BEFORE L.J. PETER GIBSON; BUXTON & CHADWICK **:** Court of Appeal : 31st July 2000

1. **LORD JUSTICE PETER GIBSON**: I will ask Buxton LJ to give the first judgment.

2. **LORD JUSTICE BUXTON**: This appeal from Dyson J arises out of a reference to adjudication of differences arising during a construction contract, under the procedure envisaged by section 108 of the Housing Grants and Reconstruction Act 1996. That provides that the parties may at any time refer disputes to adjudication and, by section 108(3), the decision of the adjudicator shall be binding until the dispute is finally determined by legal proceedings or arbitration. The purpose of this procedure is to enable a quick and interim, but enforceable, award to be made in advance of the final resolution of what are likely to be complex and expensive disputes. That feature is reinforced by the provisions of the Construction Industry Model Procedure, by which the adjudication in this case was governed. Rules 4 and 5 of that procedure provide as follows:
"4.The Adjudicator's decision shall be binding until the dispute is finally determined by legal proceedings, by arbitration ... or by agreement.
5.The Parties shall implement the Adjudicator's decision without delay whether or not the dispute is to be referred to legal proceedings or arbitration."

3. As Dyson J himself explained in the earlier case of **Macob v Morrison** [1999] BLR 93 at page 97: "It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved."

4. The effective claim in the present proceedings is an application by Dahl-Jensen (UK) Ltd ("Dahl-Jensen"), one of the parties to a substantial building sub-contract, for summary judgment under Part 24 of the CPR to enforce an award of an Adjudicator, Mr William Gard. That award arose as follows.

5. Bouygues (UK) Ltd ("Bouygues"), was the main contractor for building works under a PFI contract. Dahl-Jensen was the mechanical sub-contractor. The sub-contract contained both an arbitration and an adjudication clause, and also provided for retention of 5% of the contract price, pending certification under the main PFI contract. In due course Bouygues, being dissatisfied with Dahl-Jensen's work, determined Dahl-Jensen's employment and arranged for the subcontract work to be completed by others.

6. Dahl-Jensen issued a notice to adjudicate, claiming payment for work done but allegedly not valued under extensions of the sub- contract, and also damages for breaches by Bouygues of the sub-contract and for its wrongful repudiation. Bouygues shortly thereafter issued its own notice to adjudicate, claiming the refund of payments already made in respect of work allegedly overvalued under the sub-contract, damages for delayed completion, and damages for costs incurred by the termination of Dahl-Jensen's employment. Both notices were referred to Mr Gard. It was agreed that he should treat Bouygues' claim as a counter-claim to the claim by Dahl-Jensen. Before us, there was some consideration of whether that had been an appropriate course, but it was the course taken by agreement and, although it was the direct cause of the difficulty to which I shall shortly advert, it has not been sought to attack Mr Gard's award on that ground.

7. It will have been seen that much of the dispute concerned the valuation of work performed under the sub-contract before its termination, Dahl-Jensen claiming in respect of extensions of the works and Bouygues claiming that work within the contract had been overvalued. That meant that Mr Gard had to review the whole of the progress of the sub-contract, and not just the items specifically arising out of its termination. Mr Gard set out his conclusions in more than one form in his very detailed award and, in order to understand the issues in this appeal, it is necessary to some extent to reconstruct his reasoning from those sources. That I attempt in what follows. Although the figures are important for understanding the issues, there is no dispute about them as figures, and therefore I shall for brevity use rounded figures expressed in thousands of pounds rather than the full detail appearing in the award.

8. First, Mr Gard made no award on Bouygues's claim in respect of overpayment based on excessive valuation, subject, as he said in paragraph 16.8.1.1 of his award, to Bouygues right to set-off against payments already made any losses caused by breaches by Dahl-Jensen in the performance of the contract. Mr Gard valued the contract works, the original tender sum plus extensions, at a sum of £7,240,000. This sum is expressed in the award to be stated "gross": meaning thereby, as I infer, that it is the actual contract sum without any deduction of the retention monies. At the date of the award the retention monies had not yet become due for payment, and therefore that fact would need to be taken into account when any award of actual payment was made. The exercise that I presently describe was, however, simply a calculation of the contract sum in the light of the disputes that had been referred to Mr Gard.

9. Mr Gard then took three further steps. First he deducted from the £7,240,000 a sum of £647,000 that he awarded to Bouygues in respect of damages arising out of the termination, and he expressed the result in his award as the "contract sum minus deductions" of £6,593,000, again stated to be "gross". Second, he deducted from that revised "contract sum" the amount actually paid by Bouygues under the sub-contract of £6,772,000, to produce a balance in favour of Bouygues of £179,000, stated to be gross. Third, he then added back to the earlier contract sum of £7,240,000 an award of £387,000 that he had made to Dahl-Jensen in respect of additional works performed by Dahl-Jensen and claims for damages sustained by them while the contract was subsisting. That addition increased the gross "contract sum minus deductions" due to Dahl-Jensen from the figure stated above of £6,593,000 to £6,979,000. That in turn altered the overall calculation from the balance in favour of Bouygues of £179,000 to a balance in favour of Dahl-Jensen of, in round terms, £208,000. Mr Gard's award was therefore that Bouygues should pay that sum of £208,000 to Dahl-Jensen.

10. On receipt of that award Bouygues' solicitors immediately protested. They pointed out that since the calculations had been done on the basis of the "gross" contract price, thus including the 5% retention, the effect of the award was to require Bouygues to pay the 5% retention to Dahl-Jensen, even though it was not yet due under the contract. The solicitors contended that in order to put the matter right there should be deducted from the award to be paid 5% of the final contract sum of £6,979,000. That would reduce that sum to £6,630,000, and thus produce a payment to Bouygues of £141,000 in place of the ordered payment to Dahl-Jensen of £208,000. That sum, being the result of applying the 5% figure not to the contract sum but to a sum reached after the addition of liquidated damages may not have been mathematically the correct claim; but nothing turns on that for present purposes, and the calculation did certainly serve to raise the point of principle, namely the position in respect of the 5% retention.

11. It is not challenged in this appeal that, however Mr Gard chose to approach the calculation of the sums due under the contract, he was wrong to make an actual award requiring payment under that contract without taking account of the fact that the 5% of the contract sum that represented the retention monies was not yet due for payment. The award, therefore, was wrong: but is that a ground on which its enforcement can be resisted?

12. The judge directed himself that he should approach that question according to the same principle as applies in the case of an expert valuer: as stated by Knox J in Nikko Hotels (UK) Ltd v MERPC Plc [1991] 2 EGLR page 103, at page 108B, "If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity."

13. I did not understand that principle to be disputed. Mr Furst QC for Bouygues, however, argued that the concept of answering the wrong question extended to a case such as the present where the Adjudicator had in fact decided something that fell outside his jurisdiction, namely the release of the retention monies. Mr Gard's award therefore could not stand, even if it was clear, at least on the face of the documents used in the award, that he did not intend or purport to rule on the retention monies.

14. This is a very short point. I am satisfied that the judge was right in rejecting Bouygues' argument. Although the effect of Mr Gard's award was as Bouygues said, that was not because he answered a question about the release of the retention monies. No such question was put to him by the parties, and he did not pose any such question to himself. The case is quite different from, for example, that hypothesised by Dillon LJ in **Jones v Sherwood** [1992] 1 WLR at page 287A, where an accountant

instructed to value a parcel of shares values the wrong parcel, either by extent or by identity. Here, Mr Gard answered exactly the questions put to him. What went wrong was that in making the calculations to answer the question of whether the payments so far made under the sub-contract represented an overpayment or an underpayment, he overlooked the fact that that assessment should be based on the contract sum presently due for payment, that is the contract sum less the retention, rather than on the gross contract sum. That was an error, but an error made when he was acting within his jurisdiction. Provided that the Adjudicator acts within that jurisdiction his award stands and is enforceable.

15. Bouygues contended that such an outcome was plainly unjust in a case where it was agreed that a mistake had been made, and particularly in a case, such as the present, where Dahl-Jensen was in insolvent liquidation, and therefore the eventual adjustment of the balance by way of arbitration will in practical terms be unenforceable on Bouygues' part. I respectfully consider that the judge was quite right when he pointed out that the possibility of such an outcome was inherent in the exceptional and summary procedure provided by the 1996 Act and the CIC Adjudication Procedure. And in any event unfairness in a specific case cannot be determinative of the true construction or effect of the scheme in general.

16. Mr Furst however had another argument. When Bouygues' solicitors wrote to Mr Gard to complain about his award they suggested that an arithmetical error had been made in the award and invited him to correct what was described as a slip. Mr Gard replied in the following terms:
"I reserved the right to rectify any 'slip' in my Decision as if it were an Award published pursuant to the Arbitration Act 1996. I did this in view of the complex and detailed nature of the issues and the time which I had to consider them and publish a Decision. The relevant part of Section 57 of the Act states that the tribunal may, on its own initiative or on the application of a party: '(a) correct an Award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the Award' I have discussed the Respondent's point with Mr Kay",

17. I interpose that he was a gentleman who is an expert who was assisting Mr Gard, *"and considered the submissions made on behalf of both Parties. I am clear that the calculations to which I have been referred by the Respondent (namely the summary in Schedule 5) correctly reflect my intention and do not contain a clerical mistake or error arising from an accidental slip or omission. I shall not therefore be making any amendment to my Decision."*

18. Mr Furst contended that, by saying that the calculations set out in the award correctly represented his intention and contained no clerical error or accidental slip, Mr Gard was asserting that he indeed had intended, and had intended to rule, that Bouygues should pay Dahl-Jensen the retention monies. Accordingly, whatever might be collected from the adjudication documents read on their own, it was in fact the case that Mr Gard had answered a question that had not been put to him and which did not therefore fall within his jurisdiction.

19. I have the gravest doubts as to whether it can ever be appropriate to look outside the objective evidence provided by the terms of the award in order to determine what question the Adjudicator has in fact answered. Mr Furst disclaimed any possibility of, for instance, requiring the Adjudicator to file evidence explaining any statements made by him outside the terms of the award and then cross-examining on that evidence: but it would seem difficult to exclude such a step if investigation of the Adjudicator's subjective intentions are to be taken seriously. I do not however need to rule on that point, since I am quite clear, as was the judge, that Mr Gard's letter goes nowhere near to establishing the conclusion that Bouygues would seek to draw from it. Mr Gard simply replied to the contention put to him, that he had made a clerical error or slip. He said that he had not. That is a long way away from any admission or assertion that he had taken it upon himself to award the retention money to Dahl-Jensen when no claim had been made for that retention money.

20. I am therefore of opinion that the judge was right both in his statement of the relevant law and in his application of it to this case. I would dismiss this appeal.

21. I have reached the foregoing conclusion on the basis of the issues argued before us, which were effectively limited to the construction and effect of the award. The further issue of whether in fact it was appropriate to seek the enforcement of that award when Dahl-Jensen was in liquidation is addressed in the judgment that Chadwick LJ is about to deliver. I have had the advantage of discussing with Chadwick LJ in advance of the delivery of his judgment the observations that he intends to make and I venture to say that I respectfully agree with them. I however would dismiss this appeal.

22. **LORD JUSTICE CHADWICK**: Section 108(1) of the Housing Grant, Construction and Regeneration Act 1996 confers on a party to a construction contract the right to refer a dispute arising under the contract for adjudication under a procedure complying with that section. Section 108(3) is in these terms:
"(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement."

23. It is not in dispute that the contract in the present case is a construction contract for the purposes of section 108 of the 1996 Act. Nor is it in dispute that the parties, as they were entitled to do, referred disputes which had arisen between them under that contract to an adjudicator. They did so not under the terms of the contract itself, nor under the terms of the statutory scheme contained in Statutory Instrument 1998 649, but under the Model Adjudication Procedure, Second Edition, published by the Construction Industry Council.

24. Paragraph 4 of the Model Adjudication Procedure reflects the provisions of s108(3) of the Act. Paragraph 5 provides that:
"5.The Parties shall implement the Adjudicator's decision without delay whether or not the dispute is to be referred to legal proceedings or arbitration."

25. Paragraphs 30 and 31 are in these terms:
"30.The Parties shall be entitled to the redress set out in the decision and to seek summary enforcement, whether or not the dispute is to be finally determined by legal proceedings or arbitration. No issue decided by the Adjudicator may subsequently be referred for decision by another adjudicator unless so agreed by the Parties.
31.In the event that the dispute is referred to legal proceedings or arbitration, the Adjudicator's decision shall not inhibit the right of the court or arbitrator to determine the Parties' rights or obligations as if no adjudication had taken place."

26. The purpose of those provisions is not in doubt. They are to provide a speedy method by which disputes under construction contracts can be resolved on a provisional basis. The adjudicator's decision, although not finally determinative, may give rise to an immediate payment obligation. That obligation can be enforced by the courts. But the adjudicator's determination is capable of being reopened in subsequent proceedings. It may be looked upon as a method of providing a summary procedure for the enforcement of payment provisionally due under a construction contract.

27. The first question raised by this appeal is whether the adjudicator's determination in the present case is binding on the parties - subject always to the limitation contained in section 108(3) and in paragraphs 4 and 31 of the Model Adjudication Procedure to which I have referred. The answer to that question turns on whether the adjudicator confined himself to a determination of the issues that were put before him by the parties. If he did so, then the parties are bound by his determination, notwithstanding that he may have fallen into error. As Knox J put it in **Nikko Hotels (UK) Ltd v MEPC PLC** [1991] 2 EGLR 103 at page 108, letter B, in the passage cited by Buxton LJ, if the adjudicator has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.

28. I am satisfied, for the reasons given by Buxton LJ, that in the present case the adjudicator did confine himself to the determination of the issues put to him. This is not a case in which he can be said to have answered the wrong question. He answered the right question. But, as is accepted by both parties, he answered that question in the wrong way. That being so, notwithstanding that he appears to have made an error that is manifest on the face of his calculations, it is accepted that, subject to the limitation to which I have already referred, his determination is binding upon the parties.

29. The second question raised by the appeal is whether the judge was right to give summary judgment to Dahl-Jensen for the amount which the adjudicator had decided Bouygues should pay. In the ordinary case I have little doubt that an adjudicator's determination under section 108 of the 1996 Act, or under contractual provisions incorporated by that section, ought to be enforced by summary judgment. The purpose of the Act is to provide a basis upon which payment of an amount found by the adjudicator to be due from one party to the other (albeit that the determination is capable of being re-opened) can be enforced summarily. But this is not an ordinary case. At the date of the application for summary judgment - indeed at the date of the reference to adjudication - Dahl-Jensen was in liquidation.

30. In those circumstances rule 4.90 of the Insolvency Rules 1986 has effect. The rule is in these terms, so far as material:
"(1) This rule applies where, before the company goes into liquidation there have been mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the liquidation.
(2) An account shall be taken of what is due from each party to the other in respect of the mutual dealings and the sums due from one party shall be set off against the sums due from the other.
(3) ...
(4) Only the balance (if any) of the account is provable in the liquidation. Alternatively (as the case may be) the amount shall be paid to the liquidator as part of the assets."

31. That rule is made under section 411 of the Insolvency Act 1986. Subsection (2) of that section - and Schedule 8, paragraph 12 - provide that the Lord Chancellor may make provision by rules or regulations as to the debts that may be proved in the winding up. There is no doubt that the rule has statutory force. It applies wherever there have been mutual dealings, giving rise to mutual obligations and mutual credits, between a company which subsequently goes into liquidation and another party.

32. The effect of the rule was explained by Lord Hoffman in his speech in the House of Lords in **Stein v Blake** [1996] 1 AC 243. In that appeal Lord Hoffman was addressing the provisions of section 323 of the Insolvency Act 1986, which is applicable in an individual insolvency or bankruptcy. But the provisions of section 323 of the Act and Rule 4.90 of the Rules are indistinguishable. The rule-making body, in 1986, incorporated into corporate insolvency provisions which had, for many centuries, been part of the law in relation to individual bankruptcy. What Lord Hoffman had to say about section 323 of the Act is equally applicable to corporate insolvency; to which rule 4.90 applies. At page 251 D-F Lord Hoffman explained the difference between bankruptcy set-off and legal set-off outside bankruptcy:
"Bankruptcy set-off, on the other hand, affects the substantive rights of the parties by enabling the bankrupt's creditor to use his indebtedness to the bankrupt as a form of security. Instead of having to prove with other creditors for the whole of his debt in the bankruptcy, he can set off pound for pound what he owes the bankrupt and prove for or pay only the balance. So in ***Forster v Wilson*** *(1843) 12 M & W. 191, 204, Parke B said that the purpose of insolvency set-off was 'to do substantial justice between the parties'.*

Although it is often said the justice of the rule is obvious, it is worth noticing that it is by no means universal. It has however been part of the English law of bankruptcy since at least the time of the first Queen Elizabeth."

33. The importance of the rule is illustrated by the circumstances in the present case. If Bouygues is obliged to pay to Dahl-Jensen the amount awarded by the adjudicator, those monies, when received by the liquidator of Dahl-Jensen, will form part of the fund applicable for distribution amongst Dahl-Jensen's creditors. If Bouygues itself has a claim under the construction contract, as it currently asserts, and is required to prove for that claim in the liquidation of Dahl-Jensen, it will receive only a dividend pro rata to the amount of its claim. It will be deprived of the benefit of treating Dahl-Jensen's claim under the adjudicator's determination as security for its own cross-claim.

34. Lord Hoffman pointed out, at page 252 in **Stein v Blake** that the bankruptcy set-off requires an account to be taken of liabilities which at the time of the bankruptcy may be due but not yet payable, or which may be unascertained in amount or subject to contingency. Nevertheless, the insolvency code requires that the account shall be deemed to have been taken, and the sums due from one party

shall be set off against the other, as at the date of insolvency order. Lord Hoffman pointed out also that it was an incident of the rule that claims and cross-claims merge and are extinguished; so that, as between the insolvent and the other party, there is only a single claim - represented by the balance of the account between them. In those circumstances it is difficult to see how a summary judgment can be of any advantage to either party where, as the 1996 Act and paragraph 31 of the Model Adjudication Procedure make clear, the account can be reopened at some stage; and has to be reopened in the insolvency of Dahl-Jensen.

35. Part 24, rule 2 CPR enables the court to give summary judgment on the whole of a claim, or on a particular issue, if it considers that the defendant has no real prospect of successfully defending the claim and there is no other reason why the case or issue should be disposed of at a trial. In circumstances such as the present, where there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of an adjudication which is, necessarily, provisional. All claims & cross-claims should be resolved in the liquidation, in which full account can be taken and a balance struck. That is what rule 4.90 of the Insolvency Rules 1986 requires.

36. It seems to me that those matters ought to have been considered on the application for summary judgment. But the point was not taken before the judge and his attention was not, it seems, drawn to the provisions of the Insolvency Rules 1986. Nor was the point taken in the notice of appeal. Nor was it embraced by counsel for the appellant with any enthusiasm when it was drawn to his attention by this Court. In those circumstances - and in the circumstances that the effect of the summary judgment is substantially negated by the stay of execution which this court will impose - I do not think it right to set aside an order made by the judge in the exercise of his discretion. I too would dismiss this appeal.

37. **LORD JUSTICE PETER GIBSON**: I agree with both judgments.

Order: Appeal dismissed with costs summarily assessed at £20,000. Stay granted.

(ORDER DOES NOT FORM PART OF APPROVED JUDGMENT)

Mr S Furst QC (Instructed by J R Jones, 56A The Mall, Ealing, London, W5 3TA) appeared on behalf of the Applicant.
Mr Sean Brannigan (Instructed by Messrs Hammond Suddards, Devonshire Square, London) appeared on behalf of the Respondent.