

JUDGMENT : His Honour Mr Justice Jackson. TCC. 6th February 2006.

2. Thus judgment is in seven parts, namely Part 1: introduction, Part 2: the facts, Part 3: the present proceedings, Part 4: should the sums awarded to Cleveland in adjudication three be set off against the sums awarded to Interserve in adjudication two? Part 5: should there be a stay of execution? Part 6: the adjudicator's fees and interest, Part 7: conclusion.

Part 1: Introduction

3. This is an application for summary judgment to enforce an adjudicator's decision. The question of principle which arises is whether the defendant is entitled to withhold payment on the grounds that the defendant is pursuing a further adjudication in which it reasonably expects to recover an equivalent sum.

4. The claimant in these proceedings is Interserve Industrial Services Limited ("Interserve"). The defendant is Cleveland Bridge UK Limited ("Cleveland"). The main contractor for the project is Edmund Nuttall Limited ("Nuttall"). I shall refer in this judgment to the Housing Grants, Construction and Regeneration Act 1996 as "the 1996 Act".

5. Section 108 of the 1996 Act provides:

"(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose "dispute" includes any difference.

(2) The contract shall--

(a) enable a party to give notice at any time of his intention to refer a 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.

(3) 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..."

6. Section 110 of the 1996 Act provides:

"(1) Every construction contract shall--

(a) provide an adequate mechanism for determining what payments become due under the contract, and when, and

(b) provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

(2) Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if--

(a) the other party had carried out his obligations under the contract, and

(b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,

specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.

(3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) or (2), the relevant provisions of the Scheme for Construction Contracts apply."

7. Section 111 of the 1996 Act provides:

"(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.

The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.

(2) *To be effective such a notice must specify--*

(a) the amount proposed to be withheld and the ground for withholding payment, or

(b) if there is more than one ground, each ground and the amount attributable to it,

and must be given not later than the prescribed period before the final date for payment.

(3) *The parties are free to agree what that prescribed period is to be.*

In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts.

(4) *Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than--*

(a) seven days from the date of the decision, or

(b) the date which apart from the notice would have been the final date for payment,

whichever is the later."

8. The Construction Industry Council has prepared a set of procedural rules for adjudication which comply with the requirements of section 108 of the 1996 Act. These rules are entitled "***The Model Adjudication Procedure***". The Model Adjudication Procedure includes the following paragraphs:

"4. *The Adjudicator's decision 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.*

5. *The Parties shall implement the Adjudicator's decision without delay whether or not the dispute is to be referred to legal proceedings or arbitration ...*

27. *The Adjudicator may in any decision direct the payment of such simple or compound interest from such dates, at such rates and with such rests, as he considers appropriate.*

28. *The Adjudicator may, within 5 days of delivery of the decision to the Parties, correct his decision so as to remove any error arising from an accidental error or omission or to clarify or remove any ambiguity.*

29. *The Parties shall bear their own costs and expenses incurred in the adjudication.*

30. *The Parties shall be jointly and severally liable for the Adjudicator's fees and expenses, including those of any legal or technical adviser appointed under paragraph 19, but the Adjudicator may direct a Party to pay all or part of the fees and expenses. If he makes no such direction, the Parties shall pay them in equal shares. The Party requesting the adjudication shall be liable for the Adjudicator's fees and expenses if the adjudication does not proceed.*

31. *The Parties shall be entitled to the redress set out in the decision and to seek summary enforcement, whether or not the dispute is to be finally determined by legal proceedings or arbitration. No issue decided by the Adjudicator may subsequently be referred for decision by another adjudicator unless so agreed by the Parties."*

9. That is a sufficient outline of the framework within which this litigation arises. I must now turn to the facts of the present case.

Part 2: The Facts

10. The Highways Agency have employed Nuttall as main contractor to refurbish and strengthen Tinsley Viaduct, which forms part of the M1 motorway in South Yorkshire. Nuttall has engaged Cleveland to carry out steelwork strengthening works, including blasting and painting. Cleveland has engaged Interserve to carry out the blasting and painting works.

11. The contract between Nuttall and Cleveland is generally referred to as Cleveland's contract with the client. The contract between Cleveland and Interserve is generally referred to as "the subcontract". I shall adopt the same terminology. The completion date specified in the subcontract for Interserve's works is 27 October 2004. The subcontract includes the following provisions:

- "1(a) The Subcontractor shall provide all supervision, labour, materials, plant, equipment, tools, consumables and temporary works required for the execution of the Subcontract Works described in Part 3 of the Appendix in accordance with the subcontract and to the reasonable satisfaction of CBUK and the Client.*
- (b) The Subcontractor shall exercise all due skill, care and diligence in designing any part of the Subcontract Works for which design the Subcontractor is responsible, and in selecting any materials for which selection the Subcontractor is responsible.*
- (c) The Subcontractor shall execute, complete, maintain and remedy defects in the Subcontract Works in accordance with the Subcontract and to the reasonable satisfaction of CBUK and the Client. ...*
- 2(a) The Subcontractor shall commence the Subcontract Works on site on the date instructed by CBUK in writing and shall thereafter proceed with the Subcontract Works with due diligence and without delay in such manner and sequence to avoid hindrance to the progress of others and to ensure timely completion of CBUK's Contract with the Client. The Subcontractor shall ensure that all necessary off-site works, designs, supply and manufacture, are carried out in good and sufficient time to enable the Subcontract Works to be commenced on site in accordance with this Clause 2(a), and subsequently completed in accordance with Clause 2(b). ...*
- 8(f) Not later than 5 days after the due date for payment by CBUK, CBUK shall send written advice to the Subcontractor specifying the amount of the payment which is to be made and the basis on which that amount was calculated.*
- (g) Not later than 5 days before the final date for any payment by CBUK, CBUK may send written advice to the Subcontractor specifying the amount of the payment which is proposed to be deducted from the amount notified under Clause 8(f), together with the grounds for such deduction. ...*
- 10(b) Either party may at any time serve written notice of its intention to refer any dispute under this Subcontract to adjudication. Unless otherwise mutually agreed, the procedure for appointment of an adjudicator and the deciding of the dispute shall be the same as that in CBUK's Contract with its Client. The adjudication provisions contained within CBUK's Contract with the Client shall be applicable under the Subcontract as between CBUK and the Subcontractor as if they were respectively the Client and CBUK except that CBUK and the Subcontractor shall each bear their own costs and expenses of any adjudication and shall share the cost and expenses of the adjudicator equally, whatever the result of the adjudication.*
- (c) If for any reason the adjudication provisions of the Scheme for Construction Contracts under the Housing Grants Construction and Regeneration Act 1996 should apply, then CBUK and the Subcontractor shall each bear their own costs and expenses of any adjudication and shall share the cost and expenses of the adjudicator equally, whatever the result of the adjudication. ...*
- 18. In the event of conflict between the documents forming the Subcontract the order of precedence shall be the Appendix, the Standard Conditions of Subcontract, CBUK's Contract with the Client."*
12. The effect of clause 10 and the appendix is that any adjudication should proceed in accordance with the current edition of the Model Adjudication Procedure.
13. Unfortunately, delays and difficulties have occurred during the course of the works. The responsibility for those delays and difficulties is a matter of controversy between the parties. It has also emerged that, at least to some degree, Interserve under-priced the work which they are required to do. The extent of that under-pricing is a matter of controversy between the parties.
14. On 27 September 2004, the parties entered into an Interim Funding Agreement ("the IFA"), which included the following provisions: *"Whereas ...*
- C The Parties acknowledge that a delay has arisen to the progress of the Subcontract Works ("the Delay") and there is a dispute as to which party is responsible for the Delay ("the Dispute"),*
- D Pending resolution of the Dispute and in order to progress the Sub-Contract Works and to mitigate the effects arising from the Delay, CBUK and Interserve have agreed to the following terms.*

NOW HEREBY IT IS AGREED AS FOLLOWS

GENERALLY:

1. CBUK undertakes to handover areas to Interserve in accordance with Appendix D.
2. Interserve undertakes to complete those elements of the Subcontract Works necessary to allow the complete removal of the traffic management to the M1 Motorway and A631 trunk roads no later than 31st October 2004 (refer to Appendix A) provided that it is not prevented from doing so by reason of an event referred to in Clauses 2(c)(i) and/or (ii) of the Subcontract.
3. Interserve undertake to complete the balance of the Subcontract Works no later than 31st January 2005 provided that it is not prevented from doing so by reason of an event referred to in Clauses 2(c)(i) and/or (ii) of the Subcontract.
For the avoidance of doubt this date is not to be taken as an acknowledgement on the part of CBUK of Interserve's entitlement to an extension of time under the Subcontract.
4. In consideration of the undertakings given by Interserve in paragraphs 1 & 2 above CBUK agree to provide additional funds to Interserve over and above the current forecast contract value, giving a total aggregate figure in the sum of £8,900,000 ...
6. *Payment of all additional funds under this Interim Funding Agreement are deemed to be interim and temporary funding payments made on account only pending resolution of the Dispute. Such interim temporary funding has been provided to progress the Works on an interim basis only and is not to be taken as an admission of culpability for delay by either party. Upon resolution of the Dispute, either CBUK will make immediate payment to Interserve of the balance of any amount agreed or awarded which exceeds the amounts previously paid or, conversely, Interserve will immediately repay to CBUK the overpaid balance if the sum agreed or awarded is less than the amounts previously paid to Interserve by CBUK plus the amount awarded to CBUK by way of losses as a result of any breach by Interserve. For the avoidance of doubt, this does not affect any other right or remedy which either party has under the Subcontract or otherwise."*
15. In the event, works after 27 September did not proceed at the rate envisaged in the IFA. The reason for this slow progress is a matter of controversy between the parties.
16. It is against this background that the parties have embarked upon a series of adjudications. Interserve commenced adjudication number one in January 2004. By a decision dated 10 March 2004, Mr Brian Eggleston (who was adjudicator in adjudication number one only) resolved a number of issues between the parties. In relation to encapsulation and the provision of access, Mr Eggleston decided as follows:
 1. *The obligation to provide any necessary vertical longitudinal sheeting at or about the centre line of the viaduct rests with INTERSERVE.*
 2. *The obligation to seal the Safespan access system against egress of substances arising from INTERSERVE's work rests with CLEVELAND.*
 3. *The obligation to provide any necessary access system above the level of the Safespan Primary Access System rests with INTERSERVE.*
17. By the summer of 2005, Interserve's works were still not complete and the acrimony between the parties had not diminished. By a notice of adjudication dated 21 June 2005, Cleveland commenced adjudication number two. In adjudication number two, both parties were claiming relief: Cleveland was claiming that (1) Interserve should not receive any extension of time and (2) Interserve should pay substantial loss and expense or damages to Cleveland by reason of Interserve's delays. The cut-off point for Cleveland's claim in adjudication two was 30 April 2005. Interserve, on the other hand, contended that: (1) Interserve was entitled to substantial extensions of time and (2) Cleveland should pay to Interserve loss and expense or damages for the delay and disruption caused to Interserve. Interserve also claimed certain payments for variations. Both parties claimed interest. Mr John Uff QC was appointed adjudicator in adjudication number two.
18. Both parties pursued their claims in adjudication two with vigour. The adjudication lasted for some 21 weeks. Mr Uff appointed two experts to assist him. On 14 November 2005, Mr Uff delivered his decision. He held that 38.8 weeks' delay had occurred to Interserve's works during the relevant period. His analysis of this delay was as follows: 26 weeks' delay resulted from Cleveland's failure to provide appropriate access and from Cleveland's delay in carrying out strengthening works, together with the effects of inadequate encapsulation, access and traffic management. However, 12.8 weeks' delay were

attributable to Interserve's delay to phase one works, failing to secure approval of method statement and failure to provide adequate resourcing. So it can be seen that, of the 38.8 weeks delay, 26 weeks delay was the responsibility of Cleveland, and 12.8 weeks delay was the responsibility of Interserve.

19. Turning to quantum, the adjudicator's decision was as follows. The total value of Interserve's claims was £3,773,700. The total value of Cleveland's claims was £582,422. The net difference was £3,191,278. To this must be added £729,094 representing the agreed value of variations. Credit must then be given from the IFA in the sum of £2,673,656. As a result of those various figures, the net sum payable to Interserve was £1,246,716. To that sum there should be added interest in the sum of £121,554. Thus, the total award was £1,368,270 payable by Cleveland to Interserve.
20. Pursuant to paragraph 30 of the Model Adjudication Procedure, the adjudicator ordered that Cleveland should pay 80 per cent of his fees and costs and that Interserve should pay 20 per cent.
21. By an email dated 18 November 2005, the adjudicator issued a clarification of or correction to his decision pursuant to paragraph 28 of the Model Adjudication Procedure. In this email the adjudicator stated that he had calculated interest up to the date of the decision. He also directed that the sums due should be paid within 14 days of the decision, ie, by 28 November 2005.
22. Cleveland did not pay the sum awarded, or indeed any sum, on 28 November. Instead, by a letter dated 2 December, Cleveland made a further claim against Interserve. In this letter Cleveland pointed out that the extension of time granted to Interserve by the adjudicator expired on 27 April 2005. Accordingly, Cleveland now claimed substantial loss and expense or damages in respect of the period from 1 May to 31 October 2005. At the end of this letter Cleveland stated that the amount of its claim substantially exceeded the sums awarded to Interserve in adjudication number two. Accordingly, Cleveland would not pay those sums.
23. This letter did not constitute a valid notice of intention to withhold payment under section 111 of the 1996 Act. Indeed, Cleveland accepts that it has never served such a notice.
24. Interserve was aggrieved by Cleveland's refusal to pay the sums awarded in adjudication number two. Accordingly, Interserve commenced the present proceedings.

Part 3: The present proceedings

25. By a claim form issued on 6 December 2005, Interserve claimed against Cleveland the sums which had been awarded in adjudication number two. On the same date Interserve issued an application for summary judgment in accordance with section 9.2 of the TCC Guide. On 7 December, Ramsey J gave directions for the service of evidence and he directed that Interserve's application for summary judgment be heard on Friday, 3 February 2006.
26. The parties duly complied with the directions given by Ramsey J. At the same time, however, they were also progressing their conflict on other fronts. On 22 December 2005, Interserve sent a letter of claim to Cleveland. In this letter Interserve claimed extensions of time in respect of events not considered in the second adjudication. Interserve claimed substantial sums by way of loss and expense or damages in respect of delay and disruption caused to Interserve's works after 30 April 2005. Interserve also claimed £2,298,371 in respect of variations.
27. On 5 January 2006, Cleveland sent a letter to Interserve determining Interserve's employment under the subcontract. On 6 January, Cleveland served its notice of adjudication in adjudication number three. In this adjudication, Cleveland claimed the relief set out in its letter of claim dated 2 December 2005. By an email dated 30 January 2006, the adjudicator in adjudication number three, who was again Mr John Uff QC, ruled that Interserve's financial claims as set out in Interserve's letter dated 22 December 2005 could not be considered in adjudication number three. It therefore appears probable, and Interserve have confirmed, that those financial claims will be pursued in a further adjudication, namely adjudication number four.
28. On Friday, 3 February Interserve's application for summary judgment in the present proceedings came on for hearing. Mr Christopher Thomas QC and Mr Robert Evans represent Interserve. Mr Simon Hargreaves represents Cleveland. At midday on Friday, 3 February, the adjudicator's decision in

adjudication number three was delivered. Counsel on both sides had an opportunity to consider this decision during the short adjournment, and to deal with it during their submissions in the course of the afternoon.

29. Since Mr Uff's decision in adjudication number three is relied upon by both parties for different purposes, I shall summarise its effect. Mr Uff held as follows: Interserve is entitled to a further extension of time from 27 April to 1 June 2005, but Interserve is responsible for the delays which occurred after that date. Interserve's liability to Cleveland in respect of Cleveland's financial claims in adjudication number three, is £1,441,879.40. Interest up to 3 February 2006 amounts to £8,473.50, thus the total sum owed by Interserve to Cleveland as at 3 February is £1,450,352.90. This is due to be paid within 14 days, ie, by Friday, 17 February 2006.
30. Against this background, Mr Thomas submits that Interserve is entitled to an immediate judgment for the sums awarded in adjudication two. Indeed, those sums ought to have been paid ten weeks ago, namely on 28 November 2005. Mr Hargreaves, on the other hand, submits that the sums awarded to Cleveland in adjudication three, ought to be set off against the award to Interserve in adjudication two. Alternatively, there should be a stay of execution of any judgment in favour of Interserve pending the enforcement of the decision in adjudication number three. Finally, there are issues between the parties concerning the apportionment of the adjudicator's fees and the award of interest.
31. Counsel's submissions on these various issues occupied the whole of Friday. I said that I would consider their submissions over the weekend and give judgment on Monday morning. This I now do.

Part 4: Should the sums awarded to Cleveland in adjudication three be set off against the sums awarded to Interserve in adjudication two?

32. I must begin this part by referring to the relevant law and the authorities which counsel have cited. Where a claimant and a defendant each has a liability to the other, the general principle is that the defence of set off arises. As a matter of common law, the defence of set off applies to claims under a building contract (absent clear words to the contrary) in the same way that it applies to other contractual terms: see **Modern Engineering v Gilbert Ash** [1974] AC 689 at 718 per Lord Diplock.
33. Section 49(2) of the Supreme Court Act 1981 provides:
"(2) Every such court shall give the same effect as hitherto--
(a) to all equitable estates, titles, rights, reliefs, defences and counterclaims, and to all equitable duties and liabilities; and
(b) subject thereto, to all legal claims and demands and all estates, titles, rights, duties, obligations and liabilities existing by the common law or by any custom or created by any statute,
and, subject to the provisions of this or any other Act, shall so exercise its jurisdiction in every cause or matter before it as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided."
34. The words in section 49(2) "**subject to the provisions of ... any other Act**", are of particular importance in the present context. This means that section 49(2) of the Supreme Court Act 1981 takes effect subject to the 1996 Act. One of the purposes of the 1996 Act was to ensure that payments passed promptly down the line to contractors, subcontractors and suppliers, without the hold-ups which had become endemic in the construction industry by the 1990s. Section 108 of the 1996 Act provides for rapid resolution of disputes on an interim basis. Sections 110 and 111 impose effective limitations on what can be withheld from payments due under a construction contract.
35. In **VHE Construction Plc v RBSTB Trust Co Limited** [2000] BLR 187, the parties contracted on the JCT Standard Form with Contractors Design (1981 Edition). The employer sought to set off liquidated damages against monies payable to the contractor under an adjudicator's award. His Honour Judge Hicks QC held that such a set-off was not permissible. Judge Hicks had regard to the overall purpose of Part 2 of the 1996 Act. At paragraph 66 of his judgment, Judge Hicks said this: *"... section 111 now constitutes a comprehensive code governing the right to set off against payments contractually due. RBSTB has not complied with it. It would make a nonsense of the overall purpose of Part II of the Act, to which sections 108 and 111 are central and in which they are closely associated, not least by the terms of section 111(4), if payments*

required to comply with adjudication decisions were more vulnerable to attack in this way than those simply falling due under the ordinary contractual machinery. To return to the question left unanswered in paragraph 56 above, therefore, I find these compelling reasons for concluding that in clause 39A.7.2 and 39A.7.3, at least on the facts of this case, "comply" means "comply, without recourse to defences or cross-claims not raised in the adjudication".

36. Clauses 39A.7.2 and 39A.7.3 to which Judge Hicks referred in that passage, are broadly similar to paragraphs 4, 5 and 31 of the Model Adjudication Procedure in the present case.
37. In **Ferson Contractors Limited v Levolux AT Limited** [2003] BLR 118, there was a subcontract in the GC/Works/Subcontract form. A dispute arose between the main contractor (Ferson) and the subcontract (Levolux) concerning the efficacy of a withholding notice served by Ferson. The adjudicator held that the withholding notice did not comply with section 111 of the 1996 Act. Accordingly he ordered Ferson to pay Levolux the sum of £51,659, which was due on application for payment number two. Ferson declined to pay this sum on the ground that it had determined the subcontract. The ground for determination was that Levolux had suspended works as a result of non-payment. His Honour Judge Wilcox gave judgment enforcing the adjudicator's award, and that judgment was upheld by the Court of Appeal. The appeal proceeded on the basis that the subcontract had been invalidly determined. Mantell LJ gave the leading judgment, with which the other two members of the Court expressed agreement. At paragraph 30 Mantell LJ said this: *"But to my mind the answer to this appeal is the straightforward one provided by Judge Wilcox. The intended purpose of section 108 is plain. It is explained in those cases to which I have referred in an earlier part of this judgment. If Mr Collings and HHJ Thornton are right, that purpose would be defeated. The contract must be construed so as to give effect to the intention of Parliament rather than to defeat it. If that cannot be achieved by way of construction, then the offending clause must be struck down. I would suggest that it can be done without the need to strike out any particular clause and that is by the means adopted by Judge Wilcox. Clauses 29.8 and 29.9 must be read as not applying to monies due by reason of an adjudicator's decision."*
- Longmore LJ gave a judgment to the same effect.
38. In **M J Gleeson Group Plc v Devonshire Green Holding Limited** (Salford District Registry, 19 March 2004), His Honour Judge Gilliland sitting at the TCC in Salford, held that a payment ordered by an adjudicator could not be withheld on the basis of a claim which accrued after the commencement of the adjudication. At paragraph 20 Judge Gilliland said this: *"Now, in the present case, when one looks at clause 39A.7, although the language is not precisely the same, the contractual purpose, it seems to me, is clearly the same as that which was referred to by Longmore LJ [in **Levolux**]. The decision of the adjudicator is binding on the parties under clause 39A.7.1 until determined by arbitration or legal proceedings. The parties are to comply with the decision of the adjudicator and both parties shall ensure that the decision of the adjudicator is given effect to, and if either party does not comply then the other party shall be entitled to take legal proceedings to secure such compliance. That scheme, it seems to me, necessarily indicates that the decision of the adjudicator is to be given effect to and the idea that the decision of the adjudicator can be defeated by a withholding notice in respect of events which occurred subsequent to the commencement of the adjudication seems to me to be entirely inconsistent with the statutory purpose of providing a quick and effective remedy on an interim basis. An adjudicator's decision is meant to be enforced and complied with without, it seems to me, subtle arguments and detailed arguments as to other provisions of the contract."*
39. In **David McLean Contractors Limited v The Albany Building Limited** (Salford District Registry, 10 November 2005) Judge Gilliland, sitting at the TCC in Salford, held that the defendant could not set off its claim for damages for delay against a payment ordered by the adjudicator. At paragraph 28, Judge Gilliland said this: *"So what one has, is an adjudicator's decision ordering payment of monies, that is the 1.33 million. I will return in a moment to the claim in relation to the other two items: the two later certificates 22 and 23. So far as the adjudicator's decision is concerned, one has simply an adjudicator's award which, in my judgment, was clearly given within his jurisdiction. He may have been right or he may have been wrong in relation to the validity of the original section 24.1 notices but that is not a point which is for me to deal with today. That can be challenged in subsequent proceedings, if necessary. Having given the decision, the question then is: can the defendant refuse payment based on a cross-claim that it is going to be entitled to liquidated damages if it succeeds in the claim which it has put forward? In my view, the answer to this is no."*

Judge Gilliland then referred to his own previous decision in **Gleeson**. Then at paragraph 30 he said this: *"Mr Singer submitted, correctly, that there is no express provision in clause 39.7 saying "there shall be no setoff" but that does not meet the point, which, it seems to me, is that if parties agree to comply with the adjudicator's award they are saying that they will do that, and that means they will not then refuse to do it on other grounds which may or may not turn out to be valid. That simply delays payment. The purpose of an adjudicator's decision ordering the payment of money is to assist cash flow. It is possible to challenge the matter subsequently if the parties wish to do so. That seems to me to be a clear policy and in my previous decision I did refer to the decision of the Court of Appeal in **Levolux v Ferson** which seems to me to support that principle."*

40. I respectfully agree with the conclusions of Judge Gilliland both in **Gleeson** and in **David McLean** on the facts of those two cases. For the sake of completeness, however, I should add that in certain circumstances (not relevant to the present case) it is possible to set off liquidated damages for delay against an adjudicator's award: see **Balfour Beatty Construction v Serco Ltd** [2004] EWHC 3336 (TCC) at part six of the judgment.
41. Let me now return to the issue in the present case. This case concerns the not uncommon situation where there are successive adjudications between the same parties. When a decision has been given in one adjudication, can the losing party withhold payment on the basis that he reasonably expects to recover an equivalent or larger sum in the next adjudication. Mr Hargreaves submits that the answer is yes; Mr Thomas submits that the answer is no.
42. Mr Hargreaves submits that neither the subcontract in this case nor section 111 of the 1996 Act, can be construed as excluding rights of set off which did not exist when the rights the subject of the adjudicator's decision crystallised. Mr Hargreaves points out that in cases such as the present, a notice under section 111 cannot be served. Mr Hargreaves further submits that his interpretation would make good sense if adjudications are confined in length to the period envisaged by Parliament in section 108 of the 1996 Act. The present case is exceptional in that adjudication two lasted for a period of 21 weeks.
43. Finally, Mr Hargreaves submits that the reasoning of Judge Gilliland in paragraph 20 of his judgment in **Gleeson** is incorrect and should not be followed.
44. I am afraid that I am not persuaded by any of these submissions, forcefully thought they were put. Where the parties to a construction contract engage in successive adjudications, each focused upon the parties' current rights and remedies, in my view the correct approach is as follows. At the end of each adjudication, absent special circumstances, the losing party must comply with the adjudicator's decision. He cannot withhold payment on the ground of his anticipated recovery in a future adjudication based upon different issues. I reach this conclusion both from the express terms of the Act, and also from the line of authority referred to earlier in this judgment.
45. Let me now apply this approach to the facts of the present case. When Mr Uff delivered his decision in adjudication number two, Cleveland came under an obligation to pay the sums awarded on or before 28 November 2005. Cleveland was not entitled to withhold payment on the basis of its anticipated recovery in adjudication number three: see section 108(3) and section 111(1) of the 1996 Act, and paragraphs 4, 5 and 31 of the Model Adjudication Procedure.
46. This has remained the position ever since 28 November. Cleveland has now been in breach of contract for ten weeks by reason of its failure to pay the sums awarded in adjudication number two. Has this situation been affected by Mr Uff's decision in adjudication number three? The answer to this question must be no. Mr Uff's decision in adjudication three requires Interserve to pay the specified sums to Cleveland on or before Friday, 17 February. It imposes no obligation to be performed at the present time.
47. The matter may be tested in this way. Interserve now asserts a claim to well over £3 million which will be advanced in adjudication number four. If Mr Hargreaves' contention is right, the existence of that claim could be relied upon as a reason for Interserve to withhold payment of the sum which will fall due in respect of adjudication number three on 17 February. If Mr Hargreaves' argument is correct, it would have a bizarre consequence in cases such as the present, where there is a series of consecutive adjudications between the same parties. The result might be that no adjudicator's decision is

implemented; each award simply takes its place in the running balance between the parties. Such an outcome is plainly contrary to the policy of the 1996 Act.

48. Let me now draw the threads together. For the reasons set out above, Cleveland is not entitled to set off against the award in adjudication two, either its anticipated recovery or its actual recovery in adjudication three. My answer to the question posed in part 4 of this judgment is no.

Part 5: Should there be a stay of execution?

49. On Friday, 3 February, Cleveland issued an application for a stay. The grounds upon which Cleveland seek a stay are the special circumstances of this case. In particular, adjudication number two took a period of 21 weeks rather than the conventional period of four or six weeks. The costs of that adjudication were substantial and during the currency of that adjudication further rights accrued to Cleveland. This was a contractual adjudication, albeit one that complied with the requirements of the Act. So far as these matters are concerned, they seem to me neither to support a defence of set off nor to justify the imposition of a stay.
50. Let me turn next to five factors which, Mr Hargreaves submits, are relevant to the exercise of the court's discretion. The five factors upon which Mr Hargreaves relies are the following: (1) The common sense of this matter. (2) Saving of expense and of the court's resources. (3) The fact that a significant recovery has been made in adjudication three. (4) The terms of the IFA; in particular clause 6 of the IFA envisages a netting off between the parties. (5) There is no prejudice to Interserve if a stay is granted, since Interserve has a broadly equivalent liability to Cleveland on the basis of adjudication three. Furthermore Cleveland is willing to pay into court the amount of the award in adjudication two.
51. I am not persuaded that any of these five factors would either support a defence of set off or justify the imposition of a stay. In this regard, it should be noted that imposing a stay of execution would have the same practical effect as allowing a defence of set off. In relation to the fourth of Mr Hargreaves' five factors, it should be noted that the adjudicator has already given credit for sums due under the IFA: see paragraphs 21.10 and 24.1 of Mr Uff's decision in the second adjudication.
52. Both counsel have helpfully drawn my attention to the Court of Appeal's decision in **Winchester Cigarette Machinery Limited v Payne** TLR, 15 December 1993. Adopting the approach commended by the Court of Appeal in that case, it seems to me that the proper course is to refuse a stay.
53. Finally, on this aspect of the case, Mr Hargreaves draws attention to **William Verry Limited v North West London Communal Mikvah** [2004] 1 BLR 308. In the special circumstances of that case, Judge Thornton QC made an order that his judgment in favour of the claimant should not be drawn up for a period of six weeks. The circumstances of that case are far removed from the circumstances of the present case. Accordingly, in the present case I shall not make any order postponing the drawing up of this court's judgment.
54. Let me now draw the threads together. For the reasons set out above, my answer to the question posed in part 5 of this judgment is no.

Part 6: The adjudicator's fees and interest

55. It will be recalled that the adjudicator ordered Cleveland to pay 80 per cent of his fees and expenses. He expressly made this order pursuant to paragraph 30 of the Model Adjudication Procedure. Unfortunately, no doubt due to the multiplicity of issues with which he was dealing, the adjudicator overlooked clause 10(b) the subcontract. This clause ends with the words "*except that CBUK and the subcontractor shall each bear their own costs and expenses of any adjudication and shall share the costs and expenses of the adjudicator equally, whatever the result of the adjudication*". Those words qualify the parties' agreement that the Model Adjudication Procedure should apply.
56. Mr Thomas has struggled valiantly to uphold this part of the adjudicator's decision. First, he submitted that the adjudicator's terms of appointment gave him the power to depart from clause 10(b). On this point I prefer the submissions of Mr Hargreaves that those terms give no such power. Furthermore, the adjudicator did not rely upon his terms of appointment when making this part of his order.

57. Mr Thomas also developed an ingenious argument based upon the precedence of documents. However, I do not believe that clause 18 of the subcontract in conjunction with the attachment to the appendix, can override the effect of clause 10(b).
58. Turning to the correspondence, Mr Thomas placed emphasis on letters written by Cleveland on 15 and 16 November 2005. These letters indicate Cleveland's view that the adjudicator did indeed have jurisdiction to make an order apportioning liability for his fees. Whilst this argument has some forensic appeal, the fact is that correspondence written by one party after the event cannot enlarge the adjudicator's jurisdiction.
59. The final point which Mr Thomas pressed was an analogy between the present case and **Lesotho Highlands Development Authority v Impregilo SpA** [2005] BLR 351. Mr Thomas submits that, at worst, the adjudicator made an error of law; he did not act in excess of his jurisdiction. I am afraid that I take a different view. The dispute referred to the adjudicator in adjudication number two concerned extensions of time, loss and expense, damages, the value of variations and certain related matters: see Cleveland's notice of adjudication dated 21 June 2005. No dispute was referred to the adjudicator concerning the apportionment of his fees and expenses. On the contrary, the parties had expressly agreed that they would share the adjudicator's fees and expenses equally. This agreement was set out in the subcontract from which the adjudicator derived his powers.
60. I therefore conclude that the adjudicator did not have jurisdiction to make an order requiring Cleveland to pay 80 per cent of his fees and expenses. The parties remain bound by clause 10(b) of the subcontract to split those fees and expenses equally. There is no analogy between **Lesotho Highlands** and the present case.
61. Mr Hargreaves readily accepts that this small part of the adjudicator's decision is severable from the remainder. I agree with that analysis. Accordingly, the right course is for this court to make an order enforcing the adjudicator's decision, but omitting Mr Uff's direction in respect of his own fees and expenses.
62. The final point which I should mention concerns interest. This was not addressed in either skeleton argument, but was touched upon briefly in oral submissions. The question is this: should interest be added to the adjudicator's award in respect of the 14 day period between 14 November 2005 (the date of decision) and 28 November 2005 (the date for payment).
63. This point may be of academic interest only since the same point will arise in respect of the decision in adjudication three where Interserve is the paying party. In relation to this point, it should be noted that, in his email dated 18 November 2005, the adjudicator stated that the figure for interest had been calculated only up to the date of his decision. I surmise from this email that (as Mr Thomas submits) the adjudicator intended interest to accrue at the same rate between 14 and 28 November 2005.
64. Having dealt with all issues of principle between the parties, I now invite counsel to calculate the precise sum for which this court should give summary judgment, including interest up to today's date.

Part 7: Conclusion

65. I am grateful to the solicitors on both sides for marshalling the relevant evidence and for preparing a user-friendly bundle. This case has progressed efficiently from commencement to conclusion in accordance with section 9 of the TCC Guide. I am also grateful to counsel on both sides for their helpful skeleton arguments and oral submissions.
65. For the reasons stated above, Interserve succeeds in its claim and there will be summary judgment for the sums due on the adjudicator's decision in adjudication number two. I request counsel to agree the precise wording of the order.

Christopher Thomas QC and Robert Evans (instructed by Wragge & Co) for the claimant.
Simon Hargreaves (instructed by Walker Morris) for the defendant.