JUDGMENT : HIS HONOUR JUDGE BOWSHER Q.C. TCC : 24th January 2000.

The applications: These applications arise out of an adjudication under the Housing Grants, Construction and Regeneration Act, 1996 (the Act).

1. Northern Developments (Cumbria) Limited (NDL) apply for declarations that the Adjudication Decision, dated 15 December, 1999 is null and void and ought not to be enforced. J&J Nichol (J&JN) apply for summary judgement to enforce the decision and a declaration that the decision is valid.

2. NDL claim that the adjudicator
   a. made an error as to his jurisdiction by deciding the he did not have jurisdiction to deal with some matters raised by NDL by way of set-off against a claim by J&JN, and
   b. ordered NDL to pay J&JN's costs of the adjudication when he had no jurisdiction to do so.

4. **The contractual background** : NDL was main contractor for the construction of an outlet for M Sport Limited at Dovenby Hall in Cumbria. J&JN were sub-contractors who were appointed by NDL to construct the steel frame roofing cladding and associated works ("the sub-contract works ").

5. It is common ground for the purposes of the applications before me that the sub-contract incorporated the DOM/2 Conditions (incorporating amendments 1-6 1989 and 7 1992). The parties reserved their position in this respect as regards any future proceedings.

6. Disputes arose between NDL and J&JN over delays to the sub-contract works and the standard of workmanship. On 29 July 1999 NDL issued a notice of intention to withhold payment. On 6 August 1999 J&JN withdrew from site. NDL treated this action as a repudiatory breach of contract, accepted the repudiation and appointed an alternative contractor to complete the sub contract works.

7. It is common ground between NDL and J&JN that
   a. The sub contract agreement was a construction contract within the meaning of the Act;
   b. The terms of the sub contract agreement did not comply with section 108 of the Act and that therefore by section 108(5) the adjudication provisions of the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme") applied.

8. On 13 July, 1999, J&JN made an application for payment. On 29 July, 1999, NDL wrote a letter purporting to be a Notice of Intention to Withhold Payment under section 111 of the Act. In that letter, NDL complained of defective works and delays on the part of J&JN. NDL set a value on the defective works, but did not set a value on the delays. Having made deductions for defective work and money already paid, NDL refused payment claiming that money was due to them because the set-off for defective work overtopped the sum claimed.

9. NDL refused payment, and J&JN started adjudication proceedings.

10. **The adjudication** : J&JN issued an adjudication notice on 18 November 1999. Mr K L Scott was appointed adjudicator under the Scheme.

11. J&JN served their Referral on 26 November 1999. By the referral, J&JN claimed payment of outstanding moneys in respect of work carried out up to 6 August 1999 in the sum of £237,120.80 plus VAT together with £11,456.42 representing cash discount. NDL served their Response on 3 December 1999.

12. By their Response, NDL contended that J&JN's claim should be reduced by set-offs to take account of.
    a. Defective work;
    b. Delays;
    c. Damages arising out of J&JN's repudiation of the contract.

    The repudiation damages had not, of course, been included in the Notice of Intention to Withhold payment, because the alleged repudiation followed that Notice.

13. By letter dated 6 December, 1999, the Adjudicator noted that the Response referred to defects, delays and repudiatory breach and asked whether the parties agreed that he might take those into account by reason of paragraph 20 of the Scheme *"as being necessarily connected with the dispute which has been referred to me"*.

14. DNL by their solicitors replied that the Adjudicator could take those matters into account. J&JN by their representatives James R. Knowles replied on 8 December, 1999.
"Paragraph 20 allows you to decide the matters in dispute and these will generally be limited to what is referred to you in the Notice of Adjudication.
Further, you may take into account any other matters the parties agree are within your scope or which are matters ***under the contract*** *which you consider are necessarily connected with the dispute."*

Later the letter continued: *"It seems to us that based on NDL's assertion that* ***the Contract does not exist*** *following the alleged wrongful repudiation that this singular contention would suffice to take the repudiation issue out of your jurisdiction with due regard to the emphasised wording quoted by us from paragraph 20 of the Scheme."*

15. In a letter dated 9 December, 1999, the Adjudicator considered the opening words of paragraph 20 of the Scheme: *"20. The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute. .....*

The Adjudicator decided, correctly, that he could take into account matters outside the dispute if either the parties agreed or he considered they were matters necessarily connected with the dispute. He then continued: *"After considering the matters put forward in the "Response" I consider that they are necessarily connected with the dispute and I should consider them and I shall do so. In doing so however, I take note of Knowles' comment that such matters have to be those which are "under the Contract"*. That being the case, I agree with them that the question concerning the alleged repudiatory breach does not arise under the Contract and I shall not deal with it in this Adjudication."

As I understand it, he was saying that the matters arising out of the alleged repudiation were necessarily connected with the dispute but did not arise under the contract and for that reason he would not deal with repudiation. For reasons which I shall explain later, I hold that the Adjudicator was wrong in law in deciding that matters arising out of the repudiatory breach did not arise under the contract. I shall also discuss later the effect of that error of law.

16. The adjudication decision was issued on 15 December 1999. In that decision, the Adjudicator decided that.

a. *DNL were late in making payments*
b. *DNL's Notice of Intention to Withhold payment was invalid*
c. *J&JN were behind programme in completing the works*
d. *J&JN carried out the work defectively and in breach of contract*
e. *The alleged repudiatory breach did not arise under the contract and for that reason was not dealt with in the Adjudication*
f. *A sum which he specified should be deducted from the claim of J&JN on account of their defective work*
g. *No deduction was made on account of the finding that J&JN were guilty of delay*
h. *J&JN were entitled to be paid the balance of their claim apart from that deduction for defective work.*
i. *NDL was to pay J&JN's costs of the Adjudication as well as the costs of the Adjudicator.*

The Adjudicator was not requested under paragraph 22 of the Scheme to give reasons and he did not do so but he sent with the Decision a covering letter in which he gave an "explanation" which he said was not to be taken as part of his decision. Both counsel appearing before me ask me to look at that letter.

17 In his letter of 15 December, 1999, the Adjudicator wrote:
"*As for the Respondent Party's assertion that the works were defective (issue 7), and whether or not the Respondent Party was able to deduct monies from the Referring Party as a result of delay, defects and the like (issue 11), I found that there were defects, delays and outstanding works to complete. However, whilst I consider that I could take account of defects and outstanding works, because they were matters necessarily connected with the dispute and would apply irrespective of whether or not there was a "Notice to Withhold" (having deciding that the value of works carried out had to be works "properly" carried out), I felt that the question of delay costs*

were not so connected and in the absence of a valid "Notice to Withhold" I thought it correct not to allow the Respondent Party such costs.

As for the lack of notices pursuant to Section 110(2) of the Act, I considered that as the Scheme is silent as to the consequences of failure to comply and furthermore as the value of the works to be carried out had to be that properly carried out, then as stated previously, I decided that the question of defects and their value could be dealt with by me.

On the question of 'repudiatory breach', I decided that this matter was other than one which arose under the Contract and could not be adjudicated upon. The calculation at paragraph 5.23 of my Decision is therefore expressly stated as being the position at 6 August 1999, the date or thereabouts of the alleged repudiatory breach."

18. It therefore appears that the Adjudicator .
    a. Decided that the Notice of Intention to Withhold Payment was invalid – he did not give reasons for this decision and it cannot be impeached.
    b. Considered the defects despite their not being mentioned in the Notice of Intention to Withhold Payment and justified that decision both by his argument that the value of the works had to be the value of works properly done and by the fact that the Scheme is silent on the consequences of failure to comply with section 110(2) of the Act;
    c. Found that J&JN were in delay but made no deduction for that;
    d. Rejected issues arising under repudiatory breach on the ground that those matters did not arise under the contract..

19. DNL accept that the decision, insofar as it was within the jurisdiction of the Adjudicator, is binding on them. Paragraph 23(2) of the Scheme provides: *"The decision of the Adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration, (if the contract provides for arbitration or the parties agree to arbitration) or by agreement between the parties."*

DNL claim that the refusal to consider the repudiatory breach issues was a wrongful denial of jurisdiction and therefore the whole Decision is null and void. Counsel for J&JN accepted in argument that the reason given for rejecting the repudiatory breach issues was wrong in law but contended that those issues ought to have been excluded on the ground that they were not mentioned in the Notice to Withhold Payment: accordingly, those issues ought in any event to have been excluded and the validity of the Decision should not be impeached on the underlying reasoning if the result is unimpeachable.

20. **Review of Decisions of Adjudicators by the Court** : Part II of the Act applies to construction contracts. .

21. Section 108(1) of the Act provides: . *"A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose "dispute" means any difference".*

The remainder of the section sets out the requirements for a contract to comply with the section, and provides that if a contract does not comply with the section, the relevant provisions of the Scheme for Construction Contracts applies. The parties agree that the Scheme applies in this case. I shall have to consider later what is the meaning of "dispute" in this context..

22. The Scheme is set out as the Schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998 SI 1998 No. 649.

23. In the short time since the Act came into force, there have been many adjudications and a number of decisions of this Court considering challenges to Adjudicators' decisions and applications to enforce those decisions. .

24. The general approach to be adopted was considered by Dyson J. in **Macob Civil Engineering Limited v. Morrison Construction Limited** (1999) BLR 93; **The Project Consultancy Group v. The Trustees of the Gray Trust** (1999) BLR 377; **Bouygues UK Ltd v. Dahl-Jensen UK Limited** 17 November, 1999 and by His Honour Judge Thornton Q.C. in **Sherwood & Casson Limited v. Mackenzie** (unreported)

30 November 1999 and His Honour Judge Hicks in **VHE Construction plc v. RBSTB Trust Co Limited** 13 January, 2000. In **Sherwood v. Casson**, Judge Thornton formulated the guiding principles as follows:

i. *A decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced;.*

ii. *A decision that is erroneous, even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced;.*

iii. *A decision may be challenged on the ground that the adjudicator was not empowered by the Act to make the decision, because there was no underlying construction contract between the parties or because he had gone outside his terms of reference;.*

iv. *The adjudication is intended to be a speedy process in which mistakes will inevitably occur. Thus, the Court should guard against characterising a mistaken answer to an issue, which is within an adjudicator's jurisdiction, as being an excess of jurisdiction. Furthermore, the Court should give a fair, natural and sensible interpretation to the decision in the light of the disputes that are the subject of the reference;.*

v. *An issue as to whether a construction contract ever came into existence, which is one challenging the jurisdiction of the adjudicator, so long as it is reasonably and clearly raised, must be determined by the Court on the balance of probabilities with, if necessary, oral and documentary evidence..*

25. I agree with Judge Thornton's summary. I add that His Honour Judge Hicks said, in **VHE v. RBSTB** at paragraph 44: *"It is quite clear that the court has no appellate jurisdiction over Adjudicators, even when demonstrably mistaken"*

And in **Outwing Construction Limited v. H Randell & Son Limited** [1999] BLR 156 at 160 His Honour Judge Humphrey Lloyd said: "The overall intention of Parliament is clear: disputes are to go to adjudication and the decision of the Adjudicator has to be complied with, pending final determination."

26. In relation to the consideration of matters of jurisdiction it is also helpful to bear in mind the words of Lord MacFadyen in **Homer Burgess Limited v. Chirex (Annan) Limited** (Scotcourts) 10 November, 1999. He said: "In my opinion the temporarily binding quality accorded to decisions of an adjudicator by paragraph 23(2) [of the Scheme] is accorded only to decisions on matters of dispute arising under a construction contract. The question whether a particular dispute does arise under a construction contract is a preliminary issue which the adjudicator must address, but it is not itself a dispute arising under a construction contract. I am therefore of opinion that a decision by an adjudicator as to whether a particular dispute or a particular aspect of a dispute fails within his jurisdiction is not one which is exempted by paragraph 23(2) from review in proceedings such as the present action."

27. **The statutory provisions for payment**.: Section 110 of the Act is as follows:

"110.-(1) Every construction contract shall

(a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
(b) provide for a final date for payment in relation to any sum which becomes due.
The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

(2) Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if
(a) the other party had carried out his obligations under the contract, and
(b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,
specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.

(3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) or (2), the relevant provisions of the Scheme for Construction Contracts apply."
The only direct force of section 110 is to make the Scheme apply if the contract does not comply with the Act, and it was so effective in this case. But it also sets the context for section 111 which refers back to it.

28. Section 111 provides:

."111.-(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.

The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.

(2) To be effective such a notice must specify

(a) the amount proposed to be withheld and the ground for withholding payment, or

(b) if there is more than one ground, each ground and the amount attributable to it,

and must be given not later than the prescribed period before the final date for payment.

3) The parties are free to agree what that prescribed period is to be. In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts.

4) Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than .

1. *seven days from the date of the decision, or .*
2. *the date which apart from the notice would have been the final date for payment, whichever is the later." .*

29. The Act by section 111 imposes on the parties a direct requirement that the paying party may not withhold a payment after the due date for payment unless he has given an effective Notice of Intention to Withhold Payment. That seems to me to have a direct bearing on the ambit of any dispute to be heard by an Adjudicator. Section 110 requires that the contract must require that within 5 days of any sum falling due under the contract, the paying party must give a statement of the amount due or of what would be due if the payee had performed the contract. Section 111 provides that no deduction can be made after the final date for payment unless the paying party has given notice of intention to withhold payment. The intention of the statute is clearly that if there is to be a dispute about the amount of the payment required by section 111, that dispute is to be mentioned in a notice of intention to withhold payment not later than 5 days after the due date for payment. Equally it is clear from the general scheme of the Act that this is a temporary arrangement which does not prevent the presentation of other set-offs, abatements, or indeed counterclaims at a later date by litigation, arbitration, or adjudication. For the temporary striking of balances which are contemplated by the Act, there is to be no dispute about any matter not raised in a notice of intention to withhold payment. Accordingly, in my view, the Adjudicator had no jurisdiction to consider any matter not raised in the notice of intention to withhold payment in this case.

30. I am glad to find that His Honour Judge Hicks Q.C. was of the same opinion in **VHE Construction PLC v. RBSTB Trust** at paragraphs 36 and 37:

"36. The first subject of dispute as to the effect of section 111 is whether section 111(1) excludes the right to deduct money in exercise of a claim to set-off in the absence of an effective notice of intention to withhold payment. Mr Thomas, for RBSTB, submits that it does not. I am quite clear, not only that it does, but that that is one of its principal purposes. I was not taken to the reports or other preparatory material leading to the introduction of this part of the Act, nor to anything said in Parliament, but the see-saw of judicial decision, drafting fashion and editorial commentary in this area is familiar to anyone acquainted with construction law, and in my judgment section 111 is directed to providing a definitive resolution of the debate. The words "may not withhold payment" are in my view ample in width to have the effect of excluding set-offs and there is no reason why they should not mean what they say.

37. The other subject of possible dispute is the ambit of section 111(4). Clearly it requires there to have been an effective notice to withhold payment. Mr Furst, for VHE, submits that a further requirement is that the notice must precede the referral and that the "matter" referred to adjudication must include the effect of that notice and the validity of the grounds for withholding payment which it asserts. It may be that that was not challenged by Mr Thomas, but in case of any doubt on that score I record that in my judgment it is correct. The effect of the subsection is that, after there has been an effective notice of intention to withhold and an adjudication, payment cannot be enforced earlier than seven days from the date of the decision. There is no reason why that should be so unless the adjudication relates to the notice. Moreover that is the natural point of reference of the expression "the matter", with its definite article, as a matter of construction."

31. I am satisfied that in the present case the Adjudicator had no jurisdiction to consider the repudiation claim because it was not mentioned in any notice of intention to withhold payment. The Adjudicator did not consider the repudiation claim though he founded himself on a reason which was wrong in law. Since the Adjudicator was quite right in excluding that matter from his consideration because he had no jurisdiction to consider the matter, his decision cannot be impeached in that regard even if his reasons were wrong.

32. **Delays** : Delays were mentioned in the notice of intention to withhold payment. Counsel for NDL submitted that the Adjudicator wrongly decided that he was unable to consider issues relating to delay. I cannot agree. The Adjudicator indicated that he would take into account delays and he did so. He was entitled to do so. The delays were obviously a part of the dispute. At paragraph 5.21 the Adjudicator asked himself "whether and if so how much (NDL) may properly deduct from any such sum which may properly be due to (J&JN) as a result of delays, defects and the like on the part of (J&JN)". In the event, he made a deduction on account of defects but did not mention any deduction for delays, though he found that there were delays. Counsel for J&JN invites me to infer that the Adjudicator decided that the delays which he found caused no loss or were the responsibility of DNL rather than J&JN. That may be so, and if he made such a decision, the decision may be right or it may be wrong. Equally, it may be the case that by mistake he forgot to put a figure on the delays. In any of those events, the decision of the Adjudicator is beyond question in these proceedings. He made a decision within his jurisdiction and that decision is binding until questioned in arbitration or litigation.

33. **The result of acceptance of repudiation**. It is not necessary for me to consider the Adjudicator's view of repudiation, because whether it was right or wrong does not affect the result. However, since the matter has been argued at some length I feel I should deal with the arguments.

34. James R. Knowles led the Adjudicator into error by their statement in their letter of 6 December, 1999 that NDL had asserted "that the contact does not exist" and hence the repudiation claim did not arise under the contract. NDL had not made that assertion, and that was not the effect of their accepting the alleged repudiation on the part of J&JN. The line of thinking put forward by James R. Knowles was comprehensively rejected by the House of Lords nearly 60 years ago in **Heyman v. Darwins** [1942] 2 Ll L 65. Repudiation of a contract "is a thing writ in water" and of no effect unless accepted. Acceptance of repudiation is often said to bring the contract to an end, but that is loose language which misstates the true position. Acceptance of repudiation brings **performance** of the contract to an end. The contract still exists and rights arising under it are enforced. In **Heyman v. Darwins** at page 42, Lord Russell of Killowen said, *"Repudiation, then, in the sense of a refusal by one of the parties to a contract to perform his obligations thereunder does not of itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone. But even if the so-called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party has still his right of action for damages under the contract which has been broken, and the contract provides the measure of those damages. It is inaccurate to speak in such cases of repudiation of the contract: the contract stands, but one of the parties has declined to fulfil his part of it. There has been what is called a total breach or a broach going to the root of the contract and this relieves the other party of any further obligation to perform what he for his part has undertaken."*

It followed, in the view of Lord Russell and of the other members of the House that after an accepted repudiation an arbitration clause in the contract remained effective and that rights arising under the contract could be enforced in arbitration. Viscount Simon expressed that view at page 71: *"…. in a situation where the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen " in respect of," or " with regard to," or " under " the contract, and an arbitration clause which uses these, or similar, expressions should be construed accordingly. By the law of England (though not, as 1 understand, by the law of Scotland) such an arbitration clause would also*

confer authority to assess damages for breach, even though it does not confer upon the arbitral body express power to do so.

I do not agree that an arbitration clause expressed in such terms as above ceases to have any possible application merely because the contract has "come to an end", as, for example, by frustration. In such cases it is the performance of the contract that has come to an end."

35. Accordingly, if there was in this case a repudiation and an acceptance of repudiation (which has not been established) the performance of the contract was terminated but any rights arising under the contract remained to be enforced under the contract. Such rights would include rights enforceable in adjudication. The repudiation issues were matters arising "under the contract", and, if they had been mentioned in the notice of intention to withhold payment, the Adjudicator would have had a discretion under paragraph 20 of the Scheme to take them into account if he considered them to be necessarily connected with the dispute. Paragraph 20 says that the Adjudicator may take such matters into account. If he had the discretion, it would be a wrongful exercise of his discretion to refuse to exercise the discretion. If he did exercise such a discretion, it would almost certainly be impossible to challenge the exercise of that discretion whichever way he decided the discretion, in favour of or against considering the other matters. But in this case, the repudiation not having been mentioned in the notice of intention to withhold payment, the Adjudicator did not have a discretion and his refusal to consider exercising a discretion was not a denial of a jurisdiction which had any existence.

36. The intention of the Act clearly was to exclude the consideration of set-offs arising after the due date for the making of an interim payment. In this case, the repudiation issues might have been raised in a later adjudication either by the same or a different Adjudicator. Depending on the timing of the decision of those adjudications, it might have turned out that in considering enforcement of the decisions there might be some set-off of the decisions, as occurred in **VHE Construction plc v. RBSTB Trust Co. Limited**, but that would arise merely as a coincidence of timing. It was argued by counsel for NDL that the decision in the **VHE** case was some support for a set-off in this case. That is not right. If there are two conflicting adjudication decisions, it may be appropriate to set one off against the other in enforcement proceedings, but that is not an authority for making a set-off within adjudication proceedings of matters sought to be introduced in breach of the statutory provisions.

37. **Costs of the adjudication**. The award of costs made by the Adjudicator is challenged.

38. The Scheme by paragraph 25 provides that the Adjudicator is entitled to payment of such reasonable amount as he may determine by way of fees and expenses. The same paragraph gives him the power to apportion liability for the payment of his fees by the parties. Nowhere in the Act or in the Scheme is the Adjudicator given power to order one party to the adjudication to pay the costs of the other. .

39. In **John Cothliff Limited v. Allen Build (North West) Limited** (1999) CILL 1530, His Honour Judge Marshall Evans Q.C. decided in the Liverpool County Court that an adjudicator in that case did have power to award costs of the adjudication. .

40. The report before me is expressed to reproduce only extracts from the judgment so I am a little cautious in considering just what it was that the judge decided. The judge considered paragraph 13 of the Scheme which requires the Adjudicator to take the initiative in deciding the procedure to be adopted in the adjudication. Sub-paragraphs (a) to (g) mention specific examples of procedural points, and sub-paragraph 13 (h) gives a general power, "Issue other directions relating to the conduct of the proceedings". Paragraph 16 regulates representation of the parties and gives the Adjudicator certain powers relating to representation. Judge Marshall Evans particularly relied on 13(h) and 16 as giving him jurisdiction to award costs. I am afraid that I disagree. All of the powers given relating to procedure are simply powers to deal with what are called in the courts "case management". If Parliament had intended by the Act or the statutory Scheme to give the power to award costs, it would have said so. There is no implied statutory power granted to the Adjudicator to award costs. .

41. But in his judgment Judge Marshall Evans did say: . *"... primarily, I decide that the adjudicator has got power to award costs, at least where, as in this case, costs have been expressly sought in the application placed before the adjudicator, and where he has allowed representation, at least on behalf of the defendant by lawyers,*

and apparently on behalf of the claimant by a firm of dispute pursuing quantity surveyors. whom I am told are the leaders in that specified field of extracting money from contractors up the line, or it may be denying it to contractors down the line."

42. In the present case, Counsel for J&JN, while declining to support the reasoning of Judge Marshall Evans' judgment, submitted that on the facts of the present case, the parties had agreed to give the Adjudicator jurisdiction to award costs of the adjudication. They had made that agreement, he said, by both of them asking for costs in the Referral and the Response respectively (as they did) and not telling the Adjudicator that he had no jurisdiction to award costs of the adjudication.

43. It appears from the judgment of Judge Marshall Evans that one of the parties asked for costs to be awarded by the Adjudicator, and it is not clear whether the other party asked for costs. I infer from his judgment that no one submitted to the Adjudicator that he had no power to award costs. .

44. A party to litigation in court in the United Kingdom cannot enlarge the jurisdiction of the court by agreement. But parties to an arbitration can (within limits) enlarge or limit the powers of the arbitrator by contract. The jurisdiction of the Adjudicator is derived from contract. The contract may be made under duress from Parliament, but it is a contract nonetheless. The statutory scheme only applies to a construction contract in cases where the contract fails to satisfy the requirements of the Act. When the terms of the statutory scheme apply by virtue of the Act, "they have effect as implied terms of the contract concerned": section 114 (4) of the Act. Provided they do not detract from the requirements of the Act and the Scheme, the parties are free to add their own terms and there is no reason why they should not expressly agree that the Adjudicator should have power to order one party to an adjudication to pay the costs of the other party. There would be no difficulty if such an agreement were made expressly and in writing. From a policy point of view, there is much to be said for a requirement that such an agreement can only be made expressly and in writing. These adjudications are intended to be simple and short and not to raise lengthy disputes. But such a provision is in the province of the legislature. .

45. I must decide whether in the circumstances of this case there was an implied agreement between the parties that the Adjudicator should have jurisdiction to award costs of the adjudication. I think that there was such an agreement. One party was represented by experienced solicitors: the other party was represented by experienced claims consultants. Both asked in writing for their costs. Neither submitted to the Adjudicator that he had no jurisdiction to award costs. It would have been open to either party to say to the Adjudicator, I have only asked for costs in case you decide that you have jurisdiction to award them but I submit that you have no jurisdiction to make such an award. .

46. In general, an Adjudicator has no jurisdiction to decide that one party's costs of the adjudication be paid by the other party, but in the circumstances of this case, I find that he was granted such jurisdiction by implied agreement of the parties. .

47. **Conclusion** .I find that the Adjudicator did not exclude from his consideration any matter which he ought to have considered and there was no error going to his jurisdiction and no ground for disturbing his decision. .

48. **Decision** I dismiss the claimant's application for declaratory relief declaring that the Adjudicator's decision was null and void. .

49. I order that there be summary judgment in favour of Mr. John Nichol trading as J & J Nichol against Northern Developments (Cumbria) Limited in the sum of £205,372.08 together with VAT and interest at the rate claimed in the defendant's application. .

50. I find no need for declaratory relief in favour of J&JN and I give no such declaratory relief. .

51. I also order that Northern Developments (Cumbria) Limited pay the costs of Mr. John Nichol trading as J & J Nichol incurred in this application assessed in the sum of £11,706.00 and that there should be judgment for that further amount.

Adrian Hughes for the claimants (Solicitors: Dickinson Dees)
Ian Pennicott for the defendants (Solicitors: Berrymans Lace Mawer)