JUDGMENT : MR. JUSTICE AKENHEAD: TCC. 3rd October 2007

1. There are various applications before me, some of which are contested, some of which are not. Essentially the contested issue is as to whether there should be an ordering of preliminary issues in this case.

2. Briefly, the apparently agreed facts of the case are that in December 2005 the parties to this action entered into a contract whereby Phoenix Interiors Ltd. ("Phoenix") were employed by Leading Rule Ltd. ("Leading Rule") to carry out mechanical and electrical works under a trade contract which was based, at least generally, on the JCT form of trade contract. Works apparently proceeded until the summer of 2006 when disputes arose.

3. The parties, faced with an adjudication at that stage, reached an agreement which has been called the addendum agreement whereby, apparently, agreements were made for certain sums to be paid and certain programmes to be kept to. I am not making any findings at this stage as to precisely what the terms of this addendum agreement mean.

4. So far as the timetable was concerned, that addendum agreement was reached on or about 10th July 2006. There is an issue between the parties as to whether one of the sums, £108,000-odd, plus VAT was to be paid on or by 21st July 2006 and as to whether the 21st July represented the final date for payment. On 21st July 2006, it is pleaded that Leading Rule served a withholding notice for the purpose of the Housing Grants Construction and Regeneration Act 1996. On 4th (or possibly 7th) August 2006, Phoenix suspended work. Meanwhile, there had been a reference to adjudication. An adjudicator's decision was issued on 24th August 2007, the adjudicator being Mr. Ian Wishard. On 25th August 2007, Phoenix submitted apparently an invoice for £108,000 plus VAT. I am told that the £108,000 but not VAT was paid shortly thereafter.

5. In February it is said that Phoenix served a notice of default prior to determination under the provisions of the trade contract between them, and that on 28th February 2007 Phoenix purported to determine their contract or their employment under the contract, in effect for non-payment of the VAT element of the £108,000-odd figure referred to by me earlier. Again, I am not making precise findings about these dates or about the substance of what happened on those dates, but these are the events and dates which have emerged from the skeleton arguments and the pleadings so far. It is said that on 7th March 2007 Leading Rule rejected the notice of determination as invalid and also on that date their construction manager instructed Phoenix in effect to get on with the work or at least to proceed with the works with reasonable diligence.

6. Thereafter, it is said that on 14th March 2007 Phoenix wrote back indicating that they would not be completing the work and they did not accept that they had to comply with any instruction.

7. Phoenix commenced proceedings first in early September, and directions on that were given by Ramsey J. on 4th September 2007, fixing a hearing for 5th October, that is in two days' time, for two hours. Essentially Phoenix's claim in those Part 8 proceedings relates to legal matters in which they seek to overturn that part of the adjudicator's decision with which they disagree. They seek a declaration that clause 4.12.6 of the contract does not have the effect of modifying the notice period required by section 112 of the Act from at least seven days to at least 28 days before the right to suspend pursuant to sections 112(1) of the 1996 Act may be exercised. The second declaration only applies if the first declaration is given. They seek a declaration that the early commencement of the suspension by the claimant, if the suspension continues and the party in default continues with its default, does not render the entire suspension invalid but, rather, the claimant is entitled to rely on the provisions of section 112(4) of the 1996 Act from the date on which the right to suspend performance actually materialised.

8. So Phoenix seek to argue that although they suspended before the 28 day period referred to in the trade contract was up, nonetheless, the 1996 Act, they argue, permits them to suspend provided only seven days of non-payment has happened. Alternatively, they say that even if that is wrong and they were not entitled to suspend on 4th or 7th August, they were entitled to suspend when the 28 day period expired after 21st July. That is the argument and it is in respect of those two declarations that preliminary issues are sought.

9. Against that, Leading Rule issued their own proceedings formally towards the end of September, on 27th September 2007. They seek to expand the overall series of disputes between the parties and they seek to argue that the withholding notice, which they say was given on 21st July, was out of time. They seek to uphold the adjudicator's decision that a 28 day notice of intention to suspend had to be given under the contract. In effect they seek to argue that that did not in any way conflict with section 112 of the 1996 Act. Thirdly, they seek to pursue a claim that Phoenix's purported determination of the contract was invalid and ineffective - that determination (or purported determination) occurring in February 2007. Leading Rule also, essentially in consequence upon the outcome of the determination issue, seek to claim that the instructions given by their construction manager were validly given and, and given the non-compliance with those instructions, they seek, in effect, a declaration that they were and will be entitled to employ and pay others to carry out the relevant works. I am told by Mr. Williamson, and I accept for the purposes of this hearing, that Leading Rule have not yet employed and paid others to carry out what are said to be the outstanding works under the trade contract.

10. Good, succinct skeleton arguments have been put in by both counsel and they have been extremely helpful. Mr. Lewis frankly accepts that if his client succeeds on the preliminary issues he seeks, the decision will not be determinative. That is at para.17(i) of his skeleton argument, and that is a proper and correct concession to make. There will still be outstanding issues as to whether the suspension was justified in the first place, and one will have

to go into the issues of whether sums were properly due, whether a proper withholding notice had been served, and a number of other issues.

11. It seems to me, reviewing the matter overall and in particular having regard to the overriding objective and the TCC Court Guide approach on preliminary issues in the context of proper case management, I have formed the view that the ordering of preliminary issues will not substantially save time or money. I am not satisfied that it would significantly improve the possibility of a settlement and I am not satisfied that a significant element of the proceedings would or would necessarily be determined. It seems to me that if there were two trials - one of the preliminary issues and one of the remaining issues - there would be a significant increase in costs. The reality is that when there are two hearings - one of preliminary issues and one of the following - both parties gear themselves up to fight the case tooth and nail, quite properly so, and a significant amount of costs are wasted, whereas if there is one hearing there will be a saving in costs compared with there being two hearings.

12. I am also concerned that if I were to order preliminary issues, the effect of any appeals process would disrupt the prompt resolution of all outstanding issues. It is a slightly odd state of affairs but Phoenix is seeking preliminary issues which are only helpful (arguably) if the preliminary issues are resolved against it. That may not be entirely logical and usually when preliminary issues are sought it is the other way round, that if the party seeking the preliminary issues succeeds on them, that that will shorten time.

13. I am, however, minded, and I take into account the very real possibility, which I will now address with the parties, of a shortened timetable, to have a hearing on all the issues in respect of this case other than the quantification of any damages if the need arises on Leading Rule's claims against Phoenix. It seems to me that there is a very good chance, subject to hearing from the parties, of getting this matter on if not just before Christmas, in January of next year. It is said that I should take into account the fact that a short delay in the resolution of all the issues as opposed to the more prompt and expeditious of preliminary issues will enable Leading Rule to institute adjudication against Phoenix and seek to secure some financial or tactical advantage. I do not consider that that is a significant factor for me to take into account. The 1996 Act gives parties to construction contracts the right to proceed to adjudication at any time. That includes at a time at which proceedings may be on foot between the parties in the court or in arbitration if there is an arbitration agreement between the parties. Given that the Act gives the parties that right, then it would be a rare case for the court to take into account the fact that some slight delay in bringing matters on for final hearing might enable a party to pursue a right to adjudication. Therefore I attach little, if any, weight to that factor.

14. So, all in all, subject to there being an appropriately tight timetable to bring this matter on within the next three months or so, I am minded to disallow Phoenix's application for preliminary issues. I do not say that the application was improperly brought of course. Perhaps given the relative lateness of the response of Leading Rule to Phoenix's own proceedings, it was not necessarily a bad or wholly unjustified application to bring but, having heard the arguments, I am against Phoenix on their application.

MR. WILLIAMSON appeared on behalf of the Claimant.
MR. LEWIS appeared on behalf of the Defendant.