amount stated in application number 31, namely the sum of £9,393,815.50p, and this is what the adjudicator held. Before the adjudicator it had been argued for the Defendant that the payment regime in clause 30.3.3 to 30.3.5 did not apply but that contention was rejected by the adjudicator.

5. The provisions for adjudication are set out in clause 39A of the contract. The effect of an adjudicator's decision is dealt with in 39A.7 as follows:
 1. "The decision of the adjudicator shall be binding on the parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the parties made after the decision of the adjudicator has been given.
 2. "The parties shall, without prejudice to their other rights under the contract, comply with the decision of the adjudicator and the employer and the contractor shall ensure that the decisions of the adjudicator are given effect.
 3. "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 39A.7.1."
6. In the present case the enforcement of the adjudicator's decision is resisted, not on the grounds that he has exceeded his jurisdiction or for any procedural impropriety. Enforcement is resisted, based essentially on two events or factors. The first is that on 5th February 2004, that is before the adjudicator issued his decision on 18th February, the employer's agent, in response to a subsequent application by the Claimant for a further payment up to 31st January 2004, that is in application number 33, on 5th February issued what has been described as a valuation certificate in respect of application number 33 in the sum of £35,496,021.51p which is some £8,762,731.32p less than the amount applied for in application 31 and which the adjudicator has directed to be paid. It is said that this is an effective notice under clause 30.3.3 and that it is a correct valuation whereas the adjudicator's decision in law was a valuation of the works in respect of application 31 at £44,258,782.72p. The second matter relied on is that on 20th February 2004 the employer's agent gave notice pursuant to clause 24.2.1 of the contract requiring the Claimant to pay liquidated and ascertained damages in respect of the Claimant's failure to meet eight sectional completion dates. Under clause 24.2.1.1 it is provided that the employer may recover the same, that is the liquidated damages, as a debt. A prerequisite to serving a

notice under clause 24.2.1 is that the employer must first serve a notice under clause 24.1 giving notice to the contractor that he has failed to complete the work by the relevant completion dates. seven such section 24.1 notices were served over the period between 12th January 2003 and 3rd March 2003 in respect of failures to complete sections. The eighth notice was served on 12th February 2004 and was in respect of a failure to complete a section of the works by 16th November 2002. This and all the breaches or failures to complete on time occurred long before application number 31 but clause 24.2.1.1 notice of deduction was given only after the adjudicator had given his decision. The total amount of the liquidated damages comes to some £2,758,707. On 20th February 2004 the Defendant also gave notice to withhold the sum of £2,758,707 from the adjudicator's award of £9.0 million. The amounts of the liquidated damages plus the alleged excessive valuation of over £0.0 million obviously together exceed the amount of the adjudicator's award, and it has been submitted that this is a good reason for not enforcing the adjudicator's award or is a good reason for granting a stay of the enforcement of any award.

7. I turn now to consider the question of the effect of the valuation on application number 33. Mr. Darling, Q.C. on behalf of the Defendant has submitted that the determination by the employer's agent on 5th February of the value of the Claimant's works on application number 33 entitled the Defendant to repayment of the sum awarded by the adjudicator, that this occurred before the date of payment of the sum awarded by the adjudicator and, accordingly, that the Defendant had the right to the return of sums not yet awarded by the adjudicator, that is as from 5th February. He submitted that the notice bound the parties without any reference to adjudication. In fact the Defendant has referred application number 33 to adjudication but the adjudicator has not yet given his decision. It may not be until the end of this month that his decision will be known. Mr. Darling, Q.C., however, submitted that the reference to adjudication was really a matter of belt and braces. The claimant has taken part in the adjudication and opposed the Defendant's agent's valuation. Mr. Darling, Q.C. also submitted that any enforcement should await the outcome of the adjudication and that there should be a stay of execution until the decision of the adjudicator on application number 33 was known.
8. The first question which falls to be decided is whether it has been shown that the Defendant has no real prospect of successfully defending the claim to enforce the adjudicator's award in respect of application number 31. The decision of the adjudicator was a decision as to the amount payable under application number 31. On that question the adjudicator's decision, it seems to me, was clearly correct since the effect of clause 30.3.5 is to oblige the employer to pay the amount stated in application number 31 because no notices were given pursuant to clauses 30.3.3 or 30.3.4. Under clause 39A.7.1 the adjudicator's decision is binding on the parties until the dispute or difference is finally determined by arbitration or litigation or agreement. Accordingly, it seems to me the Defendant is bound by the adjudicator's decision

that the amount applied for should have been paid. Strictly, it should have been paid within 35 days of the receipt of the application. It was not so paid and the adjudicator has ordered payment by 25th February with interest in the meantime from the date it should have been paid. The Defendant has not complied with that decision and the Claimant has accordingly applied pursuant to clause 39A.7.3 to take legal proceedings to secure compliance pending any final determination of the dispute as to the amount payable.

9. In my judgment, the giving by the employer of a notice under 30.3.3 on a subsequent application cannot affect the question of what amount was properly payable under the earlier application. Clause 30.3.5 has fixed the amount payable under application 31 and that has been affirmed by the adjudicator. Further, the obligation of the parties under clause 39A.7.2 is to ensure that his decision is given effect to and by clause 39A.7.1 it is binding on them until the final determination of the dispute by arbitration or litigation or by agreement in writing. The subsequent notice under clause 30.3.3 in respect of application 33 is certainly not a final determination by arbitration, litigation or written agreement within 39A.7.1 and cannot, in my judgment, affect the binding force of the adjudicator's decision. It is correct that a notice in respect of application 33 was given before the adjudicator issued his decision but, again, it seems to me that cannot affect the binding force of the decision once it has been given in relation to application 31 or his order that the Claimant should pay the sum within seven days of his decision, that is by 25th February 2004.
10. It seems to me that clause 39A.7 is the important provision in this case. It provides that the parties shall ensure that the adjudicator's decision is given effect to and that they shall comply with it. Compliance with a decision is, under clause 39A.7.2, stated to be "without prejudice to their other rights under the contract" but that does no more, it seems to me, than have the effect of preserving any contractual right which the employer or paying party might otherwise have under the contract. This matter was considered in *VHE Construction v. RBSTB Trust Company* [70 Con L.R.] and if one looks at paragraph 64 of the judgment in that case one can see that the interpretation which was given by the court to the words "without prejudice" meant simply that compliance with the decision of the adjudicator did not have the effect of depriving the parties of their other rights under the contract if and when they came to challenge the decision of the adjudicator by litigation or an arbitration. It is not, however, a provision which was directed to resisting the adjudicator's decision, it seems to me. Mr. Darling, Q.C. submitted that the subsequent giving of the notice under clause 30.3.3 in relation to application 33 gave rise to a valuation of the works which was binding on the Claimant until otherwise determined, for example by adjudication, or by other means. I cannot accept that submission. It seems to me the mechanism for payment set out in clause 30.3 is not a procedure whereby the value of the works is determined by the employer's agent at all so as to be binding on the contractor until set aside or challenged.
11. The position under clause 30.3, it seems to me, is much simpler. The contractor asks for a

particular amount as his view as to the value of the works he has carried out and he must support that with appropriate details stated in the employer's requirements. It is then for the employer, not the employer's agent, to state how much he proposes to pay under that application and, subject to any withholding, his obligation is to pay that sum by the due date of 35 days from the receipt of the application. If he fails to give notices his obligation is then to pay the amount applied for. Here the amount payable is determined by the amount specified by the contractor unless the employer gives notice under clause 30.3.3, in which case it is that amount. Now, to describe the mechanism of clause 30.3 as a valuation seems to me to be incorrect. It is nothing more, it seems to me, than the setting out the respective views of the employer and of the contractor. Under the clause, the employer's view will prevail if he has given the appropriate notice. If he has not given the appropriate notice the contractor's view will prevail. It seems to me there is nothing more to it than that so far as this particular mechanism is concerned. I thus cannot accept the submission that there has been any kind of a binding valuation. In fact there certainly was none in relation to application 31. So far as application 33 is concerned, subject to any decision that the adjudicator may make which is of relevance, the amount payable under application 33 would appear to be the amount that the employer has stated is the appropriate amount. Whether that is the amount in fact, the point which had actually gone before the adjudicator for decision I am not entirely clear because there has been some suggestion that he has been asked to value the works. Whether that is strictly accurate I do not know because I have not seen the papers in relation to application number 33, but simply as a matter of contractual provision in clause 30.3.3 to .5 the mechanism, it seems to me, has got really nothing to do with valuation as such and certainly not valuation by an employer's agent. That is a different matter entirely. This is simply not a contract providing for valuation certificates to be given. It is not a contract to pay on a valuation. This is a contract to pay either the amount applied for or the amount that the employer specifies, and it is to be noted where the employer does specify an amount it is possible for him to make a withholding payment or withholding deduction from that amount so he does not even have to pay the full amount he provides. That seems to be the effect of the literal wording of clause 30.3.4. It may be somewhat surprising but that seems to be the position.

12. Mr Darling, Q.C. then went on to submit that, under clause 30.3, if an over-payment of more than the proper value of the works was made because of 30.3.5, the over-payment could be recouped on a subsequent application, and I was referred to what Jacob LJ, said in *Rupert Morgan Building Services v. David and Harriet Jervis* [2004] B.L.R. p18 at page 21 in paragraph 8 where Jacob LJ, said: "It follows that, if there is an error, for example, a double charging in an interim certificate, it can and should be corrected in the next". Although it is correct that applications 31 and 33 are on a global basis, that is it takes account of the work done to date and the total payments to date, this contract does not, it seems to me, actually

provide for any interim certificate at all. There is simply no provision for certification and it is, in my judgment, wrong to regard the employer's notice under clause 30.3.3 on the subsequent application as a certification or a binding determination of the value of the works carried out. As I have said, it is no more than the employer's view of what should be paid in respect of that application and it is no different in quality, it seems to me, from the contractor's opinion of what he ought to be paid. It may be that, on the true construction of the contract, the employer may, in a subsequent application, be entitled to say nothing should be paid under a later application, but I do not need to decide that point; but there is certainly nothing, it seems to me, in the language of clause 30.3 or in the scheme of the payment provisions to give rise to an obligation, express or implied, on the part of the contractor to repay what he has already received under that application for the proper amount due under the terms of the contract, let alone when an adjudicator has determined what is the amount properly payable in accordance with the payment provisions. The contract does contain provisions for repayment of an over-payment but they are to be found in clause 30.6 and that relates to the final statement which deals expressly with the question of the payment of any ultimate balance when the final account is dealt with between the parties, as indeed one would expect. It seems to me in these circumstances there is no need to imply any right to repayment in respect of an interim application which has been duly paid in accordance with the contractual provisions. Thus, it is not right, in my judgment, to say that on 4th February the Defendant acquired a right to recover from the Claimant the amount of the over-payment determined by the employer's agent. It seems to me that, whatever may have been decided in relation to application 33, that cannot affect the Claimant's clear right under the contract to be paid under application 31 the amount applied for or the adjudicator's decision as to the amount of that entitlement. In my judgment, the Claimant did become entitled to be paid £9,333,815.50p at the expiration of the period of 35 days specified by clause 30.3.6 and that has remained the position at all material times thereafter. In addition, it seems to me, the Defendant is bound to give effect to the adjudicator's decision which is, by the contract, expressly binding on it until set aside by arbitration or litigation or agreement. The obligation under clause 39 is to comply with the adjudicator's decision, and compliance, it seems to me, for this purpose, must bear its ordinary sense of doing that which the adjudicator has directed should be done. That is what "comply" means and it is not compliance, it seems to me, not to pay the full amount that he has directed to be paid.

13. So far as the question of liquidated and ascertained damages are concerned, at the time when the dispute arose as to the amount payable under application 31, when it was referred to adjudication, the Defendant had not served any notice pursuant to clause 24.1 of the contract, although the delay that is now complained of had occurred almost a year previously. Clearly, at the commencement of the adjudication the Defendant had no right to

liquidated damages, although it could have served a section 21 notice at any time after the delays now complained of. The question of liquidated damages was not raised before the adjudicator. The decision was given without regard to that possible issue. In my judgment, the Defendant cannot now rely on the liquidated damages as a defence to the present action to enforce the adjudicator's award. Mr. Darling, Q.C. has submitted that the Defendant now has a contractual right to be paid liquidated damages under clause 24.2.1 and to recover the same as a debt. Accordingly, it was submitted there was no need at all for the Defendant to serve any withholding notice and that it would not be appropriate to enforce the Claimant's rights when the Defendant could itself now commence proceedings to recover the liquidated damages. The difficulty with that submission, it seems to me, is that it ignores the express obligation of the parties under clause 39A.7.2 to comply with the decision of the adjudicator and to ensure that the adjudicator's decision is given effect to and it also seems to me to be inconsistent with the provisions of clause 39A.7.3 where there is an express right given to the Claimant under the contract to take legal proceedings to secure compliance with the adjudicator's decision. Mr. Darling submitted it would be in compliance with the adjudicator's decision not to make the payment of the amount ordered because the Defendant was entitled to be paid under some other provision of the contract. It seems to me, however, that compliance within clause 39 bears its ordinary meaning in the sense of doing that which the adjudicator has directed to be done. Not to pay in full the amount directed to be paid is simply a non-compliance with the adjudicator's decision which is in terms made binding on the parties until finally determined by arbitration, litigation or by an agreement in writing. It seems to me that the effect of clause 39A.7 and, in particular, 39A.7.3, is to make it clear that the award of the adjudicator is to be enforced as it stands and is not to be subject to deductions of one sort or another. The language of clause 39A.7 is, in my judgment, clear and unambiguous. If the Defendant is entitled to liquidated damages there is nothing to prevent it proceeding to seek to recover the same by action or otherwise or by adjudication if it wishes, but it is not entitled, it seems to me, to refuse to comply with an adjudicator's decision given within his jurisdiction merely because the Defendant asserts or claims, possibly rightly, that it is entitled to have monies paid to it by the receiving party. That effectively is simply alleging a set-off. It seems to me that the language of clause 39A.7 is inconsistent with any such right. Mr. Darling, Q.C. submitted, one needed clear language to oust what might be termed the common law right of set-off but it seems to me this language is clear and unambiguous. It means what it says, it seems to me, and it is not right for the court to seek to fritter away what seems to me to be the clear language of the contract and also what is clearly in accordance with what in a significant number of cases has been described as the clear intention of Parliament, namely that the decisions of adjudicators are meant to give a speedy and effective remedy on an interim basis, and if the parties wish to challenge the decision of the adjudicator that should be done by arbitration or by litigation or

by agreement.

14. Mr. Darling, Q.C. has submitted that it would be inappropriate to enforce under Part 24 the Claimant's right to payment when the Defendant can itself commence proceedings to recover the liquidated damages. To accede to that submission would, it seems to me, again to fail to give effect to the clear terms of clause 39A.7. It seems to me, as I have indicated, it would also defeat the purpose of the adjudication process. Further, it cannot, it seems to me, be right that what is intended to be a speedy interim remedy, in order, clearly, to assist matters very frequently of cashflow, should be deferred.
15. Insofar as it is a matter for the discretion of the court in considering what order to make under Part 24, it seems to me that Mr. Coulson, Q.C. is right in this case that it would be quite wrong to seek to postpone enforcement of the adjudicator's award in respect of a matter such as a liquidated damages claim when it is perfectly clear that the Defendant was in a position, if it had wanted to, long before the adjudication started, to claim liquidated damages. The fact of the matter is it did not, and it seems to me it cannot be in the public interest and is not consistent with the policy underlying adjudication that, as it were, a party who has been ordered by an adjudicator to pay a sum of money should be able, not having sought to raise it before the adjudicator or previously, to turn round and seek to defeat the adjudicator's decision by reference to a claim which, on any view, it seems to me, ought to have been raised long beforehand. But, as I say, ultimately it seems to me that clause 39.7 prevents the point from being raised.
16. The final submissions made by Mr. Darling, Q.C. were to the effect that a valid withholding notice in respect of the adjudicator's order was given on 20th February, that is within five days before the amount ordered to be paid was to be paid on 25th February. The issue was stated by Mr. Darling to be whether a withholding notice may be given against an adjudicator's decision. A copy of the notice is to be found at exhibit BB9 to Mr. Bentley's witness statement dated 15th March. The notice relates to the claim to deduct liquidated damages of £2,758,751. It seems to me that the notice dated 20th February 2004 cannot be regarded as a notice given pursuant to clause 30.3.4 of the contract since that provision in terms provides only for a notice to be given five days before the final date for payment of an amount due pursuant to clause 30.3.3. No notice was ever given by the Defendant under clause 30.3.3 and no sum ever became due under clause 30.3.3. The sum which became due in the present case became due under clause 30.3.5. The matter has been argued, however, before me on the basis that the position is the same as if a notice had been served under section 111 of the Housing Grants Construction and Regeneration Act, 1996. As far as section 111 is concerned, the last date for serving a withholding notice in respect of application 31 was probably 1st January or possibly 2nd, and the notice dated 20th February cannot be a valid notice in relation to that sum. Section 111(4) provides that, if a valid notice has been given, and the matter is then referred to adjudication, there is a provision for an extension of

the date for payment to seven days after the decision or the date which, apart from the notice, would have been the final date for payment, whichever is the later, but Section 111(4) clearly cannot apply to extend the time for giving a withholding notice in a case such as the present.

17. There are two reported decisions in which it has been held that a with-holding notice does not apply to an adjudicator's decision. The first is that of His Honour Judge Hicks, Q.C. in the *VHE* case to which I have already referred briefly. The effect of the decision of His Honour Judge Hicks was that, if a withholding notice was to be served, it needs to be served prior to the adjudication and to be considered and dealt with as part of the adjudication, and he did not accept the view that it could be served subsequently after the adjudicator had given his award. If that were done, it was the view of His Honour Judge Hicks that that would effectively be to drive a coach and horses through the provisions in relation to adjudication. The matter is dealt with by His Honour Judge Hicks in several passages in his judgment. Paragraph 65 is one of them where he says, "Finally, RBSTB relies on a residual right to set off its liquidated damages claim. I use the word 'residual' because many of the submissions already discussed would end, unsuccessfully as I have held, at establishing directly or indirectly a means by which that claim could be deducted, withheld or set off by way of clause 30.3.4 of the contract or section 111 of the Act or by some other route. In my view, there is no such residual right where these adjudication decisions are concerned. In the first place, the right under clause 24.2.1 (that is in relation to liquidated damages) is to deduct from monies due or to become due under the contract. The money here in question was not payable under the contract in the sense contemplated by that clause but by way of compliance, albeit contractually required with the adjudicator's decisions. More generally, for the reasons given in paragraphs 36 and 37 above, section 111 now constitutes a comprehensive code governing the right to set off against payments contractually due. RBSTB has not complied with it. It would make a nonsense of the overall purpose of Part 2 of the 1996 Act to which section 108 and section 111 are central and in which they are closely associated, not least by the terms of section 111(4), if payment is required to comply with adjudication decisions were more vulnerable to attack in this way, than those simply falling due under the ordinary contractual machinery." It is clear from that passage that His Honour Judge Hicks took the view that it was not possible to serve a notice pursuant to section 111 in relation to the adjudicator's decision. His Honour Judge Hicks also referred to this matter in paragraph 37 of his judgment where he considered section 111(4) of the Act. There he said: "The other subject of possible dispute is the ambit of section 111(4) but clearly it requires there to have been an effective notice to withhold payment. Mr. Furst for VHE submits that a further requirement is that notice must precede the referral and that the matter referred to adjudication must include the effect of that notice and the validity of the grounds for withholding payment which it asserts. It may be that that was not challenged by

Mr. Thomas but, in case of any doubt on that score, I record that that, in my judgment, is correct. The effect of the subsection is that, after there has been an effective notice of intention to withhold and an adjudication, payment cannot be enforced earlier than seven days from the date of the decision. There is no reason why that should be so unless the adjudication relates to the notice. Moreover, that is the natural point of reference of the expression 'the matter' with its definite article as a matter of construction." It is clear, it seems to me, from that passage that what section 111(4) is contemplating is that there may be a withholding notice but it is a with-holding notice which has been given not in relation to the adjudicator's decision but in relation to the earlier contractual provisions which has been the subject-matter of consideration by the adjudicator.

18. The second decision, dealing specifically with the question of whether there can be a withholding in respect of an adjudicator's award, is that of Lord MacFadyen in *The Construction Centre Group v. The Highland Council* [2002] B.L.R. p476 and at page 487 Lord MacFadyen said, in relation to a withholding notice under section 111, "The structure of the contractual provisions is such that the payments of that sort may not be withheld after the final date for payment unless a notice has been given. It follows, in my view, that section 111 is intended to apply only to the withholding payments in respect of which there is a contractual provision for a final date of payment. It is not intended to apply and does not apply to payments due in consequence of an adjudicator's decision" and there it was held that a notice to withhold had been served within seven days of the adjudicator's decision. However, summary judgment was granted. Mr. Darling, Q.C. submitted that there was another line of authority in the cases and he referred me to *KNS Industrial Services v. Sindall* [75 Con.L.R. 71] and *David McLean v. Swansea Housing Association* [2002] B.L.R. 125, and also *Bovis Lend Lease v. Triangle* [2003] B.L.R. 31, and Mr. Darling, Q.C. submitted that they did give support for the Parliamentary intention in providing for adjudication had been underlined by what the parties had themselves provided in the contract and he then referred to clause 39A.9 which provided, "Notwithstanding clause 38B [that is the arbitration clause] the contractor and the sub-contractor shall comply forthwith with any decision of the adjudicator and shall submit to summary judgment/decree and enforcement in respect of all such decisions. The parties have thus agreed not merely that the adjudication is to be binding but that they will comply with the adjudication, notwithstanding the arbitration clause. For good measure they have agreed that they will submit to applications for summary judgment. If Ferson had a genuine point there would then be a dispute which would have to be referred to arbitration but the parties have expressly agreed that course is not open to them once an adjudication has occurred. The clause thus prevents the party who has lost the adjudication from applying for a stay and, for good measure, requires him to submit to applications for a summary judgment. The point of that must be not that the court should hear argument at the stage of the application for summary judgment or other matters which,

apart from the adjudication provisions, should be referred to arbitration, but rather that summary judgment should be given without further ado. That is what His Honour Judge Wilcox correctly did.”

20. Now, in the present case, when one looks at clause 39A.7, although the language is not precisely the same, the contractual purpose, it seems to me, is clearly the same as that which was referred to by Longmore LJ. The decision of the adjudicator is binding on the parties under clause 39A.7.1 until determined by arbitration or legal proceedings. The parties are to comply with the decision of the adjudicator and both parties shall ensure that the decision of the adjudicator is given effect to, and if either party does not comply then the other party shall be entitled to take legal proceedings to secure such compliance. That scheme, it seems to me, necessarily indicates that the decision of the adjudicator is to be given effect to and the idea that the decision of the adjudicator can be defeated by a withholding notice in respect of events which occurred subsequent to the commencement of the adjudication seems to me to be entirely inconsistent with the statutory purpose of providing a quick and effective remedy on an interim basis. An adjudicator's decision is meant to be enforced and complied with without, it seems to me, subtle arguments and detailed arguments as to other provisions of the contract.
21. I accordingly take the view that, in the light of the reasoning of the Court of Appeal and in particular the rejection of the broad view of His Honour Judge Thornton in reliance in some considerable measure on the views expressed by His Honour Judge Humphrey Lloyd that it would defeat the purpose of this adjudication if a withholding notice can be given. It seems to me that the observations of Lord MacFadyen are clearly right in this connection.
22. The *VHE* case is also, it should be noted, a case dealing with the same contract as the present case with similar payment provisions. It is a J.C.T. contract with contractor's design and the payment provisions appear to be the same. They were considered by the court and, it seems to me that, if there were any inconsistency between first instance decisions, I ought to follow the decision in the *VHE* case, but it seems to me in any event the position is clear as a matter of construction of clause 39A.7 of this contract and that that clause has the effect of preventing a withholding notice from being served in the present case.
23. I have considered whether it is in fact right to regard the decision of the adjudicator as itself giving rise to a fresh right of payment, and it seems to me that I do not need to go into that question. It seems to me that, as far as this case is concerned, the withholding notice contemplated both by the statute and by clause 30.3 was a withholding notice given before the final date for payment in relation to the contractual provisions under this contract in relation to application 31, that is either 1st or 2nd January and that, whatever else section 111 may do, it does not have the effect of giving rise to a further and fresh right to serve a withholding notice in respect of what is essentially the obligation to pay in accordance with the application which was made in this case.

24. Mr. Darling, Q.C. has submitted that there should be a stay of enforcement pending a decision of the adjudicator in the subsequent and current adjudication. For the reasons I have already expressed, it seems to me it would be quite inappropriate to grant a stay on that ground. The decision of the adjudicator in the subsequent adjudication cannot affect the entitlement under this application which is supported by the decision of the adjudicator on application 31. It has not been suggested before me when the matter was argued that a stay should be imposed because there was any financial risk. Should at the end of the day, for example, on the final account, it be found that the Claimant had received more money than it was entitled to, it has not been suggested that the Claimant would not be able to repay the monies. The matter, it seems to me, is essentially a matter of cashflow and the contractual provisions are clear, and there is no reason, it seems to me, why the Claimant should be kept out of its money which it is clearly entitled to, both under the terms of the contract and pursuant to the decision of the adjudicator.
25. Accordingly, as I have indicated, I give judgment for the Claimant in respect of the amount claimed and I refuse a stay of enforcement pending the decision in the second adjudication in relation to application number 33.