B e f o r e : May LJ; Hale LJ, Mr Justice Hooper CA : 21 November 2003

JUDGMENT : LORD JUSTICE MAY :

1. It is not just nostalgia to recall the long since discredited decision of this court in **Dawnays v Minter** [1971] 1 WLR 1205. Junior counsel now before the court will probably never have needed to look at it. But it and cases which followed were the talk of the town in some circles in the early 1970s. These were cases in which this court, notably in the judgment of Lord Denning MR, held that architects' certificates under standard forms of building contracts were virtually cash. Cash flow was the very life blood of the enterprise. Under contemporary standard forms of building contract and sub-contract, sums certified and paid to contractors as due to sub-contractors must be paid without deductions for cross-claims or contra-accounts, as they were referred to. Contractors and sub-contractors with the benefit of architects' certificates were enabled to obtain summary judgment for the amount certified without deduction. **Dawnays v Minter** was overruled in the House of Lords in **Modern Engineering v Gilbert-Ash** [1974] AC 689. Junior counsel now before the court will have had every cause to consider this case, because it is a leading decision on the law of set off. It was held that there was no such general principle as appeared to have been laid down in **Dawnays** case. On the true construction of the sub-contract before the House, there was no provision which ousted the right of common law set off or abatement. Lord Diplock famously observed at page 718 that *"cash flow*" is the life blood of the village grocer too, though he may not need so large a transfusion from his customers as the shipbuilder in **Mondel v Steel** (1841) 8 M&W 858 or the sub-contractor in the appeal before the House.

2. Construction contracts do by their nature generate disputes about payment. If there are delays, variations or other causes of additional expense, those who do the work often consider themselves entitled to additional payment. Those who have the work done often have reasons, good or bad, for saying that the additional payment is not due. Those who consider and make policy for the building industry, including the government, have taken a general view over the years that a temporary balance should in appropriate circumstances fall in favour of those who claim payment, at the temporary expense if necessary of those who pay. In the years that followed **Modern Engineering v Gilbert-Ash**, standard forms of building contract gradually developed a process of adjudication. If there were disputes as to payment, these could be referred for speedy interim determination to an adjudicator. The adjudicator's decision would be enforceable by summary judgment if necessary. If agreement did not follow for the dispute as a whole, it would be then determined by arbitration or litigation and the eventual final answer implemented.

3. In July 1993, the government appointed Sir Michael Latham to undertake a review of Procurement and Contractual Arrangements in the United Kingdom construction industry. One of the recommendations in his report was that legislation should provide for the speedy resolution of disputes, including disputes as to payment by adjudication, referee or expert. This recommendation resulted in Part II of the Housing Grants, Construction and Regeneration Act 1996. This provides that every written construction contract has to contain the right to refer disputes to adjudication under a procedure which complies with section 108. If the written construction contract itself contains provisions for such a right, those provisions will apply. If and to the extent that it does not, the adjudication provisions of the Scheme for Construction Contracts apply - see section 108(5). Section 114 provides for the minister to make a Scheme by regulations. Section 114(4) provides that where any provision of the Scheme apply by virtue of this part of the Act in default of contractual provisions agreed by the parties, they have effect as implied terms of the contract concerned.

4. Section 108(2) provides:

   "The contract shall -

   a) *enable the party to give notice at any time of his intention to refer his dispute to adjudication;*
   b) *provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;*
   c) *require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;*

d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
e) impose a duty on the adjudicator to act impartially; and
f) enable the adjudicator to take the initiative in ascertaining the facts and the law."

5. Sub-section (3) provides:
"The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.
The parties may agree to accept the decision of the adjudicator as finally determining the dispute.".

6. The Secretary of State has made regulations under the powers conferred on him by sections including sections 108(6) and 114 of the 1996 Act by S.I. 1998 number 649, entitled The Scheme for Construction Contracts (England and Wales) Regulations 1998.

7. The provisions of Part II of the 1996 Act only apply to construction contracts which are in writing. Section 107 provides:
"(1) The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing .....
(2) There is an agreement in writing -
(a) if the agreement is made in writing (whether or not it is signed by the parties),
(b) if the agreement is made by exchange of communications in writing, or
(c) if the agreement is evidenced in writing.
(3) Where the parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.
(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.
(5) An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged."

8. The policy of the legislation is clear. It was described by Dyson J, as he then was, sitting in the Technology and Construction Court in **Macob Civil Engineering Limited v Morrison Construction Limited** (1999) 64 Con LR 1 at paragraph 14 in these terms:
"The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement: see s108(3) of the Act and paragraph 23(2) of Part 1 of the Scheme. The timetable for adjudications is very tight (see s108 of the Act). Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. So far as procedure is concerned, the adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially (section 108(2e) of the Act and para 12(a) of Part 1 of the Scheme). He is, however, permitted to take the initiative in ascertaining the facts and the law (section 108(2)(f) of the Act and para 13 of Part 1 of the Scheme). He may, therefore, conduct an entirely inquisitorial process, or he may, as in the present case, invite representation from the parties. It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved."

9. A number of first instance decisions in the Technology and Construction Court have striven to implement the policy of Parliament. Enforcement proceedings, as they are called, are brought using the Part 8 procedure of the Civil Procedure Rules and habitually there is a claim to summary judgment. Judges of the Technology and Construction Court have rightly been astute to examine technical defences to such applications with a degree of scepticism consonant with the policy of the Act, aptly described by Ward LJ in **R J T Consulting Engineers Limited v D M Engineering (Northern Ireland) Limited** [2002] EWCA Civ 270; [2002] 1 WLR 2344 as "***pay now, argue later***". There has been a number of appeals to this court. I understand anecdotally that this court may be regarded

as less than entirely supportive of the policy of the Act. There certainly are cases in which this court has upheld challenges to the enforceability of decisions of adjudicators, but examination of the cases shows that this has occurred when legal principle has to prevail over broad brush policy, as was the case in **Modern Engineering v Gilbert-Ash.**

10. One troublesome area has concerned adjudicators' jurisdiction. There is first instance authority that the question whether the adjudicator has the necessary jurisdiction is not itself a dispute arising under a construction contract and that the adjudicator has no jurisdiction to decide his own jurisdiction, except perhaps in obvious cases - see **Homer Burgess Limited v Chirex (Annan) Limited** [2000] BLR 124. This has to be seen in the light of a very recent decision of this court, to which I shall refer in a moment. This court has decided that for an agreement to be in writing within section 107(2)(c) of the 1996 Act, the whole contract has to be evidenced in writing, not merely part of it, and that it was not sufficient to confer jurisdiction to entertain an adjudication under section 108 that there was evidence in writing capable of supporting merely the existence or substance of an agreement, the parties to it, the nature of the work and the price (Ward and Robert Walker LJJ in the **R J T Consulting Engineers** case). In that case, it was held that, since the documents relied on by the defendant contained no evidence of the terms of the oral agreement made between the parties or of those terms on which the defendants sought to rely in the adjudication, there was no "agreement in writing" within the meaning of section 107. Auld LJ held that the material terms of the agreement were insufficiently recorded in writing in any of the forms for which section 107 of the 1996 Act made provision. It followed that the provisions of Part II of the Act did not apply to that agreement. Robert Walker LJ said that the purpose of the Part II of the 1996 Act was to facilitate and encourage swift and summary adjudication. Parliament decided that it was inappropriate for an adjudicator to have to deal with disputes as to the terms of an oral contract.

11. Fears have been expressed that, if challenges to an adjudicator's jurisdiction are too readily entertained, the plain intention of Parliament will be frustrated. In **The Project Consultancy Group v The Trustees of the Gray Estate** [1999] BLR 377, the question was whether the construction contract had been entered into before or after 1st May 1998, the date when the 1996 Act took effect. Dyson J, sitting at first instance in the Technology and Construction Court, recorded counsel's suggestion that it would be easy enough for an imaginative defendant cynically to invent an argument that there was no contract, or that any contract was made before 1st May 1998. In his view these fears were exaggerated. It would only be in comparatively few cases that such argument would even be possible. Where they were advanced, the adjudicator and the court would be vigilant to examine the arguments critically. He concluded that it was open to a defendant in enforcement proceedings to challenge the decision of an adjudicator on the grounds that he was not empowered by the Act to make the decisions.

12. Simon Brown LJ said in **Thomas-Fredric's (Construction) Limited v Keith Wilson** [2003] EWCA Civ 1494, 21st October 2003, that it did not follow that, because the policy of the Act was "pay now, argue later", even in the short term the adjudicator's decision binds the parties if a respectable case has been made out for disputing the adjudicator's jurisdiction (paragraph 20 of the judgment). One issue in that appeal was whether the appellant had submitted to the jurisdiction of the adjudicator. Simon Brown LJ said that to his mind it was impossible to conclude from the facts and documents that the appellant had done so. He summarised the position in paragraph 33 of his judgment in two propositions:

> *"(1) If a defendant to a Part 24(2) application has submitted to the adjudicator's jurisdiction in the full sense of having agreed not only that the adjudicator should rule on the issue of jurisdiction but also that he would then be bound by that ruling, then he is liable to enforcement in the short term, even if the adjudicator was plainly wrong on the issue.*
>
> *(2) Even if the defendant has not submitted to the adjudicator's jurisdiction in that sense, then he is still liable to a Part 24(2) summary judgment upon the award if the arbitrator's ruling on the jurisdictional issue was plainly right."*

Judge and Jonathan Parker LJJ agreed with Simon Brown LJ, Judge LJ specifically endorsing the two essential principles at the end of the judgment

13. The present appeal again raises an issue of an adjudicator's jurisdiction. It is an appeal from a decision of His Honour Judge Thornton QC sitting in the Technology and Construction Court on 14th February 2003. The judge's decision is reported at [2003] Building Law Reports 296 and has the broad approval of the editors of those law reports. The judge gave summary judgment in favour of the claimants in the sum of £115,015.50 being the amount of the decision of an adjudicator, Mr C D Morris, dated 18th August 2002. The judge also made orders for interest and costs. He himself gave permission to appeal. Part of the defendants' case before the adjudicator was that the claimants had been paid all that was due to them.

14. The judge described the background to the dispute as follows, (paragraph 1):
*"The underlying background to [the adjudicator's] decision was refurbishment works being carried out by the claimant shop fitters at a new **Tally Weijl** retail clothing store in Oxford Street, London, W1N 9HB. The refurbishment works were carried out between June and September 2000 and, following practical completion, disputes as to the value of that work arose which the claimant referred to adjudication having elected to adopt the statutory Scheme Rules concerned with the appointment of, and the procedure to be adopted by, the adjudicator."*

15. The judge referred Mr Morris' nomination and appointment and his decision. No reasons were asked for before the publication of his decision, which was accordingly unreasoned. The judge then said (paragraph 2):
"The defendant declined to pay the sums directed to be paid. Two jurisdictional grounds were taken by the defendants. Firstly, it is contended that there was no construction contract in existence between the parties and, hence, no construction contract underlay or gave rise to the claimant's statutory entitlement to an adjudication as to the disputes concerning the true value of its works. Secondly, it is alleged that if there was a construction contract in existence, that contract was different in content to the construction contract found to exist by the adjudicator. In consequence, that contract incorporated different adjudication rules into any adjudication arising out of that contract to those adopted by the adjudicator and, thus, the adjudicator was appointed, and the adjudication was conducted by reference to, the wrong rules and in contravention of the parties' agreement as to the procedural rules that would apply. On this additional ground therefore the defendant contended that the adjudication was conducted without jurisdiction."

16. The judge said that if the defendant made good either ground of alleged lack of jurisdiction, the decision was a nullity and unenforceable.

17. As will be seen, the judge put the defendants' contentions in their reverse order. There had been a "battle of forms". The defendants contended that a contract had been entered into on a standard form which they had proposed, the JCT Standard Form of Prime Cost Contract 1998, which has its own provisions for adjudication complying with section 108 of the 1996 Act, and which does not therefore have imported by implication the Statutory Scheme. Their alternative contention was that, if an agreement was not made on these JCT terms, there was no agreement between the parties, so that the claimants were entitled to be paid a reasonable sum for the work they had carried out.

18. The circumstances in which the contractual dispute arose are summarised in paragraphs 5 to 13 of the judge's judgment as follows:

"The construction contract

5. The dispute as to the adjudicator's jurisdiction involves a consideration of whether the parties entered into a construction contract at all and, if so, what conditions of contract were incorporated into that construction contract. Since detailed evidence was adduced that was directed to these questions, I will summarise it although I leave over for further consideration whether I should make my own findings on these questions which, if the adjudicator had jurisdiction, were ones that were essentially for him to decide.

6. The work on site started on 9 June 2000. Prior to that, no contract documents had been prepared, no tendering process had been undertaken. The claimant had been introduced to the defendant by the project architect a short time before work started and invited to undertake the shop fitting work which was to be undertaken at great speed and with an immediate start on site. The contract documentation would be produced and agreed

and a contract entered into as work proceeded. At the first project meeting held on 15 June 2000, it was agreed, in a non-contractual sense, that the work would be subject to a form of prime cost contract and that the claimant and the consultants would produce an agreed schedule of work. It was also agreed that a letter of intent would be provided by the defendant pending final agreement as to the terms of the contract.

7. *During June and July 2000 the claimant undertook the strip out work without any clear-cut letter of intent having been provided. The nearest that the defendant got to providing such a letter was by a letter dated 7 July 2000 in which the defendant wrote to the claimant instructing it to carry out the works subject to a term that the form of the contract would be the JCT Standard Form of Prime Cost Contract 1998 ("JCT PC 98"). However, this was immediately responded to by the claimant in a letter dated 10 July 2002 addressed to the architect declining to enter into a contract which incorporated these conditions and instead offering its own conditions which had already been sent to the defendant.*

8. *The claimant became increasingly concerned at the lack of any contractual basis for the work it was carrying out, particularly once the stripping out work was completed and the refurbishment work, involving the employment of sub-contractors, had started. On 21 July 2000, the claimant faxed the defendant and asked for formal instructions and an agreement by which it could continue the work. The fax sought a particular assurance regarding payment. The claimant reiterated these concerns at a subsequent site meeting held on 27 July 2000. On the following day, the claimant sent to the defendant four marked up plans showing the partitions that it had been asked to install with a budget price included. This document was signed by an authorised representative of the defendant. This jointly signed document is relied on by the claimant as giving rise to the construction contract. It also relies on its standard conditions sent previously to the defendant which contained a term that the defendant's acceptance of any quotation would confirm its agreement to all conditions contained in that standard conditions document.*

9. *The defendant, soon afterwards on 2 August 2000, sent the claimant a finalised letter of appointment which was in similar terms to that sent on 7 July 2000, thereby, seeking to incorporate the JCT PC 98 terms and, if already applicable, seeking to exclude the claimant's standard terms. The letter contained a requirement that the claimant should confirm its agreement to the terms of the letter by returning the enclosed copy signed where indicated but this copy was neither signed nor returned by the claimant. Nor further communication of note occurred concerning the terms of the contract under which the work was being carried out.*

10. *On the basis of these exchanges, the claimant contended that the contract was formed by its offer contained in its quotation of 28 July 2000 read with the earlier communication enclosing its standard conditions and the defendant's acceptance of both constituted by its signature on that quotation.*

11. *The defendant contended that, at best, the joint signatures on the document of 28 July 2000 could only have related to, and given rise to, a construction contract concerning the partitions. Since the quotation made no reference to earlier communications or to the claimant's conditions, these conditions could not be regarded as applying to any of the claimant's work. In consequence, the other work could only have been subject to the letter dated 2 August 2000 and the claimant's failure to sign and return a copy did not preclude a contract coming into being.*

12. *The claimant disputed the defendant's contentions, particularly on the ground that, since a contact was already in being, its failure to sign and return the offer contained in the letter dated 2 August 2000 was the clearest possible indication that it was not agreeing to be bound by that proposed contract and remained bound by the earlier contract.*

13. *It can be seen from this summary that it was not clear-cut or obvious which set of conditions, namely the claimant's conditions or JCT PC 98, had been incorporated into the construction contract but that there was in existence a construction contract of some kind. Thus, one of the disputes requiring resolution was as to which set of conditions had been incorporated since the answer to that question would determine whether the basis of valuation and payment was in accordance with the claimant's rates and quotations or by reference to a prime cost. Unless a pure question of jurisdiction as to whether or not a contract existed at all arises, a court ought ordinarily not decide a disputed question in enforcement proceedings since that question has been left, by the terms of the statutory jurisdiction of the adjudicator, for decision by the adjudicator."*

19. The claimant initiated adjudication proceedings. Both parties accepted that, if the claimants were correct that there was a contract between the parties on their standard conditions, the requirements for adjudication provided for by section 108 were not met, so that the adjudication would be governed by the Scheme. On learning that Mr Morris had been appointed as adjudicator, the defendants' solicitors wrote saying that, if there was a construction contract, it was in the JCT Standard Prime Cost Form. If there was to be an adjudication, the nomination process and the rules of the adjudication should follow the JCT procedure. They understood that Mr Morris had been appointed, not under that procedure, but under the Scheme. It followed that the defendants could not accept his jurisdiction. If the claimants were not to withdraw his nomination and if Mr Morris was minded to proceed, then the defendants would wish to participate without prejudice to their objection to his jurisdiction and under protest. The claimants' solicitors responded to the adjudicator saying that there could be no question regarding his jurisdiction as the Scheme clearly applied. They contended that the only agreement in writing that existed incorporated the claimants' conditions.

20. Mr Morris proceeded with the adjudication. As I have said, his written decision did not contain reasons. He recorded his understanding of the contractual provision as follows:

> *"2.01 The Applicant and the Respondent agree that there is a Contract in place for the construction works carried out by the Applicant between 8 June 2000 and 30 September 2000 at 360-370 Oxford Street, London W1N 9 HB.*
>
> *2.02 There is dispute between the parties as to the precise Form of Contract."*

21. The adjudicator briefly summarised the respective contentions of the parties and referred to section 108(1) of the 1996 Act. He said that a dispute arising about the formation of the contract was beyond the valid scope of an "arbitration" - he meant, I think, "an adjudication" - and that no decision had been made in that regard. He then stated:

> *"3.01 Neither a Contract based on the Terms and Conditions of Sale as maintained by the Applicant,* ***nor a Contract for payment on a Quantum Meruit basis as argued in the alternative by the Respondent****, complies with … [section 108 of the 1996 Act].*
>
> *3.02 In accordance with … [section 108(5) of the 1996 Act] …* ***the Scheme for Construction Contracts therefore applies****. (my emphasis)"*

22. He recorded that the adjudication had taken place under the authority of the Scheme.

23. It will be recalled that the judge had said in his summary that it was not clear cut or obvious which set of conditions had been incorporated into the construction contract but that there was in existence a construction contract of some kind. This was, in my judgment, an over-simplification. Each party contended for a contract on the conditions which they had respectively promoted. But it was the defendants' crystal clear contention, both before the adjudicator and before the judge, that, if no contract was concluded on the JCT Prime Cost Terms, there was no contract at all and the claimants were entitled to be paid a reasonable sum for the work they had carried out. This was not a fanciful alternative contention. For the same reason, it was an over-simplification for the adjudicator to state that the claimant and the defendant agreed that there was a contract in place for the construction works. They each contended that a contract was in place, but it was not the same contract and there was a realistic third possibility as contended for by the defendants in the alternative. The adjudicator was correct to say that a contract on the claimants' conditions would not comply with section 108 of the 1996 Act. He was not correct to say that "a Contract for payment on a Quantum Meruit basis" had been contended for. The defendants' alternative contention was, not that there was a contract for payment of a reasonable sum, but that there was no contract and that the claimants were therefore entitled to be paid a reasonable sum. That is a material difference because, if there was no contract, there was no construction contract in writing within Part II of the 1996 Act from which the adjudicator's jurisdiction could derive. Furthermore, if there had been a contract for payment on a quantum meruit basis, that would not have been a construction contract in writing within section 107 of the 1996 Act. No one has suggested that there was a written contract for quantum meruit payment.

The adjudicator was accordingly wrong to say that in accordance with section 108(5) of the 1996 Act the Scheme "therefore applies". The Scheme did not apply if either of the defendants' contentions were correct. It only applied if the claimants' contention as to the formation of a written construction contract was correct. At first blush, that was in my view the least likely of the three possibilities.

24. It is clear that, although he gave no reasons for his decision, the adjudicator's decision was on the basis that the claimants' contention as to the formation of the construction contract was correct. As counsel have explained, the dispute as to whose terms applied was critical to the real dispute between them. The claimants' conditions provided that all variations, additional work and hourly work would be charged at £27 per hour plus expenses and materials used. The JCT Prime Cost Terms for which the defendants contended entitled the claimants to be paid essentially at cost to them plus a fee. Therein lay the main difference between the parties - some £71,000, Mr Jinadu tells us. It was therefore critical to the substance of the adjudication decision that the contractual wrangle should be resolved. It did not go only to jurisdiction. Leaving jurisdiction aside, it is evident that Mr Morris did not resolve this question.

25. The adjudicator recorded that the defendants had not accepted his jurisdiction and had participated in the adjudication without prejudice to their challenge to his jurisdiction. He recorded that the defendants did not consent to or grant the adjudicator the authority to determine the issue of his jurisdiction. It is not suggested that the defendants accepted Mr Morris' jurisdiction.

26. The judge decided that:

"(a) both parties contended that there was a construction contract in being, but were at odds as to the terms and conditions that applied to it;

(b) the defendants were precluded from contending that there was no contract at all; and.

(c) since the contract did not clearly provide terms to enable an adjudication to take place, section 108 of the 1996 Act was to be construed so that the Statutory Scheme applied to enable an adjudicator appointed under it to determine which terms applied, even though his determination might result in a contract which provided for adjudication, so that the Scheme under which he was appointed did not apply."

27. The judge's decision that the defendants were precluded from contending that there was no contract at all is contained in paragraphs 24 and 25 of his judgment as follows:

"24. The jurisdictional challenge that the defendant mounted before the adjudicator was mounted on the premise that there was in existence a construction contract between the parties since that challenge was to this effect: 'Under our contract with the claimant, we are entitled to an adjudicator appointment procedure and to an adjudication in conformity with our contractual agreement. We are not required to submit to an adjudication conducted under a different procedure since that procedure would only be applicable if the terms of the construction contract contended for by the claimant, which are different from the terms that we contend for, are applicable.' It would be diametrically opposite to that approach for the defendant now to contend that there was no contract at all between the parties.

25. It is not open to the defendant to advance this contention in these enforcement proceedings. As recorded by the adjudicator in his decision, the defendant accepted that there was a contract in being between the parties for the refurbishment work carried out by the claimant and based its submissions to him on that basis. This application and the adjudication should be considered on the basis that both parties accepted that a construction contract was in place since the decision is premised on that commonly accepted understanding and it would be inequitable if the defendant was now entitled to reprobate from its position before the adjudicator. Moreover, for the purposes of these enforcement proceedings, the defendant is estopped from resiling from the position having adopted it before the adjudicator."

28. The judge's decision was therefore based on the premise that both parties agreed that their relationship was governed by a construction contract. He said that each of them had the right to refer a dispute arising under the contract to adjudication. It would be surprising if that right could be thwarted because the parties could not agree as to which set of conditions had been incorporated into the contract, or which set of adjudication provisions should apply. He said that if the parties enter into

their construction contract in such a way that its terms are not clearly and unquestionably capable of being identified, the parties had not produced a construction contract which complied with section 108 of the 1996 Act. He reasoned as follows:

> *"30. In those circumstances, section 108 of the HGCRA provides that the scheme shall apply since the contract does not comply with the statutory requirement that it should enable a party to give notice at any time of his intention to refer a dispute to adjudication nor does it provide an appropriate timetable for an appointment within seven days of such a notice. A construction contract whose terms cannot be readily ascertained by both parties does not enable these essential formalities to be under-taken in the requisite timetable. A contract only enables these things to be done if it not only provides for them but also provides for them in a form that precludes any reasonable argument as to its terms concerning the adjudication which both parties have the right to demand and have instituted in a limited timetable.*
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> *31. This conclusion arises from the use of the words "the contract shall enable" and "the contract shall provide" in sections 108(2)(a) and (b) of the HGCRA. These words, in the context of the mandatory requirement that a party has the right to refer a dispute arising under a construction contract, which includes a dispute as to which terms are included in the contract, to adjudication, mean that the contract shall both contain the required provisions, and shall contain them in a manner and form that enables their applicability to be readily ascertained without dispute. If there is a dispute as to their applicability, the contract does not enable a party to give the requisite notice of an intention to refer a dispute to adjudication with the result that the contract does not comply with section 108(1) and that the adjudication provisions of the scheme apply in default. This is so even if it subsequently emerges from the decision of the adjudicator that the terms of the construction contract did, in fact, comply with the requirements of section 108(1). Unless this extended construction of section 108 is applied by a court, effect cannot be given to the underlying mandatory requirement that a party has the right to refer all disputes arising under the construction contract to adjudication."*

29. The judge was, in my judgment, wrong (as was the adjudicator) to proceed on the unquestionable premise that both parties agreed that their relationship was governed by a construction contract. He was wrong to preclude the defendants from contending in the alternative that there was no contract. Their written submissions, witness statements and skeleton arguments before the adjudicator and the judge make it perfectly clear that their first case was that there was a written contract in JCT Prime Cost Terms. Their alternative case was that if that were wrong, there was no contract, certainly no contract in writing. They were not contending or accepting that there was a written construction contract come what may. Nor were they accepting that, if their own first case failed, there was a written construction contract on the claimants' conditions. It was not diametrically opposite to the approach of the defendants before the adjudicator to contend in the alternative that there was no written construction contract. The judge incidentally at the outset of his judgment recorded the defendants' contentions in the wrong order. It was not their first contention that there was no contract at all. In my judgment, the judge was wrong to conclude that it was not open to the defendants to advance their alternative contention in the enforcement proceedings. His decision was wrongly premised on the assumption that the defendants had accepted that there was a written construction contract, however the contractual dispute was resolved, and that the only dispute was as to its terms. The judge was also, I think, wrong to suppose that because (as he thought) there was a construction contract but the parties were not able clearly to identify its terms, the Scheme applied because the parties had not produced a construction contract which complied with section 108 of the 1996 Act. This was simply ducking the critical question.

30. The grounds of appeal essentially follow this line of reasoning. The defendants say that they have a real, not fanciful, prospect of establishing that Mr Morris acted without jurisdiction because he was appointed under the provisions of the Scheme when the Scheme did not apply; because on one view there was no written construction contract within section 107 of the 1996 Act at all; because he had no jurisdiction to determine his own jurisdiction; and because he decided the substantive arbitration with reference to conditions which did not apply. This last ground is a point of substance, since, as I have

indicated, resolution of the contractual dispute was critical to any decision on the claimants' monetary claim.

31. The claimants contend that the judge properly took account of the defendants' contention in relation to the existence and identity of the construction contract and properly rejected it. Mr Hyam submits that it was a legitimate conclusion in the context of a summary judgment application that there was a written construction contract and that the identification of its precise terms was a matter of detail which did not impugn the existence of the contract, whatever its terms may have been. I rather rudely characterised this submission in argument as palm tree contractual analysis. I apologise for the rudeness but adhere to the sentiment. It was, in my judgment, necessary for the success of this summary judgment application to conclude that neither of the defendants' contentions as to the contractual situation had any real prospect of success. I do not see any proper basis for an estoppel nor was it inequitable to allow the defendants to continue to advance what had always been their case.

32. The claimants further, by respondents' notice, contend that the no contract submission is not reasonably arguable. Mr Hyam submits that, where the factual matrix demonstrates an intention on both sides to be bound by written contractual terms of a building contract, the subject matter of which is certain and evidenced by extensive communications between the parties; where the work is complete but there remains a residual dispute as to the terms under which the work was carried out, an adjudicator or judge is entitled to conclude that there is no realistic prospect of the defendants establishing that there was no contract in existence, and thus no jurisdiction of the adjudicator to adjudicate. I agree that a judge would be entitled so to conclude in appropriate circumstances, but I do not consider that these are such circumstances. It seems to me to be at least arguable either that there was a contract here, but upon JCT Prime Cost Terms, or, perhaps more likely, that there was no concluded written construction contract. The judge's recitation of the facts and the analytic contortions evidenced in paragraphs 30 and 31 of his judgment, including his characterisation of the situation as "a construction contract whose terms cannot be readily ascertained", suggests to me a real possibility that there was no written construction contract. I emphasise that I do not so decide. Mr Hyam's submission, however, overlooks the fact that the only circumstance in which the adjudicator would clearly have had jurisdiction was if the claimants' contentions as to the contractual terms were correct. I regard this as the least likely of the three possibilities. The fact that adjudication under the Scheme and adjudication under a JCT Prime Cost Contract would be similar procedures does not overcome the twin difficulties that Mr Morris was appointed under the Scheme, and that a sufficiently secure identification of the contractual terms was intrinsically necessary to the proper performance of his adjudication task. Mr Hyam submits that the defendants' alternative contentions as to the contract were mutually exclusive. Of course they were. But that does not prevent the defendants from advancing their second alternative as an alternative, when the claimants themselves were contending that the defendants' first case was wrong.

33. Mr Hyam further submits that it would be contrary to the Parliamentary intention to permit the defence to the summary judgment proceedings to succeed, since it would enable parties to construction contracts to circumvent the "pay now, argue later" philosophy of this part of the Act. I entirely accept that the court should be vigilant to examine arguments of this kind critically. If they are insubstantial and advanced for tactical reasons, the court will not be deterred from giving summary judgment where this is appropriate. But, as I said earlier in this judgment, there may be cases when legal principle has to prevail over broad brush policy. I consider this to be such a case. One or other of the defendants' contentions as to the nature and existence of a contract may well be correct. They are certainly not fanciful. Summary judgment which does not face up to those contentions and, if necessary, determine them is not, in my judgment, appropriate.

34. For these reasons I would allow this appeal and set aside the judge's order.

35. LADY JUSTICE HALE: I am most grateful to my Lord for the history lesson and also for his analysis of the present legal position. I agree that the court should take care not to circumvent the policy of the Act. I would also emphasise the words of Mr Justice Dyson, as he then was, in **Project Consultancy Group** cited with approval by Lord Justice Simon Brown in **Thomas-Fredric's** at paragraph 32:

"It is only if a defendant had advanced a properly arguable jurisdictional objection with a realistic prospect of succeeding upon it that he could hope to resist the summary enforcement of an adjudicator's award against him."

But this is clearly such a case.

36. For what it is worth - and making no decision upon the matter, but on the material before us - my view is that the most likely analysis of the legal relationship between the parties was either a contract or a quasi-contractual claim under which, the price not having been agreed, a quantum meruit was payable. Neither of those analyses is a contract in writing under Section 107, and accordingly Section 108 did not apply. I make that observation only in the hope that the parties may reach some sensible compromise in this case, with neither side standing on what they see to be their exact proper legal rights, rather than continue to expend money on legal representation on this sort of argument.

37. I therefore allow this appeal.

38. **MR JUSTICE HOOPER**: I agree that this appeal should be allowed.

Order: Appeal allowed

MR JEREMY HYAM (instructed by Maxwell Batley of London) appeared on behalf of the Appellant

MR ABDUL JINADU (instructed by Field Seymour Parkes of Reading, Berkshire) appeared on behalf of the Respondent