JUDGMENT : HER HONOUR JUDGE FRANCES KIRKHAM : **TCC :** 29 May 2003

1. Shimizu was main contractor for work at Plot 10, Edmund Halley Road, Oxford Science Park. Shimizu appointed LBJ as sub-contractors, for the design, supply and installation of louvers and cladding. Shimizu apply to the court for declarations in relation to the decision of an adjudicator made pursuant to the Housing Grants, Construction and Regeneration Act 1996 ("the Act").

2. The parties contracted by a Letter of Intent ("LOI") sent by Shimizu and dated 14 February 2002. The LOI stated that it was Shimizu's intention to enter into a sub contract with LBJ in accordance with the documents attached to the LOI. The contract would be "in the form of DOM/1 incorporating our various non-standard amendments." The LOI went on to instruct LBJ to begin work and stated: *"If the Contract is not concluded between us, we shall pay you for any work done pursuant to this instruction up to a maximum of £84,074.25 plus VAT subject however, to this sum being reduced by the amount of any claim or set off which we might have against you from your breach of contract. You will not be entitled to any further payment by way of quantum meruit or otherwise."*

   No DOM/1 form of contract was signed. There are issues concerning the formation of the contract. It is common ground that the LOI provided for adjudication under the TeCSA rules.

3. On 9 December 2002, Shimizu wrote to LBJ enclosing a summary of set-off charges. LBJ made an application for interim payment dated 16 December 2002 in the sum of £65,172.58 plus VAT.

4. By letter dated 17 January 2003, LBJ's consultants gave notice of intention to refer to adjudication a dispute in relation to LBJ'S 16 December application for payment. LBJ sought an order for payment of the amount claimed by their application or such other sum (in relation to that application) as the adjudicator should determine. On application by LBJ, TeCSA nominated an adjudicator. It is common ground that the parties agreed to adjudicate in accordance with TeCSA Adjudication Rules 1999 version 1.3.

5. The adjudicator reached his decision on 20 February 2003. He valued LBJ's work and decided that Shimizu should "pay LBJ the sum of £47,718.39 plus VAT as appropriate, without set-off… Payment shall be made by Shimizu not later than 28 days after LBJ has delivered a VAT invoice or authenticated VAT receipt to Shimizu as required by amended clause 21.2.4."

6. Shimizu have made no payment to LBJ.

7. On 21 February 2003, LBJ submitted a VAT invoice to Shimizu in respect of the sum awarded by the adjudicator.

8. Shimizu wrote to LBJ by letter dated 25 February 2003. They reserved their position as to the validity and enforceability of the adjudicator's decision. They also gave notice of their intention to withhold payment in relation to any sum due following receipt of LBJ's invoice. The document attached to that letter summarises Shimizu's set-off charges in respect of alleged defects in LBJ's work and consequent delay, disruption and damage to other trades. The total which Shimizu sought to set off was £106,625. It is not in dispute in these proceedings that Shimizu's letter and enclosure are capable of constituting a valid withholding notice for the purposes of section 111 of the Act and of the sub contract. No application is made for a declaration as to the validity or otherwise of the withholding notice.

9. Shimizu also wrote to the adjudicator by letter dated 25 February 2003. They asked him to *"…confirm that in using the words "without set-off", and in stating that 'Shimizu is unable to set-off any sum' (paragraph 6.2.16 of your decision) you intended only to decide the amount of payment that would fall due if no set off were to be applied. This would leave intact Shimizu's rights to notify and make set off against the amount due. Your decision should then be corrected under the slip rule to state this. Alternatively, please confirm that it was your intention to exclude only set-offs pursuant to previous notices issued by Shimizu, and not newly notified set-offs (whether on the same or different grounds) included within any withholding notice issued following receipt of LBJ's VAT invoice …"*

10. The adjudicator replied by letter dated 3 March 2000: *"In preparing my Decision, I advised … that Shimizu shall pay LBJ the sum of £47,718.39 plus VAT as appropriate without set-off. This refers to my finding … based on the documents submitted as part of the Adjudication. It does not refer to any further set-off, which I will not have*

seen and which is dependent upon the future contemplation and action of the parties. The Decision therefore responds to the Notice of Adjudication, taking into consideration my powers under paragraph 11(ii) and 12 of the TeCSA Rules".

11. Shimizu by these proceedings seek declarations in relation to the proper construction of the adjudicator's decision and in respect of the adjudicator's jurisdiction and the applicability of natural justice. The declarations which Shimizu seek are that:
    1. Shimizu is not prevented from withholding payment of all or part of the sum of £47,718.39 (plus VAT as appropriate) if that sum be due in accordance with Shimizu's contractual and statutory right to serve notice of intention to withhold payment following receipt of LBJs VAT invoice.
    2. No dispute had crystallised in relation to Shimizu's future right to serve notice of intention to withhold payment in respect of a payment not due at the date of the Notice of Adjudication, and no such dispute was or could be referred to the adjudicator.
    3. The adjudicator's decision is invalid, void, unenforceable or in excess of jurisdiction insofar as it does purport to prevent Shimizu withholding payment of all or part of sum of £47,718.39 (plus VAT as appropriate).
    4. Further or alternatively, by reason of the matters set out above the adjudicator has failed to act impartially and/or in accordance with the rules of natural justice. His decision is therefore unenforceable.
    5. In the further alternative, the decision is invalid, void or unenforceable insofar as the decision purports to decide or determine the basis of the contractual relationship either on grounds of no crystallised dispute and/or excess of jurisdiction (absence of referral) or for breach of the rules of natural justice.
    6. In the further alternative, the adjudicator has purported to reach a decision under a sub-contract that the parties do not purport to exist and under which he was not appointed. He has not reached his decision under the LOI. His decision is therefore a nullity and/or unenforceable.

12. The relevant TeCSA rules provide as follows:

"11. The scope of the Adjudication shall be the matters identified in the notice requiring adjudication, together with
(i) any further matters which all the parties agree should be within the scope of the Adjudication, and
(ii) any further matters which the Adjudicator determines must be included in order that the Adjudication may be effective and/or meaningful.
12. The Adjudicator may rule on his own substantive jurisdiction, and as to the scope of the Adjudication.
14. Decisions of the adjudicator shall be 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.
28. Every decision of the adjudicator shall be implemented without delay. The Parties shall be entitled to such reliefs and remedies as are set out in the decision, and shall be entitled to summary enforcement thereof, regardless or whether such decision is or is to be the subject of any challenge or review. No party shall be entitled to raise any right to set off, counterclaim or abatement in connection with any enforcement proceedings.
33. No party shall, save in the case of bad faith on the part of the Adjudicator, make any application to the Courts whatsoever in relation to the conduct of the Adjudication or the decision of the Adjudicator until such time as the Adjudicator has made his decision, or refused to make a decision, and until the Party making the application has complied with any such decision."

The proper construction of the adjudicator's decision

13. I begin with the question what is the proper construction of the adjudicator's decision.

14. Clause 21 of DOM/1, as amended by Shimizu's conditions, contains the agreed payment provisions:

"21.1 The first and interim payments and the Final Payment shall… be made to [LBJ] in accordance with the provisions of clause 21.

21.2.3 The final date for payment for the first and interim payments shall be not later than 28 days after the date when they become due.

21.3.1 Subject to any agreement between the Sub Contractor and the Contractor as to stage payments and subject to any decision of the Adjudicator under clause 38A or of an arbitrator or the Courts under

clauses 38B or 38C as the case may be, the amount of the first and each interim payment to the Sub Contractor shall be the Contractor's gross valuation as referred to in clause 21.4……

21.2.4 Notwithstanding any other provision of this Sub-Contract, the following conditions precedent must all be satisfied in relation to each interim payment and to the Final Payment before that payment becomes due under this Sub-Contract:

[LBJ] shall have delivered to [Shimizu] a VAT invoice or authenticated VAT receipt in respect of the relevant interim payment or the Final Payment (as the case may be)…

21.3.2 Not later than 5 days after the date on which any interim payment becomes due [Shimizu] shall give a written notice to [LBJ] which shall specify:

.1 the amount of the interim payment which is proposed to be made in respect of the sub contract works and the basis on which such amount was calculated; and

.2 by way of deduction from such amount, the amount of any payment proposed to be made from [LBJ] to [Shimizu] and the basis on which such amount was calculated

.3 Not later than 5 days before the final date for payment of any interim payment, [Shimizu] may give a written notice to [LBJ] which shall specify any amount proposed to be withheld and/or deducted and the amount of the withholding and/or deduction attributable to each ground. If no notice is given, [Shimizu] shall pay the amount stated in his notice under clause 21.3.2 by the final date for payment of it.

21.3.3 Not later than 5 days before the final date for payment of any interim payment, [Shimizu] may give a written notice to [LBJ] which shall specify any amount proposed to be withheld and/or deducted from the amount notified under clause 21.3.2, the ground or grounds for such withholding and/or deduction and the amount of the withholding and/or deduction attributable to each ground. If no notice is given, [Shimizu] shall pay the amount stated in his notice under clause 21.3.2 by the final date for payment of it."

15. Shimizu's case is that, by reason of clause 21.2.4, payment did not become due until LBJ submitted a VAT invoice. The final date for payment is 28 days after that. For the purposes of the Act, a withholding notice must be served not later than five days before the final date for payment. The same requirement is found in DOM/1. The adjudicator expressly found that the money had not yet fallen due under the contract. Shimizu thus had the right to serve a withholding notice prior to the final date for payment. Shimizu's letter dated 25 February 2003 was served earlier than five days before the final date for payment of LBJ's VAT invoice. It was an effective withholding notice against the sum which the adjudicator decided Shimizu should pay.

16. LBJ accept that payment did not become due until after delivery of the VAT invoice. They also accept, for the purposes of this application and in relation to the relief which Shimizu seek, that it is not necessary for me to consider whether the withholding notice dated 25 February 2003 was effective. Their case is that the adjudicator's decision required Shimizu to pay LBJ without set-off. Accordingly, Shimizu may not set off any sum against the sum which the adjudicator decided they should pay. The adjudicator decided what sum was due and that that sum be paid without set off. The TeCSA rules gave the adjudicator the power to decide his own jurisdiction and the scope of the adjudication. By rule 11(ii), he was mandated to bring within the adjudication any matters which he determined "must be included in order that the adjudication may be effective and/or meaningful." Shimizu had the right to raise their claim to withhold money, and indeed they did raise it. The adjudicator dealt with and rejected Shimizu's claim.

17. LBJ say that the adjudication came about because they felt that their request for payment had gone unanswered and was ignored. The true scope of the adjudication was "*what sum, if any, must Shimizu pay LBJ*". In order to decide what sum be paid, the adjudicator was first required to consider how much would be due to LBJ and then consider if there were any grounds why LBJ should not be paid the sum due. The adjudicator has done no more and no less than he was required to do. LBJ are entitled to be paid the sum he decided. Although the adjudicator upheld the requirement of the contract that a VAT receipt be issued before payment became due, he did not give Shimizu another chance to withhold. He

was entitled to decide the question of withholding against a payment which became due at a later date. He did decide that Shimizu was not entitled to withhold payment of the sum he awarded.

18. I begin by construing the decision. The adjudicator considered arguments as to Shimizu's letter of 9 December 2002 and took the view that it was not an effective set-off or withholding notice. In his paragraph 6.2.15, the adjudicator concluded that Shimizu had not issued a withholding notice in respect of LBJ's interim application dated 16 December 2002 and, in 6.2.17 *"I therefore find that Shimizu is unable to set-off any sum from the amount of £47,718.39 I have computed…"*. He decided: *"Shimizu is unable to set-off any sum from the amount of £47,718.39 I have computed…"*. He went on to consider when payment of the £47,718.39 was due, and decided that Shimizu should pay LBJ *"without set-off"* not later than 28 days after delivery of a VAT invoice or authenticated VAT receipt.

19. The adjudicator decided that, in accordance with the contractual mechanism, the sum was not yet due to LBJ. The decision did not create an immediate obligation on Shimizu to pay. It amounted to a declaration as to the effect of the relevant contractual provisions. The Act permits the parties to decide when payment becomes due and the final date for payment. By paragraph 21 as amended, the parties so agreed. The adjudicator upheld the contractual mechanism and made his decision in the light of it.

20. It appears to me that, when the adjudicator stated that payment must be made "without set off", he had taken into account Shimizu's letter of 9 December 2002 and had concluded that that letter did not give Shimizu the right to set off against sums claimed by LBJ in their application for interim payment. The adjudicator knew about the 9 December 2002 withholding notice. He reached a decision about that. He could not have reached any decision about a future notice of which he can have had no knowledge. In my judgment he did not purport to restrict Shimizu's contractual and statutory right to serve a withholding notice prior to the final date for payment, which he himself had decided had not yet occurred. The adjudicator of course could not reach a decision as to a specific future set off, as none had at that stage been identified. He did not, in my judgment, purport to fetter any rights which Shimizu might still have.

21. I conclude that, on a true construction of the adjudicator's decision, the adjudicator decided that Shimizu had no right to set off against the sum which would become due to LBJ, the sums which Shimizu had identified and claimed in the adjudication, ie their claim for set off contained in their letter dated 9 December 2002. He decided what sum would become due to LBJ taking account of matters identified in Shimizu's letter of 9 December but not of matters which might arise in the future. The adjudicator did not decide that Shimizu had no future right of set off.

22. That construction is clear from the decision itself and without taking into account the subsequent exchange of correspondence between the adjudicator and Shimizu's solicitors. However, that correspondence supports the view I have formed. The adjudicator's letter makes clear that he did not consider that he had affected any further set off which he had not seen "and which is dependent upon the future contemplation and action of the parties". He did not (even if he had the power to do so) purport to restrict Shimizu's right to withhold against the sum he had awarded to LBJ.

23. Mr Collie submits that, by clauses 21.3 and 21.4 of the sub-contract, LBJ's application for payment is of no consequence. It is Shimizu's valuation which gives rise to the entitlement to an interim payment. Until the interim payment is determined by Shimizu or an adjudicator, LBJ could not issue a VAT invoice. Shimizu had not dealt with LBJ's interim application dated 16 December 2002, so the adjudicator determined the amount payable. It was then for LBJ to issue a VAT invoice. Shimizu had the opportunity to administer the sub-contract correctly. They failed to do so. The adjudicator stepped in where Shimizu had failed to do what they should have done. It is what the Act intended. Shimizu do not challenge that. It does not however follow, as LBJ seem to suggest, that by failing to value work, Shimizu thereby has lost its right to withhold payment. That does not flow from the Act or the sub contract. I accept Mr Constable's submission that, in doing for Shimizu what Shimizu should have done, the adjudicator put the parties back on to the contractual track. His decision as to the amount payable and when it was due enabled the parties to proceed to the next step in the sub contract. That in turn entitled Shimizu to serve a withholding notice.

24. Mr Collie submits that, Shimizu are in breach of the contract because they failed to determine the payment due to Shimizu; they may not profit by their breach. However, Shimizu are not profiting by any breach. The adjudicator made a decision which enabled the parties to continue to operate the sub contract. All matters other than those which the adjudicator had jurisdiction to decide and did decide remained open to the parties.

25. Mr Collie submits that, because the adjudicator did not say in terms that the parties need have no further regard to the contract, he intended that the adjudication decision should be considered outside and above the contract. The adjudicator made reference to clause 21.2.4 because he wanted compliance with it. He did not refer to clause 21.3.3. Mr Collie submits that the adjudicator intended not to allow 21.3.3 to bite. I reject that submission. The fact that he was silent as to any future set off does not assist LBJ.

26. Does the adjudicator's decision give rise to a separate right to be paid outside the payment provisions of the Act and of the sub contract, so that no right to withhold arises? In **Ferson Contractors Ltd v Levolux (CA)** unreported [2002] EWCA Civ 11, the Court of Appeal stressed that the parties' contractual obligations must be construed so as to give effect to the intention of Parliament in the Act rather than to defeat it. In that case, they held that an express contractual provision by which no further payment was due on termination of a contract did not override the contractual obligation to accept an adjudicator's decision as binding until finally determined. Mr Collie relies on that judgment, and on the judgment of His Honour Judge Hicks QC in **VHE Construction plc v RBSTB Trust Co Ltd** [2000] BLR 187, for the proposition that, unless by the date of the decision an effective notice of intention to withhold has been given that has been considered in the adjudication and upheld, a party cannot withhold from an adjudicator's decision.

27. It seems to me that there is an essential difference between **VHE** and **Ferson** and the situation here. In **VHE**, RBSTB did not issue a withholding notice before the final date for payment. In paragraph 44 of the judgment, His Honour Judge Hicks QC noted that the adjudicator had not been asked to make a declaration as to withholding against payment due pursuant to his decision, and the adjudicator had made none. In this case, as in **VHE**, no payment was due until after delivery of a VAT invoice or authenticated receipt. Accordingly, the time for service of a withholding notice did not arise until after the adjudicator's decision had been given. But unlike the circumstances in **VHE,** here Shimizu did serve a withholding notice after the decision and before the final date for payment. By section 111 of the Act, Shimizu have a statutory right to withhold (provided of course the correct steps are taken) including the giving of an effective withholding notice no later than the prescribed period before the final date for payment. It is therefore not a question here of a contractual provision purporting to override the effect of an adjudicator's decision. The sub contract provides, as required by section 108(3) of the Act, that the decision of an adjudicator is to be binding until final determination. Here, the question is whether a party may exercise a right which is given by the Act, not just by the sub contract, to withhold against a sum which an adjudicator has decided will become due.

28. Shimizu accept that the circumstances in which a party may "set off" or serve a withholding notice against an adjudicator's decision are limited. Here, however, Shimizu are not seeking to set off or withhold against the decision. Mr Constable submits that they are acting in accordance with the decision, in the sense that the adjudicator decided that payment had not yet become due. I accept Mr Constable's submission that the adjudicator decided what was due and, as it were, plugged the amount into the contractual mechanism. Once the sum became due, there remained 28 days in which Shimizu could serve a withholding notice. I accept that this case therefore differs from **Levolux, The Construction Centre Group Ltd v Highland Council** [2002] BLR 476 **and Bovis Lend Lease Ltd v Triangle Development Ltd** [2003] BLR 31. In those cases, the starting point was that money had become due. That is not the position here.

29. In my judgment, the adjudicator's decision did not override Shimizu's statutory entitlement to serve a withholding notice in relation to a payment which would become due pursuant to the decision. The decision did not have the effect of removing any of Shimizu's remaining rights under the sub contract and the Act or of preventing Shimizu from exercising any future right Shimizu might have.

30. Mr Collie submits that there is an argument that the adjudicator's decision gave rise to a separate right to be paid outside the payment provisions. Unless by the date of the decision an effective notice of intention to withhold has been served and which has been considered in the adjudication and upheld, a party cannot withhold from an adjudicator's decision. If that is right, no right to withhold arises here. It seems to me that, here, the adjudicator's decision gave rise to a right for LBJ to be paid within the context and in accordance with the mechanisms of the sub contract and the Act. The consequence is that Shimizu were entitled to serve a withholding notice after the decision and in respect of the subject matter of the decision.

31. Mr Collie submits that if every construction contract set as a condition precedent the need to provide a VAT invoice before the time to issue notice of withholding ran, then the purpose of Section 108 of the Act would be defeated. He submits that to find for Shimizu on this point would drive the proverbial coach and horses through the legislation and open the door to every contractor to avoid the consequences of an adjudicator's decision for want of a VAT receipt which (as Mr Collie submitted) could be issued only after determination of the sum due or, in the case of authenticated receipts, the sum paid. But the circumstances here seem to me to be relatively unusual. The more common circumstance is that an adjudicator decides a sum which has become due. Here, the adjudicator's decision was as to a sum due in the future, not as to payment of a sum which had already fallen due for payment. It is only because the sum had not yet fallen due for payment that it was open to Shimizu to serve a withholding notice. Shimizu accept that they or the adjudicator had to value work and it was then for LBJ to issue their VAT invoice. There is, however, nothing in the sub contract or Act which would prevent LBJ issuing a VAT invoice with their application for payment of 16 December 2002. Had they done so, the adjudicator could have decided that the sum of £47,718.39 plus VAT was due and should be paid immediately. There would then have been no question of the sum not yet being due for payment, so the unusual circumstances here would not have arisen. I recognise the practical difficulties, namely that the VAT invoice would have to be raised before the amount of the interim payment had been ascertained, so that LBJ might have issued an invoice for a sum greater than that which they were awarded, and that, if LBJ had submitted an VAT invoice with their application, it would have advanced the date on which they would have to account for VAT (which would have cash flow consequences). I accept that that is a harsh position, but it is one which neither the sub contract nor the Act dictates should not apply.

32. I conclude that Shimizu were entitled to serve a withholding notice in relation to the sum which the adjudicator decided would become due on delivery of the VAT invoice. It is, therefore, not necessary for me to deal with Shimizu's alternative cases, namely that the adjudicator acted outwith his jurisdiction and in breach of the rules of natural justice in fettering Shimizu's future rights.

Did the adjudicator act in breach of natural justice and/or outwith his jurisdiction in making findings in relation to the sub contract?

33. The adjudicator considered Shimizu's case that, by the LOI, the maximum payment to LBJ must be £84,074.25. At paragraph 6.2.1 he quoted the passage in the LOI which deals with the price cap, then stated:

> *"6.2.2 This wording is typical of a letter of intent, which seeks to cap liability and provide a degree of protection in the event a contract is not concluded. A Sub-Contract was however concluded between the parties and in consequence variations to the Sub-Contract Sum of £84,074.25, excluding 2½ discount and VAT, fall to be valued in accordance with the Sub-Contract mechanism rather than the limit imposed by the letter of intent.*
>
> *6.2.3: …LBJ's entitlement to payment is not capped by reference to the LOI but ascertained by reference to the Sub-Contract Sum of £84,074.25 excluding 2.5% discount and VAT, together with the Sub-Contract mechanism."*

34. Shimizu's case is that the parties had agreed that the contractual relationship was governed by the LOI. There being no dispute, the adjudicator had no jurisdiction to make any decision as to contract formation. The adjudicator thus exceeded his jurisdiction, because there was no dispute between the parties as to the contractual relationship between them. Further, there was no request from the adjudicator for submissions on the point and no request for evidence. If he had wanted to deal with the

point, the adjudicator should have followed the rules of natural justice and given the parties the opportunity to serve evidence and make submissions before deciding the point. He failed to do so.

35. LBJ's case is that there was a dispute as to the terms of the sub contract, so that the adjudicator did have jurisdiction to decide as he did.

36. In the notice to adjudicate dated 17 January 2003, LBJ's agent asserted that the sub-contract had been entered into on receipt of the LOI. In their referral statement of case, LBJ repeated that assertion, quoted some extracts from the LOI, then stated at paragraph 2.6: *"The sub-contract is therefore Shimizu's letter dated 14 February 2002, together with its attachments and enclosures and the DOM/1 sub-contract conditions 1998 with amendment 10 July 1999, amended by Shimizu amendments to DOM/1 conditions."*

37. Shimizu served a response to LBJ's referral notice. They state: "The contract between Shimizu and LBJ is on the terms of Shimizu's LOI dated 14 February 2002 and the documents referred to within that letter. This is accepted by LBJ (Referral paragraph 2.6)." Shimizu raised the question of the cap in paragraphs 7.11 to 7.15 of their response to the referral notice.

38. LBJ served a reply to Shimizu's response. They referred to the passage in the LOI which refers to the cap. LBJ asserted that the cap was to apply in circumstances where a contract was not concluded between the parties. They contended that it was an implied term of the LOI agreement that Shimizu would proffer a DOM/1 form for execution; Shimizu not having done so, Shimizu were not entitled to rely on the cap.

39. Shimizu served a response to that reply, in which they contended that, because no contract had been concluded, the cap must apply. They clarified their stance as to the price for the work. They denied LBJ's assertion as to the existence of an implied term.

40. LBJ's case is that parties have submitted their dispute over the applicability of the cap in these circumstances to the Adjudicator. He decided that it was necessary to determine this issue and included it within his decision. He was entitled to do so under rules 11 and 12 of the TeCSA rules. LBJ ask why, if the parties' relationship were governed solely by the LOI, Shimizu refer to the DOM/1 conditions. The LOI does not say that the DOM/1 conditions shall apply. That occurs only when a contract is entered into. Given that Shimizu relied extensively on the DOM/1 conditions in the response and reply in the adjudication, LBJ submit that the adjudicator was quite within his jurisdiction to decide as he did.

41. LBJ run the further argument that, in any event, Shimizu's position is contradictory in that it must be based on the premise that no contract was concluded between the parties, as the cap applies only if the contract is not concluded. That proposition assumes that the LOI was in fact a letter of intent rather than a contract and that the letter required that something else needed to be done before the parties would have a contractual relationship. It assumes that the parties' submissions were that there was a letter of intent not a contract in existence. It also assumes that the applicability or otherwise of the cap was not put in issue by either party in the adjudication. It assumes that the cap is of general application. LBJ submit that it is quite clear that the cap applies only "if the Contract is not concluded". So it is not of general application but applies only where the parties fail to agree a contract. It is also premised upon LBJ somehow being in breach of the contract that they have not entered into. The logic of this statement defies any comprehension.

42. I begin with the notice to adjudicate. This identifies the dispute. In the notice served on LBJ's behalf, it was said that "the sub contract was entered into on receipt of Shimizu's letter dated 14 February 2002". It was said that no engrossed sub contract had been issued by Shimizu. That position was repeated in their referral document. It was Shimizu who, in their response, raised the question of the cap. They made it clear, however, that they accepted what LBJ had stated in paragraph 2.6 of their referral document as to what the sub contract was. There is a slight mismatch between what LBJ said - that DOM/1 applied – and what Shimizu said – that the contract was on the basis of the documents referred to in the LOI. The difference between them is that the LOI does not annex or mention DOM/1. LBJ said it did; Shimizu did not specifically say that it did. Yet Shimizu accepted that LBJ's paragraph 2.6 was correct.

43. I conclude that the parties had agreed the position as to the contractual relationship between them, namely that their agreement was based on the LOI. The contractual relationship was not in issue.

Accordingly, the adjudicator did not have jurisdiction to decide the matters he dealt with at paragraphs 6.2.2 and 6.2.3 of his decision.

44. Mr Collie submits that I should have regard to the test of whether a letter of intent is a letter of intent or a contract, and he refers to **British Steel Corporation v Cleveland Bridge and Engineering Co Ltd** 24 BLR 94. He submits that the letter from Shimizu did not require formalities such as the engrossment of Articles of Agreement. It simply referred to a "Contract being entered into". Nothing remained to be negotiated. LBJ find themselves in the situation referred to by Goff J of an "if" contract. It seems to me that Mr Collie's submissions go more to the question whether the adjudicator's decision was correct (which is not a matter for me) than to whether the adjudicator had jurisdiction to decide the matter. I conclude that I must decide only whether the adjudicator had jurisdiction to decide as he did in his paragraphs 6.2.2 and 6.2.3. It does not fall to me to decide whether the adjudicator was right to reach the conclusion he did. I do not need to have regard to the merits of the issue, and thus have no regard to the **British Steel** case.

45. Given my conclusion on this point, it is not necessary to consider Shimizu's alternative case, namely that, if the adjudicator did have jurisdiction, he failed to act in accordance with the rules of natural justice because he did not invite evidence or submissions from the parties or give them the opportunity to know that he was intending to reach a decision on the question what was the contract between the parties. Given the broad jurisdiction offered by the TeCSA rules, the adjudicator probably had jurisdiction to consider that point as part of his wide ranging powers to make the adjudication "effective and/or meaningful". However, I observe that I should have concluded that the adjudicator should have made clear to the parties that, although they agreed that they had contracted on the basis of the LOI, he was intending to decide whether or not that was so, and should have given the parties the opportunity to make submissions on the question of contract formation (as opposed simply to the operation or otherwise of the cap). By not doing so, the adjudicator acted in breach of the rules of natural justice with the consequence that the court would be slow to give summary judgment to enforce the decision.

TeCSA rules

46. I next consider whether Shimizu are in any event prevented from arguing any of the points it raises by virtue of the TeCSA rules. LBJ's position is that the TeCSA rules govern not only the process of adjudication but also the process of enforcement and challenges to the validity of any decision of an adjudicator. Their case is that this application is in clear breach of Shimizu's obligations under rules 28 and 33. Shimizu may not make this application at all. Mr Collie, for LBJ, accepts, however, that Shimizu are entitled to succeed if they are able to show that the adjudicator exceeded his jurisdiction, acted partially or failed to act in accordance with natural justice.

47. I conclude that the rules do not have the effect of preventing a party from asking the court to construe a decision, which is what Shimizu are here asking the court to do. I accept Mr Constable's submission that rule 33 does not bite on the question what the decision was. It is impossible to decide whether or not Shimizu has complied with the decision for the purposes of the rules until the present claim for declarations is heard. The rules cannot, therefore, oust the jurisdiction of the court.

48. The rules presuppose that the decision would be one validly made within an adjudicator's jurisdiction. So, for example, if LBJ were to make a claim for summary judgment to enforce the decision, the rules would not prevent Shimizu raising a jurisdictional argument as a defence; if the decision is without jurisdiction, it will not be summarily enforced. In circumstances where a party is able to persuade the court that the adjudicator did not have jurisdiction, it would at the least be harsh, and in my judgment contradictory and inappropriate, to require that party first to comply with the decision.

49. If LBJ are right, rules 28 and 33 would prevent Shimizu from raising precisely the same jurisdiction questions now raised as could later be raised in defence to a summary judgment application without falling foul of the rules. This is because a party defending a summary judgment application would not be making any application for the purposes of the clause. Mr Collie fairly accepted that that leads to a difficult position. It seems to me that it is beneficial to the parties if the court is able to make a declaration to clarify the meaning of a decision. It would be undesirable for a rule to operate so as to restrict Shimizu from seeking relief which, if granted, will save the parties time and money in future.

50. I conclude that the rules do not operate to oust the jurisdiction of the court to construe the decision or to grant the declarations which Shimizu seek.

Conclusion

51. **Declarations:**

(1) On a true construction of the adjudicator's decision, the adjudicator did not decide that Shimizu had no future right of set off. The decision did not have the effect of removing any of Shimizu's remaining rights under the sub contract and the Act or of preventing Shimizu from exercising any future rights which Shimizu may have. Accordingly, Shimizu was entitled to serve a withholding notice in relation to the sum which the adjudicator decided would become due on delivery of the VAT invoice.

(2) The adjudicator's decision is invalid insofar as it purports to decide the basis of the contractual relationship between the parties. The parties had agreed that their agreement was based on the LOI and the adjudicator did not have jurisdiction to decide the matters he dealt with at paragraphs 6.2.2 and 6.2.3 of his decision.

Mr Adam Constable of Counsel (instructed by Hammonds) for the Claimant

Mr Peter Collie of Counsel (instructed by Wright Hassall) for the Defendant