JUDGMENT : **HIS HONOUR JUDGE HUMPHREY LLOYD: TCC** 4th July 2003.

1. The claimant, Abbey Developments Limited, trading as Abbey New Homes, has made a claim in which it seeks declarations. It also applies for summary judgment on those declarations under Part 24 of the CPR. The proceedings arise out of an adjudication brought at the instance of the defendant, PP Brickwork Ltd, which had been engaged by the claimant as a labour-only subcontractor for brickwork and blockwork for the development of an estate of some 69 houses at the Willow Farm, Broomfield, Herne Bay, Kent.

2. There is also (but presently offstage) an application by the defendant for the enforcement of the decision of the adjudicator which was in its favour. The adjudicator took the view that the defendant was entitled to £59,727.71 damages plus adjudicator's fees of £6,265.69. The claimant's declarations, if granted, would mean that the dispute that led to the adjudication would be resolved in favour of the claimant and the adjudicator's decision would then be unenforceable. Hence, I have heard argument on the claimant's application first. It is, however, accepted that, if the claimant were to fail in its entirety on the application, then the adjudicator's decision would be enforceable.

3. The case essentially turns on whether the claimant was entitled to take away essentially the remainder of the work which the defendant had agreed to carry out. For that purpose, it is first necessary to understand what was the contract.

4. It received a letter of invitation dated 25th September 2000 in which it was invited to submit a tender in accordance with certain documents, which were attached. The letter referred to Willow Farm, Broomfield, Herne Bay, Kent, plots 1 to 69 inclusive. The letter continued:
"For your information and guidance, we wish to advise the Site comprises of a total of 69 No. units and their respective Garages, and at present it is envisaged that the construction programme will last approximately 18 months.
"However, Abbey Developments Limited reserve the right to vary the number of units and the construction programme without vitiating the Contract or giving rise to a claim from the Sub-Contractor."

5. That sentence is important since everything depends on its interpretation.
"Your Tender should be returned to this office, together with the Stage Payment Schedule and Form of Tender duly completed by no later than 13th October 2000.
"Abbey Developments Limited reserve the right to renegotiate rates or suspend the Contract and retender the works without vitiating the Contract or giving rise to any claim from subcontractor."

6. That sentence, too, is of importance, since it forms part of the claimant's case that it affects the interpretation to be given to the previous sentence to which I have referred.

7. However, at this stage, I wish to emphasise that, like all contracts, it is necessary to read the whole of the contract together, and there are other relevant parts which need to be considered. That was merely the letter inviting the tender.

8. The tender itself was submitted on 6th November and was for some £484,000. It was accompanied by a tender summary, which the tenderer had been required by the claimant to complete. The prices for each of the house types and the numbers of the prospective house types were all set out, together with those for the various types of garage. There were a-dozen or so house types.

9. There were also General Conditions of Contract are also referred to. Condition l of the General Conditions of Contract says that:
"The contract documents will comprise [amongst other things]:
"1. Letter of invitation to Tender.
"2. Price Tender and Summary.
"3. General Conditions of Subcontract."

   (Other documents are referred to.) The conditions of subcontract include the following. (In them the Contractor is the claimant.) Condition 24 deals with variations:

10. The Sub-Contractor must allow in his price for all the contingencies listed in the Contract Documents and no additional payments will be made in respect of work shown on the Drawings or otherwise

described. He will conform with all instructions issued by the Main Contractor's Management, Architects and/or Engineers. Whether these instructions constitute a variation will be determined and valued by the Contract Surveyor, and a Variation Order will be issued detailing the changes and the value of such addition or deductions. The issue of a Variation Order for additions or omissions to sections of the works will in no way vitiate the Sub-Contract, and Sub-Contractors should take special note that no additional payments will be made except where a Variation Order has been issued, prior to the commencement of the works in questions.

11. That is a clause which is in common form and allows for both additions and omissions. Condition 30 deals with termination of the employment of the sub-contractor:
"If the Sub-Contractor fails to complete the Sub-Contract or fails to comply with any of the Conditions of the Sub-Contract, or any conditions of any other Contract between the parties hereto, the Main Contractor may give written notice to the Sub-Contractor which specifies the default and requires it to be ended. If the default is not ended within seven days of receipt of the notice, the Main Contractor may, by further immediate written notice to the Sub-Contractor determine the employment of the Sub-Contractor under this Sub-Contract. Such determination shall take effect on the date of receipt of the further notice. If cause for a written notice described herein before is required again, then the Main Contractor may determine the employment of Sub-Contractor in writing with immediate effect. The Main Contractor may employ another SubContractor to execute the completion of the Sub-Contract works and may charge and set off against any payment or retention due, the difference in price between the Sub-Contract Sum and the actual cost to the Main Contractor of the completion and maintenance of the Sub-Contractor's works. If such charge exceeds the balance of payments due to the Sub-Contractor, the excess will be a debt due by the Sub-Contractor to the Main Contractor."

12. It is, also, in a standard format and it sets out the usual steps. It requires, first, that the subcontractor to have failed in some respect; secondly, the main contractor to have given a written notice specifying the default and requiring it to be ended; thirdly, if the default is not ended within seven days of the notice being received, then, fourthly, a further written notice is given determining the employment of the subcontractor under the subcontract. Then there are the usual provisions for establishing a balance due to one party or the other.

13. All these documents form part of the contract because, on 21 December 2000, the claimant sent its subcontract order to the defendant, which was duly accepted by it, forming the contract. It referred to the tender and the fact that some of the house types had changed, and included the following printed conditions:
"This order is placed subject to the following conditions:
"2. The company reserve the right to reduce or increase the quantity of the works or to suspend or accelerate the progress of the works or to instruct works to be executed out of sequence, to meet the particular requirements of the development, and such alteration, if instructed shall not vitiate the subcontract."

14. That clause amplifies but is otherwise virtually identical to the first part of clause 24 of the conditions.

15. Some months later, in 2001, the claimant had to write to the defendant complaining of matters which it required to be put right. In May, it complained about failures to wear the correct headwear and footwear; in June, about no abrasive wheel certification; in July, about some refusal to carry out some works; in August, about some sand and cement that was missing, or not enough of, in September, about somebody being incompetent in management. And then, in October, the claimant wrote to the defendant saying that it was considering determining the defendant's contract pursuant to clauses 6 to 13 of the General Conditions by reason of failure to supply sufficient labour.

16. That drew a riposte from the defendant saying there had been labour, and there was an answer to that saying that they were merely considering it and they were not going to take the matter, at that stage, any further.

17. However, later that month, there were further complaints about health and safety matters. Although it is sometimes suggested that failure to comply with requirements relating to health and safety are in some way a separate category from other and more essential provisions of a construction contract, they are in my view just as important as most of the terms which are considered to be of top priority

commercially. One cannot, therefore, put them in some second or lower category for the purposes of considering a default under a termination clause, because they do not, or do not necessarily, affect the programme or the execution or completion of the works in terms of their quality or fitness.

18. Later on, in October, Mr Tranter, the claimant's chief surveyor, wrote making complaints about whether the works were being properly carried out and completed and as to whether there was proper progress and the like.

19. Ultimately, on 12th December, the claimant wrote complaining about insufficient supervision. It was also critical of the workmanship.

20. In it Mr Hurst, the claimant's contracts manager said:
"Our Site Manager is still liaising with multiples of gangs of bricklayers, rather than through one supervisor or foreman.
"Despite our endeavours to educate your company in this manner, it still hasn't occurred. This must be addressed immediately and my instructions to our Site Manager will be only to liaise with one foreman. He has not got the time to treat individual gangs as separate subcontract companies.
"Your progress to date has still not maintained our programme and our substructure work continually stretches out in front without any attempt to endeavour by your company to keep pace. Whilst we accept that you have taken on another gang, this is only as good as supplying more labour, but does not work as an integral part of the bricklaying strength overall.
"You have failed to concentrate on areas required by our Site Manager to tie in with our programme. Therefore, when we do perceive progress it is not necessarily in the correct areas. This again, stems back to the fact that they work as individual gangs and not under one umbrella.
"It is unfair to put this situation onto our Site Manager, who endeavours to work in the areas to produce the most results in accordance with the programme.
"I cannot stress enough that this situation must change in the future, and I inform you here that this is your company's last chance to correct these issues and hereby put you on notice of a 7 day requirement to compensate these shortfalls."

21. That letter plainly fits the preliminary notice provisions of clause 30 of the general conditions.

22. On the next day, Mr Tranter, wrote to the defendant. Although Mr Hurst's letter on the previous day was not apparently copied to Mr Tranter, it bears his initials and reference so it is clear that there is a connection between the two. It also refers to information from the claimant's management. This letter harks back to Mr Tranter's letters in October. Mr Tranter says:
"... I am informed by our Construction Department that still you are failing to provide labour in sufficient numbers and quality to maintain our build programme.
"Therefore, we must now inform you that we are limiting your works to those plots that you currently have under construction. Following the satisfactory completion of these plots your contract will be determined in accordance with our standard terms and conditions.
"An alternative contractor will be employed to complete the development and any additional costs to this company which result will be charged to your account."

23. Subsequent correspondence indicates that the additional charge seems to have been quantified at some £8,000, which appeared, on the face of it, to be all that the claimant might have suffered. That is the background to the adjudication and to the present application.

24. On 12 February 2003 the adjudicator, Mr Matthew T Molloy, decided that the claimant was in repudiatory breach of contract in deciding to limit the scope of the work and that the defendant was entitled to damages of £59,727.71 plus interest and 50% of the adjudicator's fees and expenses. He concluded that the letter of 13 December 2001 constituted a repudiatoryy breach of contract by the claimant, entitling the defendant to damages.

25. In the Particulars of Claim, the claimant set out the terms of the contract and the letters to which I have also referred. In paragraph 13, it refers to the letter of 13th December, and in paragraph 14, it says:

"The claimant was entitled so to reduce the quantity of the works by reason of the express provisions in the invitation to tender and/or the subcontract order set out in paragraph 7 and 8 above."

26. Paragraphs 7 and 8 contain the two sentences in the invitation to tender to which I have referred and the extracts from the subcontract order to which I have also referred.

27. The Particulars of Claim then continue with the story of the letter on 13th December and the subsequent events, including the adjudication and the consequences of that.

28. In paragraph 27, the claimant says that:
"... it was entitled by reason of the provisions referred to in paragraph 7 and 8 above to reduce the quantity of works and to employ others to carry out the Removal Works. In the premises such conduct was not a breach of the contract, and the Claimant is not liable in damages, interest or to the Defendant as found by the adjudicator or at all, and is not liable to pay the fees and expenses of the adjudicator. The Claimant will seek declarations in respect thereof"

29. So the application under Part 24 is based upon the paragraphs which I have read out, namely, 13, 14 and 27 of the Particulars of Claim, and seeks the relief set out in the prayer at the conclusion of the Particulars of Claim in the five declarations sought by the claimant:
"1 a declaration that the Claimant was entitled under the contract between the parties to reduce the quantity of the works the subject of the same by removing therefrom all plots upon which the Defendant had not yet started work;
2 a declaration that the Claimant lawfully reduced the quantity of the works the subject of the contract by removing therefrom all plots upon which the Defendant had not started work by its letter to the Defendant dated 13th December 2001;
3 a declaration that the Claimant was not in breach of the contract by engaging others to carry out the work removed from the scope of the contract by the said letter of 13th December 2001;
4 a declaration that the Claimant is not liable in damages, interest or adjudicator's fees and expenses to the Defendant as awarded in the decision of the adjudicator...
5 a declaration that the Claimant is not liable to make any payment pursuant to the adjudicator's said decision."

30. It is accepted by Mr West for the claimant that 3, 4 and 5 are essentially consequential on declarations 1 and 2 and that he must succeed on 1 and 2 in order to achieve 3, 4, and 5. Conversely, if he fails on 1 and 2, then he will not be entitled to 3, 4, or 5.

31. The claimant's submissions are effectively as follows. It bases its case on the invitation to tender, which, as I have said, formed part of the contract. It maintains that it had the power to limit the scope of work. Whilst accepting that ordinarily a power to omit work would probably not entitle an employer to remove work from a contract in order to give to another contractor at a cheaper price, nevertheless all depended on the applicable wording. Mr West for the claimant contended that the claimant had an absolute right to omit work, i.e. on the houses upon which the defendant had not yet started, under the provisions of the first sentence of the invitation to tender. In other words, it had the right to vary the number of units by reducing them, "without vitiating the contract or giving rise to a claim from the subcontractor".

32. He maintained that such a provision was wide and effective, not least because the next sentence upon which reliance is placed shows the ambit of the claimant's powers because the claimant also reserved the right to renegotiate rates, or to suspend the contract and retender the works, without vitiating the contract or giving rise to any claim from the subcontractor.

33. Mr West submitted the provision in the subcontract order, upon which he also relies, is to be read in that wide way as well. He contended that since the work was labour-only, and since prices had been provided for each type of house and each garage type, and since it was a matter which lay within the entire discretion of the claimant as to whether or not, under the provisions of the contract, it required the defendant to come and work on a particular house type or garage, it was therefore entitled to remove the outstanding work.

34. Mr West, in the course of his argument, grappled head-on with the case law which is relied upon by the defendant in support of its interpretation of the contract and which, it is maintained, is distinguishable. Mr West's acceptance of the usual position was based on those cases.

35. The case law starts, for present purposes, with three cases from Australia and Canada, all well-known, and, as Mr West pointed out, the subject of detailed consideration and commentary in passages in Hudson on Building Contracts, 1 lth ed.

36. Mr West relied on paragraph 4.202 in Hudson, where, having referred to the old Scots case about the building of the Forth Bridge - Tancred Arrol v The Steel Company of Scotland Limited (1890) 15 App. Cas. 125 - the editor, Mr I.N. Duncan Wallace QC says:
"It is self-evident that the building owner must permit the contractor to carry out the whole of the work, and that if he prevents the contractor from so doing, the owner will be in breach of contract and liable for damages unless there is an applicable power to omit work in the contract.
The point arises, however, in a more subtle way where there is a variation clause in the contract empowering the owner to omit work, and the owner's reason for omitting the work under that clause is because he wishes the work to be carried out more cheaply by someone else than the contractor. It is implicit in most contracts that an owner who exercises a power to omit work must genuinely require the work not to be done at all, and cannot exercise such a power with a view to having the work carried out by someone else. Thus, in the absence of express provision or the contractor's agreement, it is submitted that work to be done by the main contractor could not be omitted and then carried out by a nominated subcontractor substituted under a power to vary the work, if the owners' reason for so doing was simply a desire to have the work done more cheaply.
However, if there are sound technical or commercial reasons for omitting the work, and not simply a desire to escape the contract prices, as, for example, a desire to postpone the work until after the expected completion date due to technical or commercial doubts about its present viability, or an unexpected shortage of funds, it is suggested that this would be within the owner's discretion contemplated by the omission or postponement provisions of many variation clauses."

37. Mr West also referred to the passages in Hudson in which Mr Duncan Wallace discusses contractual terms which give a building owner the right to terminate on the grounds of "convenience". Mr Duncan Wallace points out that the stem from provisions which are widely used in the United States and which have been the subject of consideration and discussion in the various jurisdictions in that country. They are also now (have been for very many years) found in many other countries and in other typical contracts (sometimes in different forms).

38. In the discussion of those clauses, at paragraph 12-017, Mr Duncan Wallace says:
"In terms of first principle, the convenience clause may be regarded, it is suggested, as primarily designed, in the absence of express indication to the contrary, to give the owner the commercial freedom to abandon the project, or a part of it, either permanently or temporarily at any time. It may also be regarded, it is again suggested, as intended to afford an owner who is dissatisfied with a contractor's progress or work with an alternative and less controversial remedy than that available under an accompanying default-based termination clause, thus avoiding the expense and risks of a contested default determination while sacrificing some of its financial procedural advantages.

39. On this view, it is submitted, on the analogy of the authoritative Commonwealth and later English cases similarly restricting the power to order omissions by way of variation, that it will be a breach of contact for an owner to exercise the remedy, in the absence of sufficiently express wording, if his purpose in doing so is to obtain the more attractive prices of another contractor to complete the work [**Carr v JA Berriman Pty Ltd** (1953) 27 ALJ 273 and other cases are cited]. In such a case, incidentally, there seems to be no reason why knowledge of the alternative source or price on the part of the owner at the time of contracting should be a necessary ingredient or of any relevance in establishing his breach, which depends on placing a reasonableness as opposed to an exploitative interpretation on the variation power.

40. If this view of the convenience clauses is correct, and the owner exercises the power because he has decided to abandon the project either permanently or for the time being, or because he is bona fide dissatisfied with the contractor's performance but prefers to avoid a default-based confrontation, there

will be a legitimate exercise of the power, it is submitted. On the other hand, where the owner has repudiated the contract by some other breach, so that the contractor is entitled to and does rescind at common law, or where the owner has unsuccessfully sought to determine the contract a common law or under a default provision in order to obtain the remedies and damages available against the contractor in such a situation, it will follow that a ruling which deprives the contractor of loss of profit or other consequential loss in that event will mean that the convenience clause has in effect been interpreted as a partial "no damage" or exclusionary clause, operating automatically in all situations, and whether or not in fact invoked at the time by the owner. While in principle there is no objection to any such limitation of damage following a wrongful determination by the owner, sufficiently clear wording should be required for such a result to be achieved, it is submitted, and the normal tendency, in the absence of sufficiently clear language, should be to interpret such clauses as affording a useful remedy to an owner in the two principal situations envisaged, but not as providing a shield against wrongful determinations or repudiations of the contract on his own part."

41. So, Mr West pertinently posed the question: what essential difference is there between a power to omit and a power to terminate? By parity of reasoning with the submissions made by Mr Duncan Wallace in the passage which I have quoted, may not a power to omit also be exercised where there is bona fide dissatisfaction with the performance of the contractor and where an owner wishes to avoid what Mr Duncan Wallace calls a "default-based confrontation".

42. It was suggested that otherwise it cannot be done. The other cases which Mr West referred, are also extracted in Hudson -- namely, **Simplex Floor Finishing Appliance Co Limited v Duranceau** [1941], 4 DLR 260, a decision of the Supreme Court of Canada; **Carr v JA Berriman Pty Ltd**, [1953] 89 CLJ 327; AU 273, High Court of Australia; and Commissioner For Main Roads v Stuart (1974), 4 ALR 571, also a decision of the High Court of Australia. They all support the proposition that an owner is not entitled to omit work simply on the grounds that it wishes the work to be done by somebody else other than the contractor. In **Carr** Fullagar J said (at pages 346-347):
"The relevant part of clause 1 of the conditions .... is contained in the words: 'The Architect may in his absolute discretion, and from to time, issue .... written instructions or written directions ... in regard to the ... omission ... of any work. The Builder shall forthwith comply with all Architect's Instructions'. Clause 1 is part of a printed form, and the powers conferred upon the architect extend to the giving of directions on a great variety of matters in addition to the 'omission of any work'. The clause is a common and useful clause, the obvious purpose of which - so far as it is relevant to the present case - is to enable the architect to direct additions to, or substitutions in, or omissions from, the building as planned, which may turn out, in his opinion, to be desirable in the course of the performance of the contract. The words quoted from it would authorise the architect (doubtless within certain limits, which were discussed in R v Peto (1826) 1 Y & J 37; 48 E.R. 577 to direct that particular items of work included in the plans and specifications shall not be carried out. But they do not, in my opinion, authorise him to say that particular items so included shall be carried out not by the builder within whom the contract is made but by some other builder or contractor. The words used do not, in their natural meaning, extend so far, and a power in the architect to hand over at will any part of the contract to another contractor would be a most unreasonable power, which very clear words would be required to confer."

43. In addition to those three cases, Mr West referred to a recent decision of Mr Recorder Kallipetis QC in an appeal from an arbitrator: **Amec Building Limited v Cadmus Investments Co Limited** (1996) 51 Con LR 105. Unfortunately, the report does not set out the questions of law which were the subject of the appeal as they are not recorded in the judgment. However, it seems that the contract incorporated one of the JCT standard forms. The relevant issue concerned work which was the subject of provisional sums. The architect issued an instruction omitting the work. The employer later entered into a contract with another contractor for the work. The Arbitrator awarded the contractor damages for loss of profit on the work. In the course of his judgment, the judge said:
"There is no dispute between the parties that the term 'provisional sum' is a sum provided for works or costs which cannot be entirely foreseen, defined or detailed at the time the tendering documents are issued. It is also accepted that an architect has a right to omit such sums or part thereof if not required and that in that event the contractor has no recourse to a claim for loss of profit. There is apparently no authority by way of case law which covers the situation here whereby the architect having omitted a provisional sum then awarded the work to a

third party. There is a reference in Hudson, to which the the arbitrator's attention was drawn, which indicates that the power to omit work by variation cannot properly be exercised so as to omit work in circumstances where the employer intends to have the omitted work carried out by a third party. It was argued that it is a question of good faith. The Arbitrator referred to the statement in Hudson as reflecting in his view the generally accepted position in the industry.

Both parties before me are agreed that the reason for the omission was irrelevant in considering whether or not the instruction was within the terms of the contract.

……

My attention has been directed to a decision of the Supreme Court in Sydney namely ***Carr v JA Berriman Pty Ltd*** *(1953) 89 CLR 327 and in particular the passage in the judgment of Fullagar J (at 347).*

> *This decision and, I am told, the passage in Hudson to which I have already referred, were considered by Mr Recorder Brian Knight QC in this court in* ***Maidenhead Electrical Services Ltd v Johnson Control System Ltd*** *(26 January 1996), unreported). This is yet unreported but I have been provided with a transcript and the recorder in that case determined that similar words in clause 7 of the contract did not entitle the contractor to omit and grant work to a third party.*
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> *Mr ter Haar's skeleton argument at paragraph 18 submits that the contract gave the architect complete discretion as to the omission of works, so long as that omission was not so substantial as to change the character of the works so that it ceased to be a variation. Mr ter Haar argued that as long as it was a variation it was perfectly within the architect's powers and under the terms of the contract to withdraw a particular section of the works from the provisional sum and grant them to a third party. He points out that had the Food Court been included in the contract bills then the provisions of clause 13.1.1 of the contract entitle the architect to omit such work with the financial consequences that are spelled out in clause 13.5.2. This he argues supports his contention that it is within the architect's powers to withdraw the work from a provisional sum even if it is intended to give it to a third party.*
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> *He raised various other matters to show that the architect had good reasons for withdrawing the sum of this work from Amec. He referred to poor performance, poor site husbandry and the fact that they were in breach themselves at the time that the architect's instruction was issued. However both he and Mr Reese concede that the reasons for the instruction being withdrawn should not be considered as relevant. In any event the reasons put forward by Mr ter Haar were expressly dealt with and rejected by the Arbitrator. First, surrender of part possession by agreement: this was rejected by the Arbitrator at paragraphs 12.08 and 12.09; second, that Amec was in culpable delay at the time of the instruction: this was rejected by the Arbitrator at paragraph 12.07 of the award; and lastly to evidence that Amec would have made a profit, the profit element was accepted by the Arbitrator in paragraph 12.11 where he specifically accepted the 2.75 per cent of prcfit and made his award on this basis.*
>
> *I must confess that I did initially find myself in some difficulty because it did appear that the Arbitrator was hinting at, although not expressly stating, that Cadmus were guilty of some bad faith towards Amec in the way that they had obtained partial possession of the site and then awarded the Food Court work to a third party. However, the point that I have to decide is whether or not the terms of the contract permit the architect to withdraw work from the provisional sum and award it to a third party. There is no dispute that the power is given to the architect in his sole discretion to withdraw any work from provisional sums for whatever reason if he considers it in the best interests of the contract or the employer so to do. The difficulty that arises in this case is that which arose in the Australian case, namely that it would appear that the purpose was to remove it from the existing contractor and award the work to a new contractor. Without a finding that the architect was entitled to withdraw the work for reasons put forward by Mr Ter Haar, and in view of the fact that the specific reasons he advances were expressly rejected by the Arbitrator, it seems to me that the only conclusion I can come to is that the Arbitrator had concluded that this was an arbitrary withdrawal of the work by the architect in order to give it to a third party other than Amec. In those circumstances, and in particular in view of the express finding by the Arbitrator at paragraph 12.04 that the statement in Hudson reflects the 'generally accepted position in the industry' it seems to me that the Arbitrator was perfectly correct in deciding that such an arbitrary withdrawal of work from the 'provisional sum' and the giving of it to a third party was something for which Amec were entitled to be compensated and the compensation that he arrived at, namely the loss of profit having accepted the figures put forward in evidence, is one which is not open to be impugned on appeal as a matter of law. In those circumstances therefore albeit with some reluctance it seems to be that I should dismiss this appeal as well."*

(I was also referred to the Maidenhead case but it is of no assistance.)

44. I observe that the Arbitrator referred to the statement in Hudson as reflecting, in his view, *"the generally accepted position in the industry"*. However as the generally accepted position in the industry is a question of law and not of practice it derives from the assumed attitude of the courts.

45. The justification for these decisions is in my judgment to be found in fundamental principles. A contract for the execution of work confers on the contractor not only the duty to carry out the work but the corresponding right to be able to complete the work which it contracted to carry out. To take away or to vary the work is an intrusion into and an infringement of that right and is a breach of contract. (The work has to be defined sufficiently for there to be a right to execute it.) Hence contracts contain provisions to enable the employer to vary the work in order to achieve lawfully what could be achieved without breaking the contract or by a separate further agreement with the contractor. By entering into a contract with a variations clause such further agreement is obviated as the contractor's consent to changes in the works is in the primary contract. So such clauses enable an owner to remove work from a contractor, just as they oblige the contractor to carry out additional work or to make alterations in the work, none of which could be achieved without the consent of the contractor.

46. Provisions entitling an owner to vary the works have therefore to be construed carefully so as not to deprive the contractor of its contractual right to the opportunity to complete the works and realise such profit as may then be made. They are not in the same category as exemption clauses. They have been common for centuries and do not need to be construed narrowly. In developed forms they now offer contractors opportunities to participate actively in the success of the project and to enhance their returns (e.g. by way of "value engineering" or the application of concepts such as "partnering").

47. However the cases do show that reasonably clear words are needed in order to remove work from the contractor simply to have it done by somebody else; whether because the prospect of having it completed by the contractor will be more expensive for the employer than having it done by somebody else, although there can well be other reasons such as timing and confidence in the original contractor. The basic bargain struck between the employer and the contractor has to be honoured, and an employer who finds that it has entered into what he might regard as a bad bargain is not allowed to escape from it by the use of the omissions clause so as to enable it then to try and get a better bargain by having the work done by somebody else at a lower cost once the contractor is out of the way (or at the same time, if the contract permits others to work alongside the contractor).

48. It remains to be decided (but it is very doubtful) that work could be omitted simply because the owner is dissatisfied with the performance of the contractor, since the contract itself could and should, and in many cases does, make provision for what is to happen if the contractor's performance is so poor that the employer, having lost confidence in the contractor's ability to complete the work in accordance with the contract, is entitled then to take the whole or part of the work then outstanding away from the contractor in order that it can be done by others more satisfactorily. But such a provision for termination, or partial termination, is something which must be the subject of clear words, because otherwise it would be an intrusion into the contractor's right to finish the work.

49. In Amec it was accepted for both parties that the reason for the omission is irrelevant. This must be right since otherwise it would be necessary to qualify the right by subjective rather than objective criteria. The editor of Hudson refers to the possibility that there may be "sound technical or commercial reasons for omitting the work" which would justify an otherwise unlawful omission. It is as difficult to see how that can be imported legitimately into a contract as it is to see how to give effect to the policy that you may not omit work but to have it done by someone else. Could it be implied -- if so, does this mean that an employer would be liable to be interrogated as to its motives every time there was a variation by way of omission or which was seen as a prelude to or paving the way to an omission?

50. In my judgement the answer is that the purpose of a variations clause is to enable the employer to alter the scope of the works to meet its requirements. As a project proceeds it may become clear that some change of mind is needed to attain the result now desired. That might be a simple realisation that something is no longer needed (especially if it was always an option, typically signalled by the use of a provisional sum or some other indication of lack of commitment or by the absence of the necessary definition) or it might be for some other reasons such as lack of money, or a change in the requirements of the actual or prospective occupier or user. The test must therefore be whether the variations clause is or is not wide enough to permit the change that was made. If, with the advantage

of hindsight, it turns out that the variation was not ordered for a purpose for which the power to vary was intended then there will be a breach of contract. So the motive or reason is irrelevant; it is not necessary to embark on the uncertainties inherent in the suggestion in Hudson of "placing a reasonableness as opposed to an exploitative interpretation on the variation power"; nor is it necessary to speculate whether this will be the occasion to reveal that the concept of good faith in the performance of a contract is (and has always been) part and parcel of English law (albeit well hidden); the test is familiar and objective -- what purpose did the contract envisage? That purpose must however be expressed with clarity to displace the contractor's right to have the opportunity of completing all the work distinctly undertaken.

51. Mr Leabeater cautioned me about arguments from redundancy and referred me to the observations of Somervell LJ in **SA Maritime et Commerciale of Geneva v AngloIranian Oil Co Ltd** [1954] 1 WLR 492:
"Although one finds surplusage in contracts, deeds and Acts of Parliament, one leans towards treating works as adding something, rather than as mere surplusage."

52. Mr Leabeater also referred to **Beaufort Developments v Gilbert Ash Ltd** [1999] 1 AC 266 where such arguments were described as "seldom entirely secure". However, in my judgment the contractor's right to do the work is so obvious and fundamental that it is unaffected by the absence of wording to the contrary. There has to be a positive negation or dilution of that right were the circumstances such that it would be inferred.

53. On the facts presented to me the claimant may well have had good reason to be dissatisfied with the defendant's performance but that is not enough -- did the contract provide for reasonable dissatisfaction and the concomitant intention to hire another labour-only subcontractor to be the purposes which entitle the claimant to omit work under the provisions of the invitation to tender?

54. So on that basis the decisions all support the defendant's approach. They are all decisions on the wording of the relevant contracts. There is no principle of law that says that in no circumstances may work be omitted and given to others without incurring liability to the original contractor for loss of profit et cetera. That is one of the reasons why a termination for convenience clause is useful although they frequently provide that the contractor is to be compensated for its loses, including loss of profit and overheads contribution on the balance of the work. If they do not then they risk being treated as leonine and unenforceable as unconscionable. It is therefore difficult to accept that they are in themselves. relevant. They might only be relevant if set against the variations clause. The valuation provisions of many contracts also provide the contractor with a means of obtaining acceptable compensation in the event of omissions which deprive it of profit, et cetera. In these circumstances it may be doubted if there would be a viable claim for breach of contract even if the work is given to another if the contract provides its own means of awarding the contractor amounts it that might recover if it had a claim for breach of contract.

55. The question remains: what, therefore, is the interpretation to be given to this subcontract? The cases do provide, helpfully and usefully, the background against which the wording for the contract is to be examined to ascertain its purport.

56. It is as well at this stage to reiterate part of the claimant's submissions, namely that the defendant was providing labour only and not work in the sense of labour and materials, that some of the factors which may influence the approach to this issue in other forms of contract were not present, namely that the defendant was not likely to be in the position that other contractors or subcontractors may be, namely contractually committed to others for the purchase of goods and materials which it would be using in the course of the contract, since here only labour was required; that the duration of the work -- 18 months -- and the fact that the numbers or house types could be varied, and the nature of the work itself, all indicate that there was not the same expectation, still less the guarantee, of certainty and continuity which could legitimately exist and lawfully form part of other contracts. On the other hand the work for each type of house and garage was itself clearly defined as were the numbers of each type and the overall number. This was not a call-off contract.

57. These are important matters which need to be borne in mind because, as Mr West rightly said, if a little tritely, each contract is unique. That is no more than saying that one has to approach every contract in looking at its own circumstances and endeavouring to ascertain the presumed intention of the parties to that contract made for that work in those circumstances.

58. Mr West maintains that the effect of the provision whereby the claimant "reserve the rights to vary the number of units and the construction programme without vitiating the Contract or giving rise to a claim from the Subcontractor" is that it had the right to omit work without being in breach of the contract. He argued that if it had the right to renegotiate and suspend (as it had), so too it could have the right to vary the number of units yet to be carried out, which it also had, then the latter power could permissibly be used to reduce that number to nil, as it were. It had the express right to do that without vitiating the contract or giving rise to a claim from the subcontractor. Accordingly, it could not be guilty of any repudiation if it exercised the rights reserved by the contract.

59. The defendant's approach is very simple: it is that the right to vary the number of units (whether in clause 24 or in the invitation to tender, which were to be equated) is no more than a standard variations provision.

60. It does not, however, confer a right to deprive the subcontractor of the opportunity of carrying out the remaining works simply because the claimant was unhappy with the defendant but nevertheless wished to have the work finished.

61. This is not a case in which, for example, the market collapsed so that the claimant had to abandon the project or put it on hold; both of which, on the basis of the views expressed in Hudson, might provide a legitimate grounds for the exercise of a variations clause even though it deprived the contractor of the outstanding work which might be carried out by others at a later stage.

62. The defendant's case is buttressed by reference in particular to the conditions of the subcontract, such as clause 24 and the subcontract order form, which Mr Leabeater suggests must be read along with the provisions in the invitation to tender, whereby the company reserved the right to reduce the quantity of works, to suspend the progress of the works to meet the particular requirements of the development.

63. Mr West suggests that "the particular requirements of the development" means matters relating to the progress of the development. I agree with him on this. This clause is concerned only with how the development is getting on, as opposed to the developers' particular requirements: that is to say, the objective of the developer.

64. That, however, does not detract, I think, from the main thrust of the defendant's case. The contrast is with not only the second provision in the letter of intent, but also the provisions in the subcontract form which give the claimant the right to terminate on the grounds of dissatisfaction.

65. So the first limb of the defendant's argument also raises the issue: what, therefore, is the meaning of the terms of the subcontract? If, as I have been asked to do, I am to be confined simply to the wording of the first of the two sentences in the invitation to tender, read along with, obviously, the remaining terms of the subcontract, then one has to approach it on the basis: are these words sufficiently clear to enable a party such as the claimant to take work away and have it carried out by another subcontractor?

66. The second sentence in the tender invitation letter clearly envisages that:
"Abbey reserves the right to renegotiate the rates or suspend the contract and retender the works without vitiating the contract or giving rise to any claim from the subcontractor."

67. It is to be noted that the premise for the ultimate action is that the claimant has first attempted but failed to achieve an acceptable renegotiation with the claimant whether directly or, with the lever of retendering, when the claimant's new prices would be tested in comparison with others. The words in my judgement inevitably lead to the conclusion that, if you can suspend the contract -- by which is meant simply to stop work as the term "contract" here being used in terms of the work rather than the legal document itself -- and obtain different prices, then the only purpose of this provision must then

be that the suspension becomes permanent and that the claimant will be free then to have the work completed by the tenderer who it then prefers. What otherwise is the point of retendering if not to supplant the existing subcontractor but without liability which is meant by the words "without ... giving rise to any claim from the subcontractor"?

68. Harsh though that result, it is in my judgment justified commercially in the light of the nature of the services provided (essentially as and when required using labour that is not permanently employed, and without any likelihood of real of significant liability to others), the fact that house building is speculative, and the risks which not only the claimant has to assume but which it requires its subcontractors to assume. If, for example, the pressures of the market are such that it is necessary to reconsider the economics of the development, then, in an extreme situation, the claimant needs this right and, in my judgment, has it. It is something which the defendant subcontractor must accept.

69. But can that provision influence or in any way affect the meaning of the previous provision? The two are not obviously linked. They do not physically stand side by side, and there is, in my view, no necessary connection between the two. The fact that one is wide and extensive and may lead to a remarkable result does not itself mean that the same interpretation is to be given to the former provision. As it stands, read along with the subcontract provisions, primarily clause 24 but also clause 2 of the subcontract order which expands clause 24 somewhat, and bearing in mind that this is a provision which, as Mr Leabeater rightly suggests, is no more than summarising what is to appear in the formal subcontract conditions and the conditions of order, it is in my judgment a standard provision, a standard variations clause. It does not, in my judgment, begin to confer upon the claimant the right to take away work from the defendant so that it can be done by others. It is a right only to omit work that the claimant considers is no longer required for the project.

70. Indeed, the very fact that the later provision in the tender invitation may enable the claimant to achieve depriving the defendant of the right to complete the contract and without having to compensate suggests powerfully that the earlier provision is not intended to enable the claimant to do that, since they are not directed towards the same objectives but separate objectives.

71. The first is simply a restatement of the terms and purpose of clause 24 of the general conditions (which is itself a standard variations provision, as is clause 2 of the subcontract order), and the second one is much wider and more onerous. But it is upon the first that the claimant relies. Clause 24 contains nothing to empower the claimant to omit work and have it done by others, whether on the grounds of dissatisfaction with the defendant's performance or for any other reason. There is no material difference between clause 24 (with or without clause 2 of the order form) and the tender letter, certainly in terms of expression of purpose. If there was to be such a difference then as the documents are to be read together it had to be spelled out in one or other provision, for otherwise anybody, especially someone in the position of the defendant, would have no reason to believe that there was a difference. The necessary clarity of expression required to legitimise the claimant's approach is not present. The defendant's right remained unimpaired and was infringed.

72. The second provision is in reality quite comparable to a clause empowering termination for convenience, for the rights given to the subcontractor to renegotiate and to retender.

73. Accordingly, on these first parts of the claimant's submissions, I come to the conclusion that the claimant would not be entitled to the first declaration which it seeks.

74. The defendant, however, raises -- and this effectively becomes the subject of the second declaration -- the question as to whether, even if that is wrong, that is what happened in this case. It seems to me that the facts of this case are such that the claimant also must fail. I therefore reject its alternative submissions.

75. The facts include the assumption that there might be a bona fide dissatisfaction with the defendant's performance. Would that entitle the claimant to exclude the defendant for the remaining works? I think not. As I have said, the object is to take work away and if the purpose of the omission is justified by the contract, it matters not what the motivation is.

76. Next, what actually happened? As I have recounted, the letter of 13th December from the claimant did not in any way follow up the letter of the previous day by attempting to invoke the termination provisions. It says only: *"Your contract will be determined in accordance with our standard terms and conditions"*.

77. Just as the approach to variations clauses must be one which respects a contractor's right to complete the works which it has undertaken to do, and therefore clear words are required for an intrusion, so too with termination provisions. If they are to take away the contractor's right to finish the work, they themselves not only must be read clearly and carefully, but, if they are to be operated, they must be plainly and carefully operated.

78. It does not seem to me that, even if there had been a right to remove the outstanding work from the subcontract, the letter of 13th December was effective in so doing. It is not expressed in those terms. It was intended to have had that ultimate effect, but it can only be lawful if it is justified by some term of the contract. The letter is concerned with determining the contract. It is looking to the defendant to pay for the consequence of the determination; whereas the contractual right, if it were that set out in the invitation to tender, merely says that there will be no claim from the subcontractor. It says nothing, nor could it say anything, about a right to omit work giving rise to a liability on the part of the subcontractor to pay for the consequences of the exercise of the privilege to remove work from the subcontractor.

79. Accordingly, in my judgment the defendant is right, for the reasons advanced by Mr Leabeater, that the claimant did not in fact exercise its contractual rights, such as they may be, to remove works from the defendant and to give them to another contractor. What it did, on the face of it, was to attempt to determine the contract under clause 30, which it could not do, since the notice had only been given the previous day and the seven-day period had not expired.

80. It may be that at trial this letter could be nevertheless justified on the basis of the earlier defaults in October 2001. But for my purposes, and for the purposes of an application for summary judgment, I cannot give the claimant the second declaration which they seek, or indeed the third declaration, which is to the effect that the claimant acted lawfully in reducing the quantity of works by its letter of 13th December, or that the claimant was not in breach of contract by engaging others to carry out the work removed from the scope of the work by the letter of 13th December, or that the claimant was not in breach of contract by engaging others to carry out the work removed from the scope of the work by the letter of 13th December, or, fourthly, that the claimant is not liable in damages, and obviously, fifthly, that the claimant is not liable to make a payment pursuant to the adjudicator's decision. The dispute which led to the adjudicator's decision should therefore be resolved in favour of the defendant.

81. For the purpose of the present application for summary judgment the defendant has at least a realistic prospect of success in establishing that the circumstances in December 2001 did not justify the claimant's actions, and accordingly, there can be no declarations in relation to 2, 3, 4 and 5 at this stage. If the matter needs to be pursued by the claimant, it will have to be at the trial of the action.

82. Accordingly, for those reasons, this application fails.

Mr Mark West (instructed by Browne Jacobson) appeared on behalf of the claimant.
Mr James Leabeater (instructed by Shadbolt & Co) appeared on behalf of the respondent.