JUDGMENT : HIS HONOUR MR JUSTICE JACKSON. TCC. 3rd October 2006.

1. This judgment is in seven parts, namely: Part 1 – Introduction; Part 2 - The Facts; Part 3 - The Present Proceedings; Part 4 - McConnell's application for summary judgment; Part 5 - NGG's application for a stay of execution; Part 6 - The cross-applications relating to NGG's counterclaim; Part 7 - Conclusion.

Part 1 - Introduction

2. This is an application for summary judgment to enforce an adjudicator's decision, coupled with a series of other applications arising from procedural disputes between the parties. The claimant in these proceedings is McConnell Dowell Constructors (Aust) PTY Limited, which is an Australian company registered in the State of Victoria. I shall refer to this company as "McConnell". The defendant is National Grid Gas plc, to which I shall refer as NGG. NGG was formerly known as Transco plc. NGG is a gas supplier. It transports gas across the UK using pipelines.

3. This litigation concerns the construction of a gas pipeline in Lancashire. In this judgment, I shall refer to the Institution of Civil Engineers as "ICE". I shall refer to the Housing Grants Construction and Regeneration Act 1996 as *"The Construction Act"*. I shall refer to the Arbitration Act 1996 as "The Arbitration Act". I shall refer to the late Payment of Commercial Debts (Interest) Act as "The 1998 Act".

4. After these introductory remarks, I must now turn to the facts.

Part 2 - The Facts

5. By a contract dated 21st August 2001, McConnell agreed with NGG to carry out the construction of a gas pipeline running from Samlesbury to Helmshore in Lancashire. The contract documents comprised a document headed "C*ontract Agreement"*, and a number of documents referred to in the contract agreement. The documents referred to included the Core Clauses of the NEC Engineering and Construction contract (second edition) Option A; also, the Priced Contract with Activity Schedule, with certain secondary options and an Appendix 1. Amongst the secondary options was Option Y (UK) 2. I shall refer to all of the above documents collectively as *"The contract"*. I shall refer to the Core Clauses, Option A, as amended by Option Y (UK) 2, as *"The Conditions"*. There is also contained within Option A a document entitled *"Schedule of Contract Data Part One"*. I shall refer to this document as *"the Schedule of Contract Data"*. The total of the lump sums set out in the activity schedule was £15,995,869.

6. Let me now read out the relevant provisions of the contract. The contract agreement includes the following clauses:

"1. The following documents (hereinafter called "the Contract") shall be read as one and shall constitute the entire express agreement between the parties with respect to the Works and shall prevail over and supercede all prior agreements, understandings, statements, commitments and communications between the parties with respect to the Works and neither party shall be bound by any of the foregoing not appearing in or incorporated by specific reference into the Contract.

(a) This Contract Agreement …

(d) The Conditions of Contract are the Core Clauses for Option A: Priced Contract with Activity Schedule and secondary options H, L, M, P, R, Y (UK) 2, Y (UK) 3 and Z1, Z2, Z3 and Z4, as detailed in the Contract Data Part One, together with Appendix 1 …

5. The Contract shall be governed by and construed in accordance with English Law and in the event of any dispute relating thereto the parties hereby submit to the jurisdiction of the Courts of England."

7. The conditions of contract include the following clauses:

"10.1 The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and co-operation. The Adjudicator shall act as stated in this contract and in a spirit of independence.

11.1 In these conditions of contract, terms identified in the Contract Data are in italics and defined terms at capital initials …

51.5 Interest is calculated at the interest rate and is compounded annually …

90.2 If the Contractor is dissatisfied with an action or a failure to take action by the Project Manager, he notifies his dissatisfaction to the Project Manager no later than

- *four weeks after he became aware of the action or*
- *four weeks after he became aware that the action had not been taken.*

Within two weeks of such notification of dissatisfaction, the Contractor and the Project Manager attend a meeting to discuss and seek to resolve the matter.

90.3 If either Party is dissatisfied with any other matter, he notifies his dissatisfaction to the Project Manager and to the other Party no later than four weeks after he became aware of the matter. Within two weeks of such notification of dissatisfaction, the Parties and the Project Manager attend a meeting to discuss and seek to resolve the matter.

90.4 The Parties agree that no matter shall be a dispute unless a notice of dissatisfaction has been given and the matter has not been resolved within four weeks. The word "dispute" (which includes a difference) has that meaning.

90.5 Either Party may give notice to the other Party at any time of his intention to refer a dispute to adjudication. The notifying Party refers the dispute to the Adjudicator within seven days of the notice …

90.8 The Adjudicator acts impartially. The Adjudicator may take the initiative in ascertaining the facts and the law.

90.9 The Adjudicator reaches a decision within twenty-eight days of referral or such longer period as is agreed by the Parties after the dispute has been referred. The Adjudicator may extend the period of twenty-eight days by up to fourteen days with the consent of the notifying Party.

90.10 The Adjudicator provides his reasons to the Parties and to the Project Manager with his decision.

90.11 The decision of the Adjudicator is binding until the dispute is finally determined by the tribunal or by agreement …

92.1 The Adjudicator gives his decision on the dispute as independent adjudicator and not as arbitrator. His decision is enforceable as a matter of contractual obligation between the Parties and not as an arbitral award …

93.1 If after the Adjudicator
- *notifies his decision or*
- *fails to do so*

within the time provided by this contract a Party is dissatisfied, that Party notifies the other Party of his intention to refer the matter which he disputes to the tribunal. It is not referable to the tribunal unless the dissatisfied Party notifies his intention within four weeks of

- *notification of the Adjudicator's decision or*
- *the time provided by this contract for this notification if the Adjudicator fails to notify his decision within that time*

whichever is the earlier. The tribunal proceedings are not started before Completion of the whole of the works or earlier termination.

93.2 The tribunal settles the dispute referred to it. Its powers include the power to review and revise any decision of the Adjudicator and any action or inaction of the Project Manager or the Supervisor related to the dispute. A Party is not limited in the tribunal proceedings to the information, evidence or arguments put to the Adjudicator."

8. The Schedule of Contract Data includes the following provisions:

"1 … the Adjudicator is to be agreed between the parties …

9 Disputes and determination
- *The person who will choose a new adjudicator if the Parties cannot agree a choice is the - President for the time being of the Institution of Civil Engineers*
- *The tribunal is arbitration.*

10 Optional statements
- *The arbitration procedure is the Institution of Civil Engineers Arbitration Procedure (England and Wales) 1997 …"*

9. The Schedule of Contract Data also states that the works should commence on 23rd July 2001 and should be completed by 13th September 2002. McConnell duly commenced work in July 2001. Unfortunately, the works were delayed for a number of reasons, and the costs escalated. A dispute developed between the parties as to what additional payments and what extensions of time should be granted to McConnell. This dispute was resolved by a supplemental agreement dated 12th December 2002.

10. The Supplemental Agreement provided as follows:

"1. Preamble

A Under a contract dated 21st August 2001 ("the Contract") the Employer entered into an agreement with the Contractor in which the Contractor was to construct the 1050 mm Samlesbury to Helmshore Pipeline and Associated AGI works (hereinafter called the "Works")

B Disputes have arisen between the Parties regarding the extent to which the Contract Price for the Works and the Date for completion of the Works should be changed to take into account the occurrence of certain facts, matters and events. The Parties have agreed to settle these disputes on the terms set out in this Supplemental Agreement.

C The terms of the Contract shall continue with full force and effect save and except to the extent to which the terms of this Supplemental Agreement modify, alter or vary the terms contained in the Contract.

2. Terms of Supplemental Agreement.

2.1 The total Contract Price shall be adjusted to £30,500,000.00, and the unpaid balance of this sum shall be paid in accordance with the terms set out at ection 3 of the Supplemental Agreement.

2.2 This adjustment to the total Contract Price shall be in full and final settlement of the following:

i. The Contractor's entitlement to adjustment of the total Contract Price in respect of Compensation Events (as defined by clause 60 of the Contract) where such entitlement has accrued or arisen, whether wholly or in part, by virtue of any act, omission, default, instruction, physical condition, weather condition, decision, survey, drawing or diagram inaccuracy, transaction, event or other matter occurring prior to the date of this Supplemental Agreement and regardless of whether such entitlement has been notified orally or in

writing or at all, and regardless of whether such entitlement was known or not known to either Party prior to or at the date of this Supplemental Agreement.

ii. The Contractor's entitlement to reimbursement for all additional costs, losses, damages and expenses associated with carrying out the Works, including all damages for prolongation, delay and disruption, whether such entitlement arises under the Contract in tort or otherwise, where such entitlement has accrued or arisen either wholly or in part by virtue of any act, omission, default, instruction, physical condition, weather condition, decision, survey, drawing or diagram inaccuracy, transaction, event or other matter prior to the date of this Supplemental Agreement and regardless of whether such entitlement has been notified orally or in writing or at all, and regardless of whether such entitlement was known or not known to either Party prior to or at the date of this Supplemental Agreement.

iii The Contractor's entitlement to adjustment of the total Contract Price in respect of any Compensation Event (as defined by clause 60 of the Contract) arising from any act, omission, default, instruction, physical condition, weather incident, decision, survey, drawing or diagram inaccuracy, transaction, event or other matter occurring after the date of this Supplemental Agreement where such adjustment would otherwise be £5,000.00 or less.

2.3 In consideration of those matters taken into account at 2.2 (i) and (ii) above, the Date for Completion of the Works shall be:

Mechanical completion: 28th February 2003
Completion of the works: 19th September 2003

2.4 The Contractor hereby warrants that as at the date of this Supplemental Agreement it had no entitlement to any adjustment of the total Contract Price, any entitlement to adjustment to the Date for completion of the Works or entitlement to reimbursement for additional costs, losses, damages and expenses associated with carrying out the Works other than that for which provision is now made in sections 2.2 and 2.3 of this Supplemental Agreement.

2.5 The Contractor hereby irrevocably waives and withdraws all claims against the Employer arising from any act, omission, default, instruction, physical condition, weather condition, decision, survey, drawing or diagram inaccuracy, transaction, event or other matter occurring prior to the date of this Supplemental Agreement."

It is not necessary for me to read out clause 3 of the Supplemental Agreement, which deals with the mechanics of payment.

11. After the Supplemental Agreement had been executed, McConnell duly proceeded with the remainder of the works. Following completion of the works, it was necessary to establish what further payments were due to McConnell in addition to the sum of £30.5 million specified in the Supplemental Agreement. This involved (a) examining the work which was done and the events which occurred after 12th December 2002, (b) identifying which matters were included in the revised contract price of £30.5 million and (c) evaluating what payments were due to McConnell in respect of matters not included within the revised contract price.

12. NGG paid the sums which they conceded were due. By a letter dated 17th February 2006 McConnell claimed that it was entitled to a further payment of £1,477,702. This claim was based upon a re-measure of provisional sum items and provisional quantities, as well as compensation events said to have occurred after 12th December 2002.

13. NGG rejected McConnell's claim. By a letter dated 21st April 2006, NGG asserted that most of the matters for which McConnell was claiming additional payment had been settled by the Supplemental Agreement.

14. By a notice of adjudication, dated 2nd June 2006, McConnell referred its claim against NGG to adjudication. NGG did not accept that an adjudicator would have jurisdiction. In those circumstances, unsurprisingly, the parties did not agree upon the identity of the adjudicator. Accordingly, McConnell applied to the President of the ICE to appoint an adjudicator. On 8th June 2006 the President of the ICE appointed Mr. A.R. Elven to act as adjudicator.

15. NGG maintained that Mr. Elven had no jurisdiction to adjudicate upon McConnell's claim, because the issues between the parties concerned the meaning and effect of the Supplemental Agreement. The Supplemental Agreement did not contain an adjudication clause. Furthermore, in NGG's view, the Supplemental Agreement was not a construction contract within the meaning of Part 2 of The Construction Act. Very sensibly, NGG took a full part in the adjudication, despite reserving its position and denying that the adjudicator had jurisdiction.

16. On 26th June, NGG served its response in the adjudication. In this response, NGG set out not only its jurisdiction arguments but also its substantive defence to McConnell's claim.

17. On 31st July 2006, the adjudicator issued his decision. The adjudicator concluded that he did have jurisdiction. The adjudicator considered the meaning and effect of the Supplemental Agreement, and decided that this did not shut out McConnell's various heads of claim. He noted that all of the works for which McConnell was claiming payment had been carried out after the date of the Supplemental Agreement. The adjudicator then evaluated the various heads of claim in the total sum of £681,159.01.

18. Turning to interest, the adjudicator noted that McConnell was claiming interest in accordance with the 1998 Act. He also noted that NGG's only submission in relation to interest was the assertion "NCD is not entitled to interest as alleged or at all". The adjudicator rejected that defence of blanket denial. He awarded interest in accordance

with the provisions of the 1998 Act as proposed by McConnell. After twenty-one pages of careful calculations, the adjudicator assessed that interest in the total sum of £353,130.37. If one adds together the principal and interest, the total sum awarded by the adjudicator to McConnell was £1,034,289.38.

19. The adjudicator's own fees and disbursements amounted to £38,506. McConnell paid the whole of the adjudicator's fees and disbursements in the first instance. The adjudicator ordered that NGG should pay £36,273.50 towards this sum. The adjudicator further ordered that NGG should pay the sums which had been awarded to McConnell by 7th August 2006.

20. NGG took the view that the adjudicator's decision was wrong for a number of reasons. More fundamentally, NGG maintained that the adjudicator's decision was made without jurisdiction. Accordingly, NGG refused to pay the sums which had been awarded. McConnell was aggrieved by that refusal. Accordingly, McConnell commenced the present proceedings.

Part 3 - The Present Proceedings

21. By a claim form issued in the Technology and Construction Court on 18th August 2006, McConnell claimed against NGG the various sums awarded by the adjudicator. McConnell also applied for summary judgment pursuant to CPR Part 24.

22. On the same date that proceedings were issued (namely, 18th August) this court gave directions for the service of evidence by both parties, and fixed a hearing date of 28th September.

23. On 30th August, NGG served a defence and counterclaim. NGG denied that the adjudicator had jurisdiction, and argued that most of the items for which the adjudicator awarded payment had either been settled or waived by the Supplemental Agreement. NGG contended that even if the adjudicator's decision were enforced, part of the interest awarded should be disallowed or reimbursed to NGG. This was because the 1998 Act only applied to contracts made after 7th August 2002, and the contract in this case was made before that date. NGG also asserted that it was entitled to damages for breach of clause 2.4 of the Supplemental Agreement.

24. Finally, NGG counterclaimed for the following six declarations:

> *"(A) That on the true construction of the December Agreement the Claimant cannot recover in respect of any entitlement where such entitlement accrued or arose either wholly or in part by virtue of any event or matter occurring prior to the date of the agreement (12 December 2002).*
>
> *(B) That each of the items listed in the schedule hereto (save as highlighted in yellow) were matters settled by the 2002 Agreement, and that accordingly the Claimant has no further entitlement in respect thereof.*
>
> *(C) That in the premises of clause 2.4 of the 2002 Agreement the Claimant's claim in respect of each of the items listed in the schedule hereto and highlighted in yellow is defeated by circuity of action.*
>
> *(D) That in the premises of clause 2.5 of the 2002 Agreement the Claimant waived its claims in respect of each of the items listed in the schedule hereto and highlighted in yellow.*
>
> *(E) That Mr. Elven had no jurisdiction to make the purported decision dated 31 July 2006.*
>
> *(F) That the Defendant is entitled to restitution of any sum recovered by the Claimant in accordance with The Late Payment of Commercial Debts (Interest) Act 1998 and to a set off accordingly."*

25. At the same time as serving its defence and counterclaim, NGG issued an application for summary judgment in respect of its counterclaim for declaration (F) relating to interest. NGG also applied to this court to order a trial of the following five preliminary issues:

> *"1. Whether on the true construction of the 2002 Agreement the Claimant can recover in respect of any entitlement where such entitlement accrued or arose either wholly or in part by virtue of any event or matter occurring prior to the date of the 2002 Agreement (12 December 2002)?*
>
> *2. Whether the items listed in the schedule to the Defence and Counterclaim (save as highlighted in yellow) were matters settled by the 2002 Agreement?*
>
> *3. Whether in the premises of clause 2.4 of the 2002 Agreement the Claimant's claim in respect of each of the items listed in the schedule to the Defence and Counterclaim (save as highlighted in yellow) is defeated by circuity of action?*
>
> *4. Whether in the premises of clause 2.5 of the 2002 Agreement the Defendant waived its claims in respect of each of the items listed in the schedule to the Defence and Counterclaim (save as highlighted in yellow)?*
>
> *5. Whether interest is recoverable in accordance with The Late Payment of Commercial Debts (Interest) Act 1998 where the contract was made before 7th August 2002?"*

NGG also intimated an application to stay the execution of any order that may be made enforcing the adjudicator's award.

26. On 14th September, McConnell issued an application for an order that NGG's defence and counterclaim be stayed to arbitration pursuant to section 9 of the Arbitration Act.

27. By this stage there were five separate applications or cross-applications before the court. There was some lively correspondence between solicitors, debating when and in what order the various applications should be heard. It

seemed to me highly undesirable that the parties should be put to the cost and inconvenience of attending court on two separate occasions. Therefore, at the start of the hearing on 28th September I directed that counsel for both parties should make their submissions in respect of all issues, starting with McConnell's application for summary judgment.

28. Both Mr Alexander Nissen for McConnell and Mr Nicholas Baatz Q.C. for NGG presented their submissions with great skill and economy. I am grateful to solicitors and counsel on both sides for their co-operation in covering so much ground at a one-day hearing.

29. I must now deal with the individual issues, starting with McConnell's application for summary judgment.

Part 4 - McConnell's application for summary judgment

30. There is no dispute that the adjudication provisions contained in the contract comply with the requirements of the Construction Act. Mr Nissen, on behalf of McConnell, submits that on well-established principles the adjudicator's decision (whether right or wrong) is binding upon both parties until such time as the issues are finally resolved either by arbitration or litigation. Accordingly, the adjudicator's decision should now be enforced by summary judgment.

31. Mr Nicholas Baatz, on behalf of NGG, submits that the adjudicator had no jurisdiction to adjudicate upon McConnell's claims. Those claims had been settled by the Supplemental Agreement. Consequently, there was no "dispute" within the meaning of clause 90 of the conditions. Furthermore, the Supplemental Agreement did not contain an adjudication clause. The Supplemental Agreement was not a "construction contract" within the meaning of the Construction Act. Mr Baatz submits on the basis of these propositions that NGG's defence has a real prospect of success. Accordingly, McConnell is not entitled to summary judgment under CPR Part 24.

32. Three previous decisions of the Technology and Construction Court are directly relevant to the questions which I have to decide. Both counsel have analysed these decisions in some detail. They are ***Shepherd Construction Ltd v Mecright Ltd*** (2000) BLR 489; ***Quarmby Construction Co Ltd v Larraby Land Ltd*** (Leeds Technology and Construction Court 14th April 2003); ***Wesminster Building Company Ltd v Beckingham*** [2004] EWHC 138 (TCC); 2004 BLR 163.

33. In ***Shepherd,*** a compromise agreement was entered into between a main contractor and a subcontractor concerning the value of variations. The material part of the compromise agreement reads as follows:

"We, Mecright Ltd, accept the sum of £366,000 in respect of manufacture, supply, delivery and installation … in full and final settlement of all our claims under the above contract but without prejudice to our outstanding obligations."

34. Subsequently, the subcontractor made claims for further payment, which it referred to adjudication. In the adjudication proceedings, the subcontractor argued that the settlement agreement had been made under duress. The main contractor commenced proceedings in this court, claiming a declaration that the adjudicator had no jurisdiction. His Honour Judge Humphrey Lloyd Q.C. granted the declaration sought. At paragraphs 12 to 14 of his judgment, Judge Lloyd said this:

"12. The issues as presented to me really boil down to whether the question of whether the agreement was entered into under duress is a matter which prevents me from granting the declaration sought. It is common ground that there was an agreement. Equally, the settlement agreement is an agreement which, but for the plea of economic duress, would have the effect of extinguishing all the disputes that then existed on 15th March so that there could be no dispute capable of being referred to adjudication thereafter in relation to valuation.

13. The subcontract incorporated the terms of DOM//1. Clause 38A.1 of DOM//1 applies where a party exercises its right under Article 3 to refer "any dispute or difference arising under this Subcontract to adjudication". In my judgment where parties have reached an agreement which settles their disputes there can thereafter be no dispute about what had been the subject matter of the settlement capable of being referred to adjudication under a provision such as clause 38A.1 or otherwise for the purposes of section 108 of the Housing Grants, Construction and Regeneration Act 1996. The prior disputes have gone, and no longer exist. Therefore, on 3rd July there was no dispute about any of the matters which were the subject of the notice of adjudication (just as there was no dispute about whether the agreement had been entered into under duress). Thus Mecright had no right to apply for adjudication, and the adjudicator had no authority or jurisdiction to deal with the notice of 3rd July.

14. Similarly, although Mr. Bartle reserved the points (but he would have grave difficulty in contending to the contrary) I should make it clear that in my judgment a dispute about a settlement agreement of this kind could not be a dispute under the subcontract since the effect of a settlement agreement is one which replaces the original agreement to the extent to which it applies. Here, the agreement has the effect of replacing Shepherd's obligations to value and to pay Mecright under the sub-contract the value of the work. The only subsisting obligation to pay that apparently was not extinguished was the obligation to release retention as and when the time arose. So there could be no dispute under the subcontract. Indeed, it was also part of Shepherd's case, and in my judgment correctly accepted by Mr. Bartle, that the effect of the settlement agreement is that a dispute about it is outside section 108, since a settlement agreement is not a construction contract within the meaning of section 108. Mr. Darling referred to an extract from a judgment of His Honour Judge MacKay in ***Lathom Construction Limited v Cross***, which is to be found in the *Construction Industry Law Letter*, where he seemed to be of the same view. A dispute about an agreement which settles a dispute or disputes under a construction contract is not a dispute *under* that contract. The word "under" in the

> Act was plainly chosen deliberately. It has been followed in this subcontract. It is not, nor is it accompanied by words such as, **"in connection with"** or **"arising out of"**, which have a well-established wider reach."

35. In the latter part of his judgment, Judge Lloyd went on to hold that the settlement agreement was valid unless and until the court held that it was void for economic duress. Accordingly, the settlement agreement was binding upon the subcontractor.

36. Three years later, similar issues arose for decision at the Technology and Construction Court in Leeds. In ***Quarmby*** the employer was seeking damages for delay against the main contractor. In July 2001 the parties reached an agreement about this matter in correspondence. On 20th July 2001, the contractor wrote as follows:

> *"We were extremely disappointed to receive your notice of adjudication dated 13th July 2001, particularly as you had indicated that you wished to resolve our differences without the need for proceedings. As you are well aware, there are a number of live issues between us, not least your refusal to honour valuation no. 12. However, for purely commercial reasons only, we are prepared to pay you the sum of £43,196.85 in full and final settlement of your claims relating to liquidated and ascertained damages under the contract. The sum is calculated as the difference between your claim for £60,000 offset against outstanding interim certificate no. 12, in the sum of £14,300.55 plus VAT, i.e. £16,803.15.*
>
> *This payment will not constitute an admission that these sums are due and owing to Larraby Land Limited, nor that Quarmby Construction Company Limited waives its rights to challenge certificates issued by the Architect."*

37. The employer replied on 23rd July, accepting that offer. Subsequently, the contractor applied for a further extension of time, which the architect refused. The contractor referred this matter to adjudication. The adjudicator held that the contractor's claim was not barred by the agreement of 2001, and he awarded an extension of time. The contractor then brought proceedings to enforce the adjudicator's award and recover liquidated damages which it had paid to the employer.

38. His Honour Judge Grenfell gave judgment for the contractor. Judge Grenfell's reasoning may be summarised as follows:

> (1) Despite Judge Lloyd's reasoning in ***Shepherd,*** section 108 of the Construction Act should not be construed unduly restrictively. Furthermore, ***Shepherd*** should be distinguished on its facts from the instant case.
>
> (2) The adjudicator was correct to consider whether the parties' dispute had been compromised by the July correspondence.
>
> (3) Nevertheless, the compromise issue went to the adjudicator's jurisdiction. Therefore, the court had to consider that same issue again, before enforcing the adjudicator's decision.
>
> (4) On the facts, the contractor's present claim for extension of time had not been compromised by the July agreement.

39. The third case in the trilogy is ***Westminster.*** In this case, during the course of building works the employer and the contractor signed a capping agreement which included the following provision:

> *"(6) Total fees shall not exceed £300,000 including VAT before deductions."*

40. There was subsequently a dispute about what payments were due to the contractor. This dispute was referred to adjudication. The adjudicator held that the capping agreement was unsupported by consideration, and therefore ineffective. The contractor brought proceedings to enforce the adjudicator's decision. The employer, relying on Judge Lloyd's decision in ***Shepherd***, argued that the adjudicator lacked jurisdiction because the capping agreement amounted to a compromise of underlying disputes.

41. His Honour Judge Thornton Q.C. rejected the employers' defence, and gave summary judgment enforcing the adjudicator's decision. In paragraphs 23 and 24 of his judgment, Judge Thornton analysed the decision in ***Shepherd.*** At paragraph 25, Judge Thornton said this:

> *"That case is, however, not relevant to this one. First and foremost, the agreement of 20th February 2003 was not a settlement agreement settling all disputes or a stand alone agreement. It was clearly intended to be a variation agreement varying the terms of the underlying contract. It is to be read with and as part of that underlying contract. Furthermore, it does not settle all disputes, it merely provides a new contract sum or cap, albeit that that cap is subject to unspecified deductions. Thus, a dispute as to whether it is enforceable is one arising under the contract since its terms form part of and are to be read with the underlying contract."*

42. Let me now stand back and review those three authorities. It seems to me that in each case the relationship between the first agreement and the second agreement was crucial. The reason why the adjudicator had jurisdiction in ***Beckingham*** was that the second agreement operated as a variation of the first agreement. The second agreement was not a stand alone agreement. Both agreements were subject to the same adjudication provisions, and, therefore, the adjudicator had jurisdiction to determine the effect of the second agreement. On the other hand, in both ***Shepherd*** and ***Quarmby*** the second agreement was a stand alone agreement, which did not incorporate and was not subject to any adjudication provision. Accordingly, in each of those cases the court analysed the second agreement in order to determine whether there was a surviving dispute which could be adjudicated.

43. With the benefit of this guidance from earlier decisions of the Technology and Construction Court, I must now turn to the present case. The crucial question to consider is the relationship between the contract and the supplemental agreement. Mr Nissen submits that the Supplemental Agreement operates as a variation of the contract, and therefore, both are subject to the same adjudication provisions. Mr Baatz, on the other hand, submits that the Supplemental Agreement is ***"carved out"*** from the original contract. The Supplemental Agreement does not contain an adjudication clause. Matters compromised by the Supplemental Agreement ceased to be disputes referable to adjudication under the contract.

44. On this issue, I prefer and accept the submissions of Mr Nissen. In my judgment, the Supplemental Agreement operated as a variation of the original contract, and was subject to the same adjudication provisions. I have reached this conclusion for five reasons:

(1) The Supplemental Agreement varied the contract sum and the contractual completion dates. (See clauses 2.1 and 2.3 of the Supplemental Agreement).

(2) The Supplemental Agreement defined, as it had to, (a) which matters were covered by the increased contract sum and (b) which matters were not so covered and therefore may be the subject of a claim for additional payment under the terms of the original contract. (See clause 2.2 of the Supplemental Agreement).

(3) Recital C, upon which Mr Baatz placed much emphasis in argument, seems to me to support the proposition that the Supplemental Agreement varies the original contract and is not a stand alone agreement.

(4) The officious by-stander test, which Mr Baatz has invited me to apply, supports this conclusion. The contract and the Supplemental Agreement are mutually intertwined. It would not make commercial sense to have one procedure for resolving disputes under the contract and a different procedure for resolving disputes under the Supplemental Agreement. Suppose that an officious by-stander had been present on 12th December 2002 and had asked whether the dispute resolution machinery of the contract would apply to disputes under the Supplemental Agreement. Both parties would have testily turned round to the officious by-stander and said "Yes, of course".

(5) The reasoning of Mr. Justice Ramsey in ***L. Brown & Sons Limited v Crosby*** (Technology and Construction Court, 5th December 2005) strongly supports the above analysis (see in particular paragraph 51 of Mr. Justice Ramsey's judgment).

45. By 2006 the parties were in disagreement about how much should be paid to McConnell over and above the adjusted contract sum of £30.5 million. This dispute had a number of elements. First, it had to be determined which heads of claim were included in the adjusted contract sum and therefore shut out by the Supplemental Agreement. Secondly, the heads of claim, which were not shut out, had to be assessed and valued. It seems to me that all of these matters constituted a dispute or disputes falling within the adjudicator's jurisdiction.

46. In my judgment, the present case is analogous to ***Westminster***. Judge Humphrey Lloyd's decision in ***Shepherd*** should be distinguished for a number of reasons. In particular, the settlement agreement in ***Shepherd*** did not incorporate, either expressly or impliedly or by operation of statute, an adjudication clause. Secondly, the settlement agreement in ***Shepherd*** resolved all disputes between the parties. In the present case, by contrast, the Supplemental Agreement was subject to the adjudication provisions. Furthermore, the Supplemental Agreement resolved some disputes but not others. As Mr Baatz graphically put it in argument, in our case there are two buckets. Some claims have been settled and go into the first bucket. Other claims have not been settled and go into the second bucket.

47. Let me now draw the threads together. I am quite satisfied that it was a task for the adjudicator, not for this court (in enforcement proceedings), to determine which claims had been settled by the Supplemental Agreement. The adjudicator may have been wrong in his decision, but that is for determination in subsequent proceedings. The adjudicator reached a decision which was within his jurisdiction. That decision is, for the time being, binding upon the parties, and it must be enforced by this court.

48. In relation to interest Mr. Baatz has made out a strong case to the effect that the adjudicator took too high a rate. This is because the contract was made before the 1998 Act came into force. It is unfortunate that no-one drew this fact to the adjudicator's attention during the course of the reference. Mr Nissen has an argument by which he proposes in future proceedings to support the adjudicator's rate of interest. This argument appears to me to be somewhat thin, to say the least. Such considerations, however, are irrelevant to the question of enforcement. This court must enforce the adjudicator's decision, whether right or wrong. See the Court of Appeal's decision in ***Carillion Construction Limited v Devonport Royal Dockyard Ltd*** [2005] EWCA Civ 1358; [2006] BLR 15 and the cases there cited.

49. For all of the reasons set out above, McConnell succeeds in its application for summary judgment.

Part 5 - NGG's application for a stay of execution

50. RSC, Order 47, Rule 1(1) empowers the court to stay the execution of a judgment if:

"There are special circumstances which render it inexpedient to enforce the judgment."

51. NGG applies, pursuant to that rule, for an order that execution of McConnell's summary judgment be stayed. The application is, essentially, based upon two grounds. First, it is said that NGG has a good prospect in future proceedings of clawing back much of the moneys awarded by the adjudicator. Secondly, McConnell is an

Australian company, which is registered in Victoria. At the time of contracting with NGG, McConnell had a registered branch office in the UK. Now, however, that office has been closed down. Consequently, any judgment or arbitral award obtained by NGG will have to be enforced in Victoria. Mr Baatz submits that this process will be more time consuming and expensive than enforcing against McConnell's registered office in England.

52. I am bound to say that I could see much force in this argument, but for McConnell's offer of a bond. By letters dated 23rd August and 19th September 2006, McConnell's solicitors offered to provide a bond, which would protect NGG's position if NGG subsequently obtains a judgment or arbitral award clawing back money awarded by the adjudicator.

53. If a bond is provided by McConnell, that will be sufficient to meet the specific concerns expressed by NGG. In those circumstances, the general principle applies, that an adjudicator's decision must be enforced promptly, even if the defendant has good prospects of recovering the money paid in later proceedings. See the judgment of Judge Coulson in ***Wimbledon Construction Company 2000 Limited v Derek Vago*** [2005] BLR 374 and the judgment of Judge Toulmin CMG QC ***in Hillview Industrial Developments (UK) Limited v Botes Building Limited*** [2006] EWHC 1365 (TCC).

54. Let me now draw the threads together. On the basis that a bond along the lines offered in correspondence will be provided, I refuse NGG's application for a stay. In the unlikely event that the parties are unable to agree the wording of the bond, the dispute should be referred back to myself for decision.

Part 6 - The cross-applications relating to NGG's counterclaim

55. As explained in Part 3 above, McConnell is applying for an order that the counterclaim be stayed to arbitration. NGG is applying for summary judgment in respect of part of the counterclaim and for the trial of preliminary issues.

56. Logically, I must consider first the application for a stay pursuant to section 9 of the Arbitration Act. This raises the question whether the contract contains an arbitration clause.

57. Mr Baatz submits that there is no effective arbitration clause, because clause 5 of the contract agreement overrides clauses 9 and 10 of the Schedule of Contract Data. I have come to the conclusion that this submission cannot be correct. The Schedule of Contract Data is a form published by the ICE which the parties fill in as they see fit. In the blank form, clause 9 reads: "The tribunal is …" There then follows a series of optional statements. If the chosen tribunal is arbitration, the optional statement reads: "The arbitration procedure is …" It can be seen that in the present case the parties have applied their minds to each of the issues raised by the printed form. They have jointly decided that if either party is dissatisfied with an adjudication decision, the tribunal to resolve their disputes shall be an arbitrator, and the procedure shall be that prescribed by the ICE. I must give effect to that which the parties have themselves written into their contract. See ***Homberg Houtimport BV -v- Agrosin Private Limited*** [2004] 1 AC 715.

58. I shall therefore proceed on the assumption that clause 9 of the Schedule of Contract Data is a valid arbitration clause. What then is the effect of clause 5 of the contract agreement, and how can this be reconciled with the arbitration clause? In my view, the effect of clause 5 is two-fold. First, it provides that the proper law of this contract (which has been made between and English company and an Australian company) is English law. Secondly, clause 5 provides that the English courts shall regulate the dispute resolution procedure. Thus, it is the English courts which enforce an adjudicator's decision in accordance with clause 90.11 of the contract conditions. It is the English courts which hear appeals or applications arising out of any arbitration, and so forth. In my view, this reconciliation of the various dispute resolution provisions in the contract makes good commercial sense and is in accordance with the expressed intention of the parties. Furthermore, this interpretation of the dispute resolution provisions follows the approach of the Commercial Court in three cases where a similar problem arose. See the decision of Mr. Justice Steyn in ***Paul Smith Limited v H & S International Holding Inc.*** [1991] 2 Lloyds Law Reports 127; the decision of Mr. Justice Moore-Bick in ***Shell International Petroleum Co. Limited v Coral Oil Co Limited*** [1999] 1 Lloyds Law Reports 72; the decision of Mrs. Justice Gloster in ***Axa Re v Ace Global Markets Limited*** [2006] EWHC 216 (Com).

59. The next question which arises is whether the claims advanced by NGG in its counterclaim fall within the scope of the arbitration clause. I have already held that the Supplemental Agreement incorporates the dispute resolution machinery set out in the contract. It seems to me that all of the disputes fall within the scope of clauses 90, 92 and 93 of the contract conditions. Accordingly, the first level of dispute resolution is a reference to the project manager. The second level of dispute resolution is adjudication. The third level of dispute resolution is arbitration.

60. Section 9 of the Arbitration Act provides:

> *"(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the arbitration agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.*
>
> *(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures …*
>
> *(4) On an application under this section, the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."*

This section gives no discretion to the court. The fact that this court is seized of the issues and could offer a speedy resolution of all the matters raised by the counterclaim is nothing to the point. I am bound to respect the dispute resolution machinery which the parties have chosen and have written into their contract.

61. For all these reasons, pursuant to section 9(4) of the Arbitration Act, I make an order that the counterclaim be stayed. In those circumstances, NGG's applications for summary judgment on part of the counterclaim and for the trial of preliminary issues must be dismissed.

Part 7 - Conclusion

62. For the reasons set out in Part 4 above, McConnell is entitled to summary judgment on its claim. There is one small point of detail on the figures which I should mention. It appears to me, from page 47 of the adjudicator's decision, that the figure pleaded in the Particulars of Claim for the adjudicator's fees and expenses should be reduced by £2,232.50. I would be grateful if counsel could check this point and agree the arithmetic before the order for summary judgment is drawn up.

63. For the reasons set out in Part 5 above, NGG's application for a stay of execution is refused.

64. For the reasons set out in Part 6 above, the counterclaim is stayed pursuant to section 9 of the Arbitration Act. NGG's applications for summary judgment and the trial of preliminary issues are refused.

MR ALEXANDER NISSEN (instructed by Baker McKenzie LLP) appeared on behalf of McConnell Dowell Constructors.
MR NICHOLAS BAATZ Q.C. (instructed by Eversheds LLP) appeared on behalf of National Grid Gas.