JUDGMENT HHJ Judge Frances Kirkham (sitting as a deputy High Court Judge) Birmingham District Registry, TCC. 29th April 2008.

1. The parties contracted in September 2006 on the JCT 1998 Private Without Quantities form of building contract. A dispute arose. This was referred to adjudication. By his decision dated 14 February 2008, the adjudicator awarded the claimant £56,380, this sum to be paid by 21 February 2008. The defendant has refused to pay. The claimant has issued proceedings to recover that sum and now makes an application for summary judgment.

2. It is not suggested that the adjudicator did not have jurisdiction. The defendant resists the application on the ground that it is entitled to set off LADs against the sum awarded. Alternatively, the defendant seeks a stay of execution, or an order that the money be paid into court and not distributed until the outcome of a second adjudication.

Is the defendant entitled to LADs at all?

3. The defendant accepts that the contract terminated as at 14 September 2007. It now accepts that it is not entitled to LADs after that date.

4. The claimant's case is that there is no underlying entitlement to LADs on the part of the defendant. This is because the LADs clause fails according to the principle in ***Bramall & Ogden v Sheffield City Council*** (1983) 29 BLR 73.

5. There appears to be no doubt that the defendant took partial possession of some of the work. That is clearly stated by Mr Loftus, the defendant's solicitor, in his witness statement. Further, by its letter dated 15 February 2007, the defendant in effect acknowledges (by its calculation of what it claims to be entitled to by way of LADs) that it took partial possession of some elements of work. There is no provision in the building contract for sectional completion. Accordingly, the principle in ***Bramall & Ogden*** applies.

6. The defendant's case is that it would be wrong to allow the claimant to rely on that principle because of what it contends are the unusual circumstances of this case. In his statement, Mr Loftus states that the claimant threatened to barricade a show home if the defendant refused to pay £20,000; the defendant refused; on the evening of 14 September 2007, the claimant proceeded to barricade a show home and prevent public access to it. There was no challenge to that evidence. Mr Maguire, for the defendant, submits that those matters should be tried, and that the grant of partial possession was frustrated by the claimants' actions. The defence to payment of LADs following ***Bramall & Ogden*** is a technical argument. The court should take into account the conduct of the claimant. To permit the claimant to rely on that defence, the claimant must be blameless.

7. I am not persuaded by that submission. It is a question of law whether, partial possession having been obtained, LADs are payable at all. The claimant's defence to a claim for LADs is not an equitable defence but one available pursuant to the contract.

Is the defendant entitled to set off its claim for LADs against the sum due pursuant to the decision of the adjudicator?

8. Even if the defendant were entitled to be paid LADs, the question arises whether it is entitled to set off that claim against the sum which the adjudicator has decided must be paid to the claimant.

9. Jackson J gave guidance at paragraph 53 of his judgment in ***Balfour Beatty Construction Ltd v Serco Ltd*** [2004] EWHC 3336:653:

   "(a) Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision…..

   (b) Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the employer is entitled to set off liquidated and ascertained damages against sums awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case."

10. Here, so far as (a) is concerned I reject the defendant's submission that it is entitled to set off LADs on the ground that the adjudicator determined the point. The defendant relies on passages in the adjudicator's decision. In paragraph 15.2.9 the adjudicator refers to a certificate of non completion, dated 24 July 2007, and subsequent continued delays. He notes that such certificate is, pursuant to clause 20.4.2, a condition precedent to the deduction by the defendant of LADs. He notes that the purpose of such certificate relates to payment of LADs and not to determination of the contract. In paragraph 15.2.10 the adjudicator refers to the fact that the claimant granted extensions of time, then states:

    "As stated previously, there is a remedy in the Contract of Liquidated and Ascertained Damages for late completion and in the absence of any valid notices under Clause 27.2.1, that is the remedy open to Sharba for any lack of progress by Avoncroft."

11. In my judgment, the adjudicator did not decide the question of entitlement to LADs. He decided whether the claimant was entitled to an extension of time for completion. No claim was made within the adjudication for payment of LADs. The question of entitlement to LADs was not argued. In paragraph 15.2.10 of his decision, the adjudicator merely made a statement of the normal remedy *prima facie* available to an employer for delay in completion. It is not appropriate to construe decisions of an adjudicator as closely as one might a judgment of the court.

12. So far as (b) is concerned, there is no express provision in the contract entitling the defendant to deduct and withhold LADs. To the contrary, Clause 41A.7.2 is clear: the parties are obliged to comply with the decision of an adjudicator. There is no reference to any right of set off against such decision.

13. The defendant does not come within either of the circumstances identified by Jackson J in ***Balfour Beatty***. I conclude that, even if the defendant is entitled to be paid LADs, it is not entitled to set these off against the sum which the adjudicator has awarded.

Validity of withholding notice

14. Given my conclusions on these points, it is not necessary to deal with the further point which Mr Thompson raises, but I do so because it is a point of interest and which merits consideration. Mr Thomson submits that the defendant's withholding notice dated 15 February 2008 was not served in time.

15. Two clauses in the contract make express provision for service of a withholding notice, namely clause 30.1.1.4 (which deals with payment of Interim Certificates) and clause 30.8.3 (which deals with payment due pursuant to the Final Certificate.) Neither of these is relevant here. The sum which the adjudicator has decided is due to the claimant is not and does not reflect an entitlement to an interim payment, nor does this sum arise out of the provisions of Clause 30.8: the Final Certificate has not been issued so the mechanism provided by Clause 30.8 has not come into operation.

16. I accept Mr Thompson's submission that the decision provides for a sum due under the contract. The adjudicator decided that a sum was payable; by reason of the obligation contained in clause 41A.7.2, the parties must comply with the decision reached by the adjudicator; accordingly, the sum is due under the provisions of the contract ie under the contract. The sum which the adjudicator awarded is not due pursuant to the contractual payment mechanisms. The adjudication provisions of the building contract do not provide for a notice of withholding to be served against a decision. Section 111 of the 1996 Act requires provision to be made for service of a withholding notice against "a sum due under the contract". As the contract has made no provision for service of a withholding notice against the decision of an adjudicator, one must look to section 111(3) of the Act. This provides that the prescribed period for service of a withholding notice shall be that provided by the Scheme for Construction Contracts Regulations 1998. Pursuant to paragraph 10 of Part 2 of the Scheme, that period is "not later than 7 days before the final date for payment".

17. The adjudicator's decision required the defendant to pay £56,380 "*peremptorily*" and by no later than 4 pm on 21 February 2008. Accordingly, the final date for payment was 21 February 2008. The notice was served only six days before 21 February 2008 and was thus out of time. Accordingly, the defendant would be prohibited, in any event, from withholding any money from the sum awarded by the adjudicator's decision.

18. In response, Mr Maguire submitted that the effective and applicable withholding notice was that dated 19 September 2007. I reject that submission: the notice dated 19 September 2007 is expressly stated to apply to sums to be withheld from the claimant's Application for Payment number 13, and not to sums to be withheld from the payment due pursuant to the adjudicator's decision.

19. Mr Maguire also submitted that, as the decision was made on 14 February, it would be impossible for the defendant to satisfy the provisions of the Scheme. He submits that the court should recognise that impossibility and make an allowance in favour of the defendant for later service of the notice eg on the following day. I reject that submission also: many authorities in this field stress the importance of strict compliance with the time limits provided by the Act, and I see no reason here to depart from that general approach.

20. The defendant has no real prospect of success. No other reason has been advanced why summary judgment should not be given. It follows that judgment should be entered for the claimant for the full sum claimed.

Application for stay or payment into court

21. There are two limbs to the defendant's application for a stay. One of these concerns the claimant's financial circumstances. I have considered carefully the evidence provided by Mr Loftus and by Mr Lewis of the claimant on this point.

22. The defendant's case is that the claimant's finances are cause for concern. Mr Maguire submits that the evidence is of a grave worsening of the claimant's financial circumstances.

23. The defendant has produced two reports from Busybody, a credit reference agency. As at 8 October 2007, the claimant scored 39 (apparently on a scale of 1 to 100) and the claimant was described as "an above average risk company". However, in the report as at 18 March 2008, the claimant scored only 7 and was described as "a maximum risk company". I approach the credit references with caution, as the criterion applied by an agency such as this may be its willingness to lend money, a factor which is of little relevance here.

24. There are a number of county court judgments registered against the claimant, totalling a little over £10,000. A further county court judgment has been given recently - 8 April 2008 - in the sum of £1,155. The existence of such judgments is a factor which I take into account.

25. Mr Loftus has exhibited a number of letters from suppliers of the claimant, contending that they have claims for substantial sums. I find little in these to assist. They are largely self-serving documents.

26. The claimant's parent company has provided a guarantee. It has assets of over £300,000. The defendant complains about clause 6 of the guarantee, which entitles the guarantor to stand in the shoes of its subsidiary and

to run any defence which would be open to that subsidiary. In my judgment, the fact that this is not an unconditional guarantee, but contains an unexceptional clause, is not significant. If the claimant is called upon to repay the sum awarded by the adjudicator, there exists a parent company with funds to make that payment if the claimant itself cannot repay it.

27. The second limb - and indeed the main ground - of the defendant's application is that it wishes to await the outcome of a second adjudication, the decision in which is said to be due in about two weeks' time. In that second adjudication, the defendant is the referring party and I am told that its claim is for a sum in excess of £880,000. Jackson J concluded in ***Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd*** [2006] EWHC 741 (TCC) that there was no entitlement to a stay on this ground. I reject Mr Maguire's submission that (given the claimant's financial circumstances and the size of the defendant's claim in the second adjudication) I should take a different course.

28. I have considered these points against the principles usefully summarised by Coulson J in ***Wimbledon Construction Co 2000 Ltd v Derek Vago*** [2005] BLR 374. Mr Maguire submits that the following are relevant here:

"(d) The probable inability of the claimant to repay the judgment sum (awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1 rendering it appropriate to grant a stay (see ***Herschell***)

….

(f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

(i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see ***Herschell***) or

(ii) the claimant's financial position is due, either wholly, or insignificant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see ***Absolute Rentals***)."

29. I am not persuaded that the claimant would probably be unable to repay the judgment sum. Nor am I persuaded that there are special circumstances within the meaning of RSC Order 47 rule1. I therefore reject the application for a stay and, for the same reasons, reject the application for an order that the defendant pay the judgment sum into court.

Mr James Thompson of Counsel (instructed by Shakespeare Putsman) for the Claimant
Mr Andrew Maguire of Counsel (instructed by New Hampton Law) for the Defendant