

BEFORE HIS HONOUR JUDGE HULL QC : Epsom County Court. 1st February 2003

Mr Salvador-Rico engaged Dumarc Building Service Ltd to carry out construction works at his residence. In consequence it was not a construction contract within the scope of the Housing Grants Construction and Regeneration Act 1996 and the Part II Scheme for construction adjudication was not automatically applicable. The contract was in JCT Minor Works form, 1998 standard form, with MW11 amendment incorporating adjudication pursuant to s108 HGCRA.

On 10 September 1999 the Architect produced an interim certificate by which he certified £13,558 as being due to the Contractor.

Pursuant to Clause 4.2.2. the Employer served a withholding notice for defective works, non-performance and liquidated damages on the 14th September 1999.

Dumarc referred the dispute to adjudication. The adjudicator found for Dumarc, subject to a reduction to take into account over-certification and ordered payment within 28 days.

The employer did not pay, asserting a right to deduct liquidated damages. Dumarc applied for enforcement and summary judgment.

The employer asserted that Clause 2.3. JCT gave him a right to set off for liquidated damages against any monies due under the contract *'including sums owed under an adjudication'*. Reliance was placed on the judgement of Thornton J in **Bovis Lend Lease Ltd v Triangle Development Ltd** [2002] Adj.L.R. 11/2, where he stated at 67 (3) that *"... where other contractual terms clearly have the effect of superseding, or provide for an entitlement to avoid or deduct from, a payment directed to be paid by an adjudicator's decision, those terms will prevail."*

Exactly what was decided by the adjudicator was in dispute. The court found that the adjudicator had not dealt with the issue as to whether or not the employer was entitled to a set off for liquidated damages (*in the absence of the full judgement, it is not apparent why the adjudicator had not dealt with this, but it may be that the sum was at that stage unascertained and thus not amenable to a adjudication. The summary indicates that the liquidated damages claim was asserted post judgement but earlier indicates that liquidated damages were featured in the withholding notice*).

Dumarc asserted that MW11 brought the contract within the HGCRA. That being the case, as set out at first instance and subsequently by the CA in **Ferson Contractors Ltd. v Levolux A.T. Ltd.** [2003] Adj.L.R. 01/22 at Para 30 per Mantell LJ, in order to comply with the s108 requirement any contractual right to set-off against an adjudication decision could not be extended to claims arising after the adjudication.

Hull J, following **Levolux** which he considered had overruled Thornton's reference to a withholding against an adjudicator's decision in **Bovis**, held that clause 2.3 did not provide a party with a right to set off a claim for liquidated damages against an adjudication decision. He expressed the view that to hold otherwise would drive a coach and horses through the HGCRA and detract from the parties decision to settle the dispute through adjudication.

Accordingly the Defence and Counterclaim failed. The court entered judgment for Dumarc, with costs.