JUDGMENT : HIS HONOUR MR JUSTICE DYSON: TCC : 14th April 2000.

1. This is an application for summary judgment pursuant to CPR Part 24 for £180,135.24, which represents the unpaid balance of the sum ordered to be paid by an Adjudicator appointed pursuant to the provisions of the Housing Grants Construction and Regeneration Act 1996.

2. The dispute arose between the claimant and defendant, who were parties to a construction contract for the carrying out of works for the environmental improvement of Swanley Town Centre. The dispute concerned (a) the claimant's alleged entitlement to an extension of time for the completion of the work, (b) its claim for loss and expense as a result of delay and disruption and (c) its claim to be paid for variations.

3. On the 20th January 2000 the claimant sent the defendant a notice of adjudication in respect of the dispute. The sum claimed by the claimant was almost £700,000 plus VAT. The notice of referral to the dispute set out in section 8 certain gross figures for loss and expense which did not give credit for sums already paid on account by the defendant. To give one example, at section 8.1 there was a claim for loss and expense for drainage and borehole works at £93,822. At paragraph 91, which is the summary of claims of loss and expense, there is a note which reads: "The gross figures which appear in section 8, paragraphs 8.1.7, 8.2.6, and 8.3.6 above have been reduced by the amounts certified."

4. In respect of the item entitled *"drainage and bore hole drilling'"*, the grid reads *"Add £93,822". "Certified "£15,860". "Amount in dispute £77,962.""*

5. The parties agreed to the appointment of Mr C S Dancaster as Adjudicator on 25th January. The dispute was duly referred to him. He gave his decision on 9th March.

6. He decided that the claimant was entitled to (a) an extension of time of 18.2 weeks in respect of phase I, and (b) the sum of £403,119.28 plus VAT, "subject only to such retention and liquidated and ascertained damages as may be properly deductible under the contract."

7. He expressly stated that his decision did not include any considerations of later phases of the project, i.e. those later than phase 1.

8. When those advising the defendant read the adjudication decision, it seemed to them that Mr Dancaster had not taken into account the payments on account mentioned in section 10 of the notice of referral. They arranged an appointment with the Adjudicator. By letter dated 17th March Mr Dancaster acknowledged that he had made an error and had failed to take account of the £48,800 that had already been certified for loss and expense as stated in paragraph 91 of the referral notice. He said that the sum to be paid which was stated in paragraph 95 of his decision should be £354,319.28. He added, *"I do not believe that I have jurisdiction to amend my decision, but consider that it would be improper not to acquaint you of this situation."*

9. By letter dated 21st March the claimant's solicitors demanded that the defendant pay the claimant £471,605.10. This sum was based on the admittedly erroneous decision of the Adjudicator, plus VAT of £70,239.06. The letter asserted that no liquidated damages were properly deductible since the defendant had failed to give the correct notices as required by clauses 2.6 and 2.7 of the contract.

10. The defendant's response was given by its letter of 22nd March. Enclosed with the letter was a schedule showing how liquidated damages for delay in the sum of £43,230 were properly deductible. Taking account of that sum and the £48,800 error in the Adjudicator's decision, the defendant calculated that it owed the claimant £363,469.86 inclusive of VAT. It enclosed a cheque for that amount. The cheque was accepted on account of the larger sum that the claimant maintained was still due.

11. These are the facts. It is accepted that taking account of VAT the two points raised by the defendant are, if correct, a complete defence to the claim.

12. I now turn to the submissions. The first question is whether there is any defence to the claim as to £48,800, the subject of the mistake. Mr Coulson contends that this case cannot be distinguished from **Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd** [2000] BLR. 49. In that case I found that the Adjudicator had made a mistake in his calculations. That however did not mean that he had decided something

that he had no jurisdiction to decide. He had not answered the wrong question, he had simply answered the right question in the wrong way.

13. Mr Acton Davis QC. seeks to distinguish that decision by arguing that in the present case the error is not one of poor mathematics. I do not find it possible to distinguish the two cases. In each case the Adjudicator purported to decide an issue that he undoubtedly had jurisdiction to decide. In each case he made an error in carrying out that exercise. The defendant's argument in **Bouygues** was that the effect of the error was that the Adjudicator decided an issue that had not been referred to him. I decided that that was not sufficient to enable me properly to characterise the decision as being outside the jurisdiction of the Adjudicator. If anything the present case is less strong from the defendant's point of view.

14. I do not therefore accept that this case can be distinguished by reference to the nature of the mistake. But there is a feature of the present case which was not present in **Bouygues.** In the present case, within a few days of publishing his decision the Adjudicator realised that he had made a mistake, and so informed the parties. Moreover, by his letter of 17th March he made it clear that he would have corrected the error if he had the power to do so. In my view it is at least arguable that he did have the power to do so.

15. I refer to the decision of **Bloor Construction (UK) Limited and Bowman and Kirkland (London) Limited**, a decision of Judge Toulmin CMG QC. Judge Toulmin decided that pursuant to an implied term of the contract an Adjudicator has the power to correct accidental errors within a reasonable time of giving his decision. Mr Coulson submits that Judge Toulmin's decision is wrong. It is subject to appeal. In my view, putting the matter at its lowest, it is at least arguable that it is right.

16. The question that arises, therefore, is whether, on a footing that Mr Dancaster did in fact have jurisdiction to correct his error, his letter of 17th March should be read as if it did just that. In my judgment it is at least arguable that the defendant would succeed in such an argument at trial if Mr Dancaster did have jurisdiction to make corrections of accidental errors. I did not understand Mr Coulson to disagree with this proposition.

17. Even if I had held that the point to which I have just referred were not arguable, I would in any event have been disposed to grant the defendant permission to defend.

18. That is because, although I refused permission to appeal to the defendant in **Bouygues,** a single Lord Justice has since granted permission to appeal. The appeal is due to be heard in July. In these circumstances, I do not see how I can now properly say that the issues raised by the defendant in **Bouygues** would have no real prospects of success at trial.

19. I turn to the second issue, namely liquidated damages. There were four phases of the work, each with its own completion date. The Adjudicator dealt with the defendant's claim for an extension of time on phase 1 only. The defendant did not refer to the Adjudicator any delay issue on the remaining three phases. It is accepted by Mr Coulson that the defendant may deduct from the sum ordered to be paid by the Adjudicator the amount of any liquidated and ascertain damages "properly deductible under the contract".

20. No point is taken for the purposes of this application as to the calculation of the liquidated and ascertained damages that the defendant seeks to deduct. I am told by Mr Coulson that the claimant does, in fact, wish to dispute the defendant's alleged entitlement to liquidated and ascertained damages. That, he says, is for another day. Moreover he accepts that valid certificates of non-completion were issued under clause 2.1.6 of the contract in respect of phases 2, 3 and 4.

21. Mr Coulson's submission is simple. He argues that it is not open to the defendant to deduct liquidated and ascertained damages from the amount ordered to be paid by the Adjudicator, because neither of the conditions stated in clause 2.7 of the contract has been satisfied.

22. At this point I need to refer to the relevant contractual provisions. Clause 2.7 provides: *""Liquidated damages for **non-completion**" "Provided the Architect/the Contract Administrator has issued a certificate under clause 2.6 and provided the employer has informed the Contractor in writing before the date of the final*

certificate that he may require payment of, or may withhold or deduct, liquidated and ascertained damages, the Employer may not later than five days before the final date for payment of the debt due under the final certificate either.

2.7.1 require in writing the Contractor to pay to the Employer liquidated and ascertained damages at the rate stated in the Appendix for the period during which the Works shall remain or have remain or have remained incomplete and may recover the same as a debt.

or

2.7.2 give a notice pursuant to clause 4.2.3(b) or clause 4.6.1.3 that he will deduct liquidated damages at the rate stated in the Appendix for the period during which the Works shall remain or have remained incomplete;" Clause 4.2 provides for interim payments pursuant to interim certificates issued by the contract administrator. Clause 4.2.3 provides:

"(a) Not later than 5 days after the date of issue of a certificate of interim payment, the Employer shall give a written notice to the Contractor which shall, in respect of the amount stated as due in that certificate of interim payment, specify the amount of the payment proposed to be made, to what the amount of the payment relates and the basis on which the amount is calculated.

(b) Not later than 5 days before the final date for payment of the amount notified pursuant to clause 4.2.3(a) the Employer may give a written notice to the Contractor which shall specify any amount proposed to be withheld and/or deducted from that notified amount, the ground or grounds for such withholding and/or deduction and the amount of the withholding and/or deduction attributable to each ground.

(c) Where the Employer does not give a written notice pursuant to clause 4.2.3(a) and/or to clause 4.2.3(b) the Employer shall pay the amount due pursuant to clause 4.2 (a) ."

23. Mr Coulson submits that under clause 2.7 the defendant had an election. It could (a) require the claimant in writing to pay the sum as claimed as liquidated and ascertained damages under clause 2.7.1, or (b) give notice pursuant to clause 4.2.3 (b), or 4.6.1.3 that it would deduct liquidated and ascertained damages against an outstanding interim certificate, or the final certificate as the case may be.

24. Mr Coulson contends that the defendant did not adopt the first course and he elected to require the claimant to pay the liquidated and ascertained damages. He asserts that by his letter of 22nd March the defendant issued a notice of deduction under clause 4.2.3(b). But he says that the letter of 22nd March did not satisfy the requirement of clause 4.2.3(b) that it should be given not later than five days before the final date for payment of the amount notified by reference to a certificate of interim payment. In short, the letter of 22nd March did no more than give rise to a pending right to deduct the liquidated and ascertained damages from the next interim certificate. Finally, he submits that, if it is suggested that the Adjudicator's decision itself was in effect an interim certificate, then the final date for payment was 23rd March. On this basis, it follows that notice of deduction would have to be given by 18th March, five days earlier than the final date for payment. Accordingly, even on this analysis the letter of 22nd March cannot be invoked in order to deduct liquidated and ascertained damages from the sum ordered to be paid by the adjudicator.

25. On behalf of the defendant Mr Acton Davis accepts that no requirement of payment within the meaning of clause 2.7.1 has been made. He also accepts that the letter of 22nd March is not a notice of deduction pursuant to clause 4.2.3(b), or 4.6.2.3 of the contract.

26. In my view he is clearly right to concede both of these points. There is no document that even arguably amounts to a requirement that the claimant pay the liquidated and ascertained damages that are now claimed. Nor do I consider that the letter of 22nd March amounts to a notice within the meaning of clause 4.2.3(b) or 4.6.1.3.

27. I shall confine myself to clause 4. 2.3, although mutatis mutandis the same points can be made in relation to clause 4.5.1.3. What that clause requires is (a) that an interim certificate be issued in respect of which the employer specifies within five days how much he is prepared to pay, and (b) that not later than five days before the date for payment of the amount that the employer has notified that he will pay he gives written notice specifying with reasons the amount proposed to be deducted.

28. The letter of 22nd March did not satisfy either of these requirements. The key paragraph of the letter reads *"The Council as employer under the contract has notified the contract administrator that before the date of the final certificate there will be a deduction of liquidated and ascertained damages in accordance with the contract."* Mr Acton Davis seeks to overcome these difficulties in the following way. He points out that the contract makes no provision for the payment of a sum awarded by an Adjudicator. He does not seek to argue that where an Adjudicator has made an award, the award should be treated as if it were an interim payment certificate, and that clause 4.2.3 should be read accordingly.

29. He contends that a term of the contract should be implied that, where an Adjudicator has made an award in favour of the contractor, the employer should be able to deduct liquidated and ascertained damages from the amount of the award. He submits that such a term is necessary to give business efficacy to the contract. Without it the contract is unworkable where an Adjudicator's award is issued in favour of a contractor, and the employer wishes to make a deduction, for example of liquidated and ascertained damages.

30. I cannot accept this submission. It seems to me that the contract works perfectly satisfactorily without such a term. Moreover, I think I ought to be extremely wary about implying a term as to the circumstances in which liquidated and ascertained damages may be deducted from a sum due to the contractor when the contract contains detailed express provisions which deal precisely with that issue.

31. It may be that those who draft these standard forms of contract will decide to enlarge the scope of clause 2.7, so as to admit the deduction of liquidated and ascertained damages by employers from sums awarded by Adjudicators to contractors. That however is not a matter for me. There may well thought to be good policy reasons for rejecting this suggestion in any event.

32. I see no obvious injustice or unfairness to the defendant in rejecting the suggested implied term. The clause 2.6 certificates of non-completion relied on in respect of phases 2, 3 and 4 were issued in August and September 1999. According to the schedule prepared by the defendant, practical completion of those phases was achieved on the 19th December, (phase 2), and 15th February 2000, (phases 3 and 4).

33. No reason has been advanced as to why the claim for liquidated and ascertained damages in relation to these three phases was not referred to adjudication by Mr Dancaster. If that had occurred none of the problems now facing the defendant would have occurred. But even if that were not the case, I do not accept that the absence of the alleged implied leads to the contractual scheme for the deduction of liquidated and ascertained damages being substantially undermined or serious injustice resulting to the employer. An employer in the defendant's position can at any time require payment of the liquidated and ascertained damages pursuant to clause 2.7.1, although I accept that he may find that his claim is disputed and that he is driven to refer the dispute to adjudication. Or if there are further payment certificates to come, he may exercise the right conferred by clause 2.7.2 and deduct the liquidated and ascertained damages from future certificates.

34. As I have said, if an employer who has a right to claim liquidated and ascertained damages wants to protect himself from the possibility of having to pay a sum awarded to a contractor by an Adjudicator, then he should claim those damages, and if the claim is disputed, refer the claim to the Adjudicator who is to determine the contractor's claim.

35. I am quite satisfied that the defendant is not entitled to deduct the liquidated and ascertained damages claimed in respect of phases 2, 3 and 4 from the sum awarded by the Adjudicator to the claimant. Those damages were not properly deductible under the contract at the time of the Adjudicator's decision, nor are they properly deductible now.

36. In the result the claimant is entitled to summary judgment for a sum that I will ask counsel to calculate so as to reflect this judgment.

MR P COULSON, instructed by Messrs Shadbolt & Co, appeared on behalf of the Claimant.

MR J ACTON DAVIS QC,instructed by Sevenoaks DC Solicitors, appeared on behalf of the Defendant.

MR COULSON: *My Lord, I am very grateful. We will need to calculate the deduction, and because it is a deduction that amount will carry VAT and there is also interest. All of which calculations I am entirely confident my learned friend and I can do without delaying your Lordship, if that is convenient and then provide your Lordship's clerk with the effectively agreed order, if that would be convenient.*

MR JUSTICE DYSON: *Subject to Mr Acton Davis, that seems to be a sensible course. If, as I hope is not the case, there is a problem then you will have to come to me.*

MR COULSON: *I am sure there will be no problem. My Lord, that then leaves two questions of costs, I hope relatively short. One is your Lordship will remember that I had the costs of Wednesday, and we have now provided our summary assessment statement. I do not know what, if anything, is said about that. Those are the costs I seek by way of summary judgment.*

MR JUSTICE DYSON: *2,000 on an adjournment application.*

MR COULSON: *My Lord, yes. Because we had very little time and notice most of that is my instructing solicitor's time in dealing with it.*

MR JUSTICE DYSON: *Part of it is your fee, is it not?*

MR COULSON: *My Lord, it is. In relation to that it is. I cannot say anything further.*

MR JUSTICE DYSON: *These things are always difficult. There it is. I will have to hear what Mr Acton Davis has to say.*

MR ACTON DAVIS: *My Lord, only this. The brief fee seems a little high on the adjournment application.*

MR JUSTICE DYSON: *I do think that this is a very heavy bill for an adjournment application. I accept it was not absolutely the most simple thing, but it was estimated for 10 minutes, and I think we got through it in 10 minutes, if I remember.*

MR ACTON DAVIS: *15 minutes.*

MR ACTON DAVIS: *My Lord, we did. I would like to think it was because---*

MR JUSTICE DYSON: *Of your skeleton argument.*

MR ACTON DAVIS: *My Lord, some work had been done.*

MR JUSTICE DYSON: *Certainly. I have to do my best. I do think that is too much. I always find this more difficult than giving judgment on substantive issues. I am going to assess it at 1,250. That will be payable within 14 days. So costs of 12th April 1,250 pounds. What about today?*

MR ACTON DAVIS: *Perhaps I should go first on today because ordinarily I would pay the costs of today. My position on costs is simply this. They were successful in round terms as to half. It is my submission that we should pay the costs, but that the costs should be limited to half.*

MR JUSTICE DYSON: *So they should be half of a reasonable amount. What do you say is a reasonable amount do you say?*

MR ACTON DAVIS: *Has your Lordship seen the costs? It is a little difficult for me to say that the sum of 5,600 odd is an unreasonable sum. If your Lordship was to say perhaps 3,000 pounds your Lordship would hear nothing more from me.*

MR JUSTICE DYSON: *Yes. Mr Coulson:*

MR COULSON: *My Lord, in relation to that it is less than half the amount the defendant would have been seeking.*

MR JUSTICE DYSON: *He would not have got anywhere near 12,000 pounds.*

MR COULSON: *I accept that. My Lord, in my submission in relation today those are not unreasonable costs, and on this occasion at any rate I can defend myself, as it were, by pointing to my learned friend's brief fee, the difference.*

MR JUSTICE DYSON: *I have not found his brief fee yet.*

MR COULSON: *It is the second item down in his statement of costs.*

MR JUSTICE DYSON: *What do you say that you should not have all your costs anyway?*

MR COULSON: *My Lord, in relation to that I would simply say this. I have come for summary judgment and been successful in relation to half of it. Had there been an offer for half of that amount I have no doubt that would have been seriously considered, particularly after Wednesday and the debate that we had then. Obviously we recognise the point in relation to the mistake was not straightforward. In my submission it would be wrong to deprive a successful claimant half of his costs when the defendant could have made an offer had they so chose.*

MR JUSTICE DYSON: *You want to say something?*

MR ACTON DAVIS: *Just in response to that. There are two sides here. My learned friend could have made an offer to have gone away for half and half, and they chose not to do so, but pressed on today for the whole amount.*

MR JUSTICE DYSON: *Yes. Undoubtedly a lot of the time and effort must have been directed at the liquidated damages point, and I think I should reflect in my decision the fact that you have not succeeded on that issue. What I propose to do is to award you 3,500 pounds.*

MR ACTON DAVIS: *My Lord, there are just two matters I have to deal with. The first is an application for permission to appeal. I simply say that this is a point of some interest to the industry.*

MR JUSTICE DYSON: *If there is such a point, I am afraid I have to ask the Court of Appeal. I can see that it might be of some interest, but I have to ask myself whether there is any real prospect of the Court of Appeal reaching a different view. I do not think there is. I may be wrong. That is my view, for good or for ill. What is the second point?*

MR ACTON DAVIS: *I was going to ask for a stay.*

MR JUSTICE DYSON: *Why?*

MR ACTON DAVIS: *Pending any application to the Court of Appeal.*

MR JUSTICE DYSON: *No. I am sorry.*