JUDGMENT : His Honour Humphrey Lloyd : TCC : 21st July 2000

1. This is an application by the Claimants to enforce by way of summary judgment an award of an adjudicator made under a sub/contract between the Claimants and the Defendant. The issue raised by the Defendant in opposition to the application for enforcement, is that there was insufficient compliance with Part I of the Scheme for Construction Contracts (England & Wales) Regulations 1998 (SI 649/1998) which formed part of the sub/contract, by default. Section 114(4) of the Act provides:

   "Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned."

   The Scheme therefore took effect as implied terms of the sub/contract, (although otherwise it apparently incorporated provisions which were the same as or equivalent to those of DOM/1). Accordingly the Defendant says the Claimants only had the right to seek adjudication if they complied with the requirements of the Scheme, and that as it did not do so the adjudicator did not have jurisdiction to decide that the Claimants were entitled to all or part of the amounts which he said that the Defendant had to pay them.

2. Paragraph 1 (3) of the Scheme provides that the Notice of Adjudication has to set out briefly:

   " (a) the nature and a brief description of the dispute and the parties involved;
   (b) details of where and when the dispute has arisen;
   (c) the nature of redress which is sought; and
   (d) the names and addresses of the parties to the contract...."

   The purposes of such a notice are first, to inform the other party of what the dispute is; secondly, to inform those who may be responsible for making the appointment of an adjudicator, so that the correct adjudicator can be selected; and finally, of course, to define the dispute of which the party is informed, to specify precisely the redress sought, and the party exercising the statutory right and the party against whom a decision may be made so that the adjudicator knows the ambit of his jurisdiction.

3. Miss Franklin says, with reason, that the nature of adjudication is such that precision is required. She used the term 'draconian' but such an epithet is strictly inappropriate to describe the process as it has been endorsed by the construction industry. The adjective is apposite in that it serves to emphasise the abbreviated time within which the procedure has to be conducted and the binding nature of the decision (albeit provisional until the real and final determination of the dispute in subsequent proceedings). It therefore important that the adjudicator acts within his jurisdiction so that the party is truly entitled to the redress given and the other party knows that it too is bound by it.

4. In my judgment in considering the validity of a notice the essential questions will include, first, whether or not a dispute has arisen. That is a question of fact, as, for example, His Honour Judge Thornton QC set out in **Fastrack Contractors v Morrison Construction** [2000] BLR 168 to which Miss Franklin has referred. A dispute can arise in a wide variety of circumstances, and one must be careful to look at the language used by the parties since not every exchange creates a dispute or even a difference. Adjudication is intended to resolve what has not been settled by the normal processes of discussion and agreement: see paragraph 27 of Judge Thornton's judgment (at page 177). A dispute is not lightly to be inferred. Nevertheless, there must come a time when a dispute will arise, usually where a claim or assertion is rejected in clear language without the possibility of further discussion, and such a rejection might conceivably be by way of an obvious and outright refusal to consider a particular claim at all. In paragraph 29 of his judgment Judge Thornton also gave the instance of a rejection without reasons which may give rise to a dispute although otherwise there would not have been a dispute had the rejection been part of a rational process by which a dispute might or not emerge.

5. I have also said elsewhere, on other occasions, that one must be take care when looking at correspondence, to bear in mind by whom they were written and to whom they were addressed, although, in this case, since they were both written by, and addressed to solicitors, that point is not of such moment as it would be where the parties themselves had written the letters.

6. The letter in question is dated 3 May 2000. It says:
"We refer to our two letters to Midas Homes, dated 11th April and 13th April respectively. Copies of the letters are enclosed for ease of reference. As no payments have been received from your client in respect of either of these letters, a dispute now exists between our client and your client, and this dispute will now be referred to adjudication, in accordance with the Act."
And it then goes on to say that the solicitors have applied to the Chartered Institute of Arbitrators for the appointment of an adjudicator.

7. The letter of 11 April itself referred back to two previous invoices dated the 22 April, one for £11,300 and the other for £617. That letter said that payment was considerably overdue. The reason why it was overdue was that a difference had arisen between the Claimants and the Defendant about the performance of the Claimants' sub-contract works, which had resulted in the Defendant taking the view that the Claimants were guilty of such culpable default as entitled it to terminate the sub-contract, which it had done in March.

8. The second letter was dated 13 April but it enclosed two invoices dated the 17 April. As they bear the date stamp of the solicitors acting for the Claimants for 20 April the letter was probably not sent and at least the invoices were certainly not sent on 13 April. The probability is that this letter did not reach the Defendant or its solicitors until 19 or 20 April, assuming for the purposes of today, that at some stage the letter was sent by registered post. They would therefore have arrived immediately prior to the Easter Holiday. The invoices were each stated to be the "Final Invoice" for work carried at Royal Sands, Weston-super-Mare"; the first, for £17126.08, was "New Build" but it also concluded "we require the release of retention on all new build contracts"; the second was for £8632.59 (net) it too asked for the release of "all retention on refurb contract".

9. The letter of 13 April itself starts by referring to a letter of 28 March, by which the Defendant had determined the sub-contract between itself and the Claimants. It then set out at some length why the determination was not correct and in the penultimate paragraph stated:
"It is clear for all practical purposes, our client's employment cannot be reinstated, we therefore enclose our client's invoices to cover the costs of all work carried out by him up to the date of the termination of his employment by you, as the determination by you is in breach of contract provisions of Clause 16.2 cannot apply."

   (That is a reference to the provisions of DOM/1 by which a contractor is not obliged to make any further payment to a sub-contractor, whose employment has been determined.) The letter continued:

   "In addition our client will be seeking the sum of £5,000 in compensation for this breach of contract, and for loss of profit. In addition, our clients will be looking for reimbursement of legal and other costs incurred, and arising from the determination of his employment.

   Please submit your cheque in respect of the enclosed invoice within seven days of the date of this letter ...."

   But, as the Defendant rightly points out, it didn't actually get the letter and the invoices until around the time when payment was expected.

10. So when the letter of 3 May was sent, which was now about a fortnight after the letter had arrived but, because of the holidays, less than 10 working days, it was met, on 8 May, by the response from the Defendant's solicitors that it was not an effective Notice of Adjudication. Their letter said:

    "We have absolutely no idea from your Notice of Adjudication which of these numerous items you are intending to refer to the adjudicator, or the grounds on which you seek to do so.

    Accordingly, until such time, as your Notice of Adjudication conforms to the provisions of the Scheme we regard it as invalid and that any adjudicator appointed upon it shall not have jurisdiction to deal with it. ....".

    The Claimants' solicitors did not take the course that many (perhaps most) people would have done in those circumstances, ie to start off again, to withdraw the notice, and to meet the Defendant on its ground, by specifying precisely what the dispute or disputes were. Instead they went ahead. The Defendant participated in the adjudication process "under protest", as it were, without prejudice to that primary contention. They now seek to enforce that primary contention that the adjudicator had

no jurisdiction. I return therefore to the terms of the scheme which I have quoted. Did the letter of 3 May 2000 comply with them?

11. It was written by a solicitor so it should be treated as having been carefully prepared and ought not to need the same latitude that might be given to a letter which had not had the benefit of external advice (whether legal or otherwise). The real dispute cannot be seen from the letter (bare non-payment is rare) and indeed the letter took a short cut by referring to correspondence where the circumstances of the dispute was to be found. It is possible to give a Notice of Adjudication by reference to other correspondence, but since paragraph 1(3) of the Scheme requires the dispute to be defined a party must be sure that the other correspondence is sufficiently clear, and that it records the dispute with some precision, if the correspondence is effectively incorporated in the Notice of Adjudication so as to meet the requirements of the Scheme. The letter itself says *"... a dispute."* So, what is that dispute? I leave to one side the other points taken by the Defendant, that the other parts of paragraph 1(3) were not observed, namely the parties involved and the details why the dispute has arisen were not specified, and that the names and addresses of the parties were not specified. They were in my view reasonably clear to anybody receiving that letter and the Defendant's solicitors did not mention their absence in their letter of 8 May. Those parts are not in this case the material parts, although they are of course an integral part of a valid notice under the Scheme as they may, for instance, be needed to establish that there was a construction contract within the Act. They could also have been relevant had it been necessary to pursue, for example, the throw away references to the release of retention at the end of the invoices of 17 April. The key questions are, what is the brief description of the dispute and what the nature of the redress which is sought? These are crucial to the party receiving the notice and to the adjudicator.

12. There are a number of choices apparent from the correspondence and evidence. First what might be the possible dispute? There was a dispute about the invoices submitted prior to determination. They were outstanding, but the reason why they were outstanding was the determination. There is the determination itself, which is the subject of the letter of 13 April. There are the consequences of the determination, namely the invoices dated 17 April (which came to £17,126.08 and £8,632.59), the general and unsupported claim for £5,000 for breach of contract and loss of profit. With such a range of possibilities I find it very difficult to see how the letter of 3 May complies with the scheme, so as to embrace all the disputes which the Claimants say were properly referred to the adjudicator, and which form the subject of his decision.

13. The letter has not been well drafted in: (a) incorporating correspondence, the essence of which should have been properly extracted and re-stated in the terms that the Scheme requires; (b) in saying specifically "a dispute" when there were a number of disputes. This is an application for summary judgment (said by the claimant to require no more than 30 minutes) so I have to satisfied that the Defendant has no realistic prospect of success in one or more of its contentions. In my view, one can safely say that by 3 May that there was one dispute that surely existed, and which was the pivotal dispute, namely who was responsible for the determination? The letter of 13 April, amongst other things, challenged, if it had not already been challenged, the determination. Could the words "a dispute" also cover the invoices prior to the determination? In my judgment they do since the letter of 3 May was about non-payment. So giving that letter some assistance (which it needs) it should be read as indicating that payment of those invoices formed at least part of the redress which was sought.

14. I find it extremely difficult to conclude that on 3 May there existed any other dispute or that the terms of the scheme were otherwise complied with, either in specifying a dispute as to the consequences of the determination, apart from the prior invoices, or stating the redress sought, as I shall indicate. In my view the adjudicator has jurisdiction only to determine the question of determination. He may have determined that incorrectly, as suggested by the Defendant. That is not a matter which can preclude enforcement of the decision. It seems to me also that it must follow, that if the determination was incorrect, as the adjudicator so found, the Defendant had no apparent right to refuse payment of the invoices which had been issued prior to 11 April.

15. But what of the invoices thereafter? The letter of 13 April is equivocal. It does not appear to accept a repudiation. It just says: "*The employment cannot be reinstated*." In the context of any notice of adjudication it is essential to inform the other party and the adjudicator the basis upon which such a claim is being made for the subject matter of these invoices, ie the redress. Are they being claimed as damages for repudiation, or are they being claimed pursuant to the terms of the sub-contract, on the basis that, as a matter of fact, work can no longer be carried out, but the sub-contract continues in existence? Does the reference to breach of contract means that further work has been prevented? Thus it is important to say whether or not the sub-contract is at an end, and whether both parties are discharged, or whether it continues. If it continues, then one could not possibly say that the invoices fell due for payment, having regard to the terms of Appendix A of the sub-contract which provided that payments would be made at the "*end of month following month of application*". If the sub-contract subsisted they could not possibly have been due on 3 May so there could be no dispute referable to adjudication at that date. Certainly the general claim could not be made, expect by reference to some unspecified breach, i.e prevention. So there are in effect two ways of looking at the letter of 13 April. In turn the letter of 3 May did not resolve this dichotomy (which one might have expected from a solicitor's letter) and to state what was in dispute and, above all, the redress sought if it was more than non-payment of the earlier invoices which, subject to the issue of determination, were outstanding under the terms of Appendix A of the sub-contract.

16. In addition there was in my judgment on 3 May 2000 no dispute referable to adjudication about the invoices or the general claim for £5000. These claims had only reached the Defendant about 19 or 20 April. The general claim was unsupported by any back up. Even though there was a dispute about the determination for there to be a dispute about the financial consequences a sufficient opportunity had to be given to deal with the claims in the invoices and the general claim. That means that not only has there to be time to consider the claim or assertion but also, in an appropriate case, time to discuss and to resolve it by agreement, for only if that fails will there be a dispute, as I set out at the beginning of this judgment. Adjudication is not a substitute for discussion and negotiation nor is it to be used to provide the agenda for discussion and negotiation where no dispute had truly existed. The Defendant had obviously no time properly to consider the invoices before 3 May and it had no means of investigating the general claim. It was not in a position at that date to state what its position was. Moreover even if it had had the opportunity of doing so and had done so no dispute would have arisen until the Claimants had responded. A dispute will not exist if the other party accepts or has no real answer to a justified criticism of the whole or part of a claim. Only when these stages are complete may there be a dispute which could be referred to adjudication. In practice this means that a party in the position of the Claimants in this case should ask the adjudicator for a decision on the validity of the determination. If that is adverse to the referring party there will be no need to deal with the financial consequences unless and until it is necessary to commence litigation or arbitration about the dispute. If the decision is in favour of the referring party it will remain to be seen whether there is a dispute about the financial consequences following discussion and negotiation.

17. For these reasons, the Notice of Adjudication was in my judgment invalid: there was no dispute about the financial consequences nor, in the case at least of the general claim, could there have been; it did not set out the dispute about the financial consequences and it did not set out the nature of the redress which was sought. Certainly for these reasons the Defendant has realistic prospects of success in contending that the adjudicator had no authority to decide anything other than the question of determination and liability for the two earlier invoices.

18. Accordingly I come to the conclusion that the decision is enforceable only effectively as to the invoices of the 22nd of February 2000, for £11,300, and £617, if it is possible to sever those amounts, which I believe it is, from the adjudicator's decision. Put another way the Defendant does not have realistic prospects of success in resisting payment for the sum of those invoices.

19. I have been asked by the claimants to deal with the amount of the adjudicator's fees, namely £2,350. Paragraph 25 of the Scheme for Construction Contracts (England & Wales) Regulations 1998 (SI 649/1998) provides that the adjudicator is entitled to reasonable fees and expenses. It then states:

"The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned".

In his decision the adjudicator referred to this provision and said that stated:
"on the basis that this decision is substantially in favour of the Sub/Contractor I have apportioned all of my fees plus VAT to the Main Contractor".

20. It does not now seem that the parties will agree on the order in respect of the fees. The claimants wishes the decision in respect of the fees to be enforced in full; the defendant says that they should now be split equally. The defendant has suggested that there might have to be a further hearing. This would incur disproportionate expense. I propose to set out the conclusions that I have reached so far. If they are unacceptable then there may have to be further argument, although this could and should be by way of written submission.

21. The Scheme apparently implicitly confers on the adjudicator a power to apportion his fees and to decide who should pay the apportionment. The adjudicator has done so on the basis of all the work that he carried out. However in the light of my decision it is clear some of that work was unauthorised as it was beyond his jurisdiction and accordingly the defendant cannot be liable for it. Only the party that sought adjudication is liable for the fees, expenses and costs incurred by asking for a decision which the adjudicator had no authority to make and to which it was not entitled under the contract and which in breach of contract it sought. Section 114(4) of the Act provides
"Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned."

Thus the Scheme took effect as implied terms of the sub/contract. The claimants were only entitled to exercise their right to call for adjudication if it first complied with paragraph 1(3) of the Scheme. They did not do so in part and were thus in breach of contract.

22. The tribunal (court or arbitrator) that is ultimately seized of any dispute properly referred to adjudication will deal with the fees and costs incurred as a result of the dispute being resolved temporarily by an adjudicator's decision (see section 108(3) of the Act), since, subject to the terms of the contract, they would arise out of the dispute and be a further dispute. The judgment or award will therefore decide who was liable for them.

23. In this case I have no means of determining how much of the adjudicator's fees is referable to the part of the decision for which the claimant has obtained judgment. On the other hand it is clear that the adjudicator must have incurred the majority of his fees in investigating and deciding the issues on which I have decided that he had jurisdiction. In my judgment, it follows from my earlier decisions that the defendant does not have realistic prospects of success in relation to that part. However, equally, the claimants cannot therefore recover the whole of the amount claimed and their application for judgment in this respect fails.

24. Nevertheless I do not consider that the claimants are left without any remedy. In my view the claimants are entitled to an interim payment order under Rule 25.7(1)(b) or (c) of the CPR. Rule 25.7 provides in part:

"(1) The court may make an order for an interim payment only if
- *(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;*
- *(b) the claimant has obtained judgment against that [sic] defendant for damages to be assessed or for a sum of money (other than costs) to be assessed;*
- *(c) except where paragraph (3) applies, it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for interim payment ; or*

(4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment."

This rule, like all other rules, has to be interpreted and applied in the light of the overriding objective (see Rule 1.2), but it is available to a court on an application for summary judgment (not least as part of the powers of case management). For the purposes of sub-rules (1) and (4) and in proceedings for

the enforcement of an adjudicator's decision I assume that the underlying disputes with respect to which the adjudicator had jurisdiction will be the subject of a final judgment or award in favour of the claimants. (This will not always be the case, eg where the court is unable to say that the ultimate tribunal would probably arrive at the same decision as the adjudicator did, but it is not be inferred that I am able so to conclude, as I am setting out a somewhat pragmatic course that I propose to take subject to further submissions, and primarily in order to minimise cost.)

An order under Rule 25.7 is subject to Rule 25.8(2):
"The court may in particular
(a) order all or part of the interim payment to be repaid;
(b) vary or discharge the order for the interim payment;"

Thus an order of this kind enables the defendant to recover the whole or any part of the amount should it be held by the court or arbitrator that there was an overpayment.

25. On this basis I consider that the amount of a final judgment in respect of the adjudicator's fees is likely to be £1500. I assess a reasonable proportion to be £1,250.

26. I direct that if either party is dissatisfied with such a conclusion it must notify my clerk by 4.00 pm on 4 August 2000 with its proposals as to how the court should proceed (bearing in mind paragraph 2 above). If more time is reasonably needed it will be granted. Otherwise the claimant may draw up the order or submit a revised or supplemental order for an interim payment of £1250. This decision will then to be treated as part of my judgment, subject to any editorial or consequential amendments.