JUDGMENT : HIS HONOUR HUMPHREY LLOYD : TCC. 4th February 2000

1. This is an application by the claimant, Cook, to enforce by way of summary judgment under Part 24 of the CPR an adjudicator's decision made on 15 December 1999 by Mr Julian Critchlow, who had been appointed by the Technology and Construction Solicitors' Association, as provided in the subcontract between Cook and the defendant, Shimizu. The application is resisted by Shimizu. It paid the sum that it considered to be due pursuant to the decision, namely £22,246.26. The amount of the decision was, in gross terms, some £222,659 in favour of Cook. By amendment the application is thus for summary judgment for £197,827. (All figures are inclusive of VAT.)

2. In my view the issue primarily turns on the meaning to be given to the notice by which the disputes were referred to the adjudicator (i.e. what were the disputes referred to the adjudicator) and what is the meaning to be given to the decision. Enforcement is also resisted on the grounds that if the decision were to mean what Cook says it means, then the adjudicator has exceeded his jurisdiction because he has decided that the sum of money which Cook seeks to be paid was an amount which he had to decide was payable by Shimizu to Cook. It is of course well established that decisions of people such as adjudicators may be challenged and may be unenforceable if the decision of the adjudicator was not one which he was authorised to reach; in other words the adjudicator has exceeded his jurisdiction: **Jones v Sherwood Computer Services plc [**1992] 1 WLR 277 which was referred to and applied in **Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd** [2000] BLR 49 to which Mr Bowsher for Cook referred in his skeleton argument. I do not of course refer to a decision was not authorised because it was merely mistaken, because, although an adjudicator might be regarded as exceeding his jurisdiction in the sense that he was not authorised to make a mistake, that is not the sense in which the term is used (unless of course the mistake in the application of the law or principles which the adjudicator was authorised to apply), such as where the adjudicator gave a decision which was not within the contract. The purpose of an adjudication is to resolve, at least temporarily, an existing dispute and not to create a new and different dispute.

3. The subcontract was for mechanical works at the Telehouse 2000 building in the London Docklands. It was made in 1998 and although no formal subcontract was executed it is accepted that it incorporated DOM/2. Evidently in the summer of 1999 practical completion was achieved, either in June or July. For technical reasons, retention, which at one stage was referred to the adjudicator, was not released because Shimizu had not achieved the requisite degree of completion which might have entitled Cook to be paid its retention. Before the dispute was referred to adjudication payments on account had been made so the disputes essentially arose out of discussions about Cook's final account. That is clear from the letter of reference of 15th October 1999 which gave notice of intention to seek adjudication. The letter was written by the managing director of Cook, Mr Anstead, (and on its face did not emanate from any legal or other adviser). I intend to read this letter in the sense in which I am sure it was received by Shimizu. It is not right to read letters of this kind minutely, to pore over individual words, to milk a particular noun or verb and to try and give it a legalistic effect. One must put oneself in the position of the parties at the time and adopt, so far as one can, a commonsense approach. It said:

   "The writer visited Mr Stannard [to whom the letter was being sent] at your offices on 22 September 1999. We observed that our provisional final account figure was circa £2.4 million compared with your valuation of circa £1.8 million, and that such significant differences of opinion existed between our respective colleagues as to the value of variations, acceleration, delay, disruption and contra charges that it was unlikely that we could agree the final account without involving third parties.

   "We emphasised that we preferred to negotiate with yourselves in a professional way, but that unless you felt able to make movements towards us on certain key issues we would use adjudication. To date we have had no meaningful response from yourselves.

   "Accordingly, please accept this letter as notice of our intent to refer the following disputes to adjudication under the ORSA Adjudication Rules:

   "1. Reinstatement of the agreed sum for acceleration circa £72K.

   "2. Removal of negative variations for work not within the scope of our subcontract circa £60K.

"3. Removal of contra charges not relevant to our activities circa £80K.

"4. Release of half retention monies circa £45K.

"We will present detailed figures to the adjudicator and they may differ from the above."

4. The letter concluded by *saying "Further substantial sums were claimed by us for [various matters].... and we would welcome an opportunity for further discussion."* That letter was also then sent to the Appointments Officer of TecSA and Mr Critchlow was appointed. He conducted the procedure in accordance with the TecSA Rules, version 1.2. Rule 11 provides: *"The scope of the adjudication shall be the matters identified in the notice requiring adjudication". I* was also referred to Rules 3, 14, and 28, although I do not consider that anything turns on them. Mr Critchlow received submissions from the parties. The time for making his decision was extended by agreement. He duly gave his decision in which he concluded that he had four issues to deal with arising from the letter of referral. I am concerned only with the first three issues.

5. He recorded in his letter of decision the nature of the case of each party, using language which was comparable to but not identical to the terminology used by Cook. Some of the figures which are recorded in the decision clearly differ from those contemplated by Cook, both as regards its own claims and as regards Shimizu's claims.

6. Although the acceleration agreement is clearly a claim in the usual positive sense, the other two claims were ones which were made in order to recover or to get a decision about amounts which Shimizu had considered were either effectively due to it or were valuations made by it. They therefore covered *"negative variations"* which was a term used to describe a wide variety of items other than pure contra charges or set-off items such as omissions and over-valuations. In the summary of the decision the figures thus naturally changed.

7. The adjudicator decided that a binding acceleration agreement had been entered into and that Cook was entitled to be paid £73,461 plus VAT in respect of it. That was issue 1.

8. Issue 2 concerned the negative variations. Having considered each of the items Mr Critchlow said: "I find and hold that the respondent was entitled to deduct £29,146.24 plus VAT but has wrongfully deducted a further £61,000.90 plus VAT, and the referring party is entitled to recover the said sum of £61,000.90 plus VAT from the respondent."

9. Similarly in respect of the third issue he said: "I find and hold that the respondent is entitled to items of set-off amounting to £67,068.70 plus VAT, but has wrongfully deducted a further £55,035.65 plus VAT, and the referring party is entitled to recover the same from the respondent."

10. So on both issues 2 and 3 whilst he accepted much of Cook's case he thought that Shimizu had also been right. He did not total up those figures in any way and, having dealt with retention, interest and costs he concluded his decision by saying only: "I direct that all sums payable pursuant to this decision shall be paid by the respondent to the referring party within seven days of the date hereof, save that my fee shall be paid to me within seven days of the date of the invoice."

11. Cook read that decision as entitling it to a payment of over £200,000. It treated the last words which said the sums that had been mentioned in the decision were "payable" as meaning that they were then to be paid in full. Shimizu, however, read the decision as indicating that the adjudicator had decided that some of the items which were being disputed were to be treated in a particular way in the overall final account then under negotiation between the parties. Accordingly, within seven days, on 22nd December 1999, Shimizu duly issued a payment notice and set out, in explanatory schedules and other forms, how the amount should be treated. In its payment advice notice no. 11 it summarised the position. It shows that it regarded the effect of the decision as resulting in a further payment to Cook of £22,246.26. It arrived at that amount by starting with the previous sum of £1,826,474.06 for measured work, then (1) adding to it the amount awarded in respect of acceleration, (£73,461); (2) treating the negative variations in the sum of £29,146.24 as a deduction; (3) treating the contra charges as £67,068 again as a deduction, and thus so as to arrive at a net balance (before amounts paid on account) of £1,803,720.12. It then deducted the amount paid on account of £1,781,474.06 to produce £22,246.26, which it then paid.

12. Cook immediately issued proceedings and made the usual application for abridgement of time. The parties sensibly anticipated the usual practice of this court and agreed a consent order so that Shimizu's evidence was available by 18 January (taking into account the Christmas and New Year holidays) and thus the application could be heard as soon as possible thereafter.

13. Shimizu therefore opposes enforcement on the grounds that its interpretation of the decision was correct. I have already said that this is primarily a question both of the meaning to be given to the decision itself but also of the letter of referral and the points which were being referred to the adjudicator for decision. The adjudicator did not express the consequences of his findings in the form of a total or net figure payable to Cook as he might have done if Cook's view of the decision were right. Shimizu says that this is indicative of the true construction to be given to the decision and of their view of the referring letter. Since it is to assumed that the adjudicator intended to decide only that which he had been asked to decide it is convenient first to consider the effect of the letter of referral.

14. I have come to the conclusion that Shimizu is right in its view of the referring letter. The referring letter expresses the view on the part of Cook that, out of the many items in dispute on the final account, it wished to have decisions on certain of them in the hope that, other items might well be resolved once the adjudicator's decisions were given. I refer to the opening paragraph of the letter which sets the scene. What Cook was faced with was the unlikelihood of agreeing *"the final account without involving third parties"*. Hence it had recourse to adjudication to advance that process of agreement. It made therefore a selection of items and questions relating to key points on the negative variations and on the contra charges. The letter expressly said that the detailed figures would be put forward later. (Obviously the amount for acceleration was in a separate category.) Thus the letter mentioned only rounded sums in relation to what later became issues 2 and 3. It did not refer to or ask for a revision of what had been paid so far. Furthermore, as Mr Thomas for Shimizu rightly emphasised, the letter spoke of "reinstatement" and "removal" which are naturally appropriate where there are "significant differences of opinion" about the contents or ingredients of a "provisional final account". The use of word "deduct" by the adjudicator signifies not that he had decided that a sum or sums should then be paid but expresses the view that the amount ought not to have removed by Shimizu from its version of the final account and ought to be reinstated.

15. The adjudicator's decision indicates to me that Shimizu so understood Cook's position, since in relation to both the negative variations and the contra charges Mr Critchlow recorded Shimizu's case so that it matched the case being put forward by Cook in the sense both that it dealt with Cook's case and it also wished to bring into account what it considered to be the overall position on some of the negative variations and, in particular, on the contra charges.

16. I have said that the notice requiring adjudication, did not claim that any particular sum of money was then immediately due. I do not think that, strictly I can look at the payment notice which preceded it for the purposes of deciding what the referring letter means but only because Mr Bowsher says that it is not accepted that the payment notice of 5th October 1999 had reached the claimant by the time the letter of 15th October 1999 was written. I have seen the payment notice (it has been exhibited to Shimizu's witness statement in opposition) and the figure for measured work is comparable to the figure referred to in the referring letter. But for what Mr Bowsher said, one might have assumed, that a letter of 5th October 1999 would almost certainly have reached Cook by the date of the referring letter of 15th October 1999. Any document such the letter of 5 October which operates to define jurisdiction has to be placed in its context so normally a party such as Shimizu would be entitled on an application of this kind to adduce evidence that would be admissible for that purpose.

17. It is in any event not necessary in this case to read the letter of referral with that disputed background in mind since the relevant background is to be found in the text of the letter itself. Its form, is, as it were, negative. It is not written by reference to a particular net state of accounts between the parties. If it had been then one would have expected a subcontractor such as Cook effectively to have challenged the relevant payment notice or interim valuation on the grounds that it failed to give proper effect to the matters in dispute and that it ought, therefore, to have resulted in a higher payment (or payments) than

the amount which had been paid or had not in fact been paid. The letter would then have referred specifically to the payment notice that was disputed.

18. So these factors point to the conclusion which I think is the only conclusion to be reached. Looking at this letter and notice it is plain that Cook wished to obtain a decision on what might not correctly be called points of principle, but which were a number of items or elements or ingredients in an overall final account and valuation, as opposed to obtaining a decision as to how much the next interim payment should be.

19. Cook's case is, of course, that that approach is not entirely consistent with the text of the decision letter itself. Surely, it is said, the decision should be read as it stands. It ends up by a direction, but it is a direction that "all sums payable pursuant to this decision shall be paid ..." However in view of the fact that, as I have indicated, the adjudicator did not produced a combined quantification of the result of his earlier decisions on the various issues, I consider that the adjudicator was well aware of at least the background, namely that it was a dispute about the final valuation and that it was not a dispute about a particular interim payment notice or the amount that ought to be due on it or the next one. I was told that the material before the adjudicator contained or referred to Shimizu's last payment notice but, although I would in any event have expected an adjudicator such as Mr Critchlow to have informed himself about such matters, I do not consider that I can take such a factor into account in interpreting a decision which is otherwise admirably clear.

20. I also do not consider that he adjudicator decided to leave the parties to tot up the total as the true amount to be paid within seven days. The tenor of the decision does not suggest that the adjudicator shirked such a simple task. Rather it suggests that the adjudicator decided that he did have the material to express the result in terms of an immediate payment, given that he was examining only parts of the final account that were in dispute in October 1999. The words *"I direct that all sums payable ..."* do not of themselves mean that the sums payable in the decision are necessarily immediately payable. They are payable pursuant not just to the decision but, quite obviously, pursuant to the sub-contract. Therefore, the words *"the sums payable pursuant to the decision ..."* must necessarily mean sums that are otherwise payable pursuant to the subcontract, ie if payable pursuant to the subcontract. That interpretation does not pervert or bend the words of the decision. It gives effect to the decision in the manner in which a decision of this kind should be read, ie one which is intended to implement the subcontract between the parties (and not to conflict with it). Cook's view would result in no account being taken of what amounts had or had not already been paid on account of some of the items in dispute, as the case may be. The adjudicator was not required to take that aspect into account at all. Obviously, if Cook is right then it would be entitled to all these sums in the final account, but it would not now be entitled to these amounts, if indeed the amount already paid to Cook is, as Shimizu contends, quite sufficient to meet the decisions of the adjudicator.

21. For these primary reasons, I am bound to give effect to the contentions of Shimizu on this application, whether seen either as an application for summary judgment or indeed, as conditionally suggested by Mr Bowsher, for the interpretation of the decision and the referring letter. There is, for the purposes of summary judgment, at least a realistic prospect of success on Shimizu's part in establishing that the decision and the referring letter have the meanings which Shimizu puts forward. It equally follows that, if I were to accede to Mr Bowsher's argument that I should look at this application almost as a preliminary point, then *a fortiori* I would decide that point against his contentions and in favour of the defendant.

22. I raised in argument a possible alternative route which was that the decision might be ambiguous, in which case I might then be permitted to look at the payment notice. If I were wrong, which I do not think that I am, then certainly the last part of the decision was ambiguous. This is not a criticism of the adjudicator since in my view the adjudicator expressed himself in clear terms. If one were only to ask what is really meant by the last paragraph of the decision and to look at that alone (but in its context) then in my view quite clearly there are two possible meanings - "payable now" or "payable if otherwise payable". That dilemma could be resolved by looking at the circumstances surrounding the decision including for this purpose the fact that the payment notice was part of Shimizu's submissions to the adjudicator. Once that is known any ambiguity that there might be has immediately to be resolved in favour of Shimizu, because an adjudicator (and certainly one of Mr Critchlow's calibre) must be taken to

have borne in mind that only those specific elements of that payment notice which were in dispute remained effectively to be decided by him. Therefore Shimizu was right so to interpret the decision as it did. On this basis the decision is tantamount to a direction to the parties as to certain ingredients of the next valuation and that Shimizu has to give effect to them.

23. Lastly, if my view of the decision is wrong, but if, put another way, my view of the referring letter is as I have described it then the adjudicator did not give effect to it. To that extent he has not done what he was authorised to do under Rule 11 of the TecSA Rules (which here do no more than reflect sections 108(1) and (2) of the Act), namely to decide the dispute described in or the subject of the notice requiring adjudication which relate to the ingredients or elements in the final valuation. If, therefore, the interpretation to be given to the decision letter is that contended for by Cook, then I would similarly, for the same reasons, but regretfully, reach the conclusion that the adjudicator had nodded and had done something which he was not authorised to do, namely, to decide in favour of the claimant that it was entitled to sums of money which the referring letter had not asked him to do.

24. For the reasons I have already indicated I acquit the adjudicator of any such inadvertence. In my judgment he rightly had in mind the intention of providing the parties with the third party assistance (as contemplated by Cook's notice) as to what should go into the final account and, to that extent, Shimizu has correctly interpreted the award in the way it has done. Accordingly, the application will be dismissed.

Michael Bowsher appeared on behalf of the claimant, instructed by Shadbolt & Co
David Thomas appeared on behalf of the defendant, instructed by Edge Ellison.