Case Number:HT-06-247

Neutral Citation Number:[2007] EWHC 1174 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

St Dunstan's House
133-137 Fetter Lane
London EC4A 1HD
4 May 2007

B e f o r e:

HH Judge Thornton QC

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Steve Domsalla
(trading as Domsalla Building Services) **Claimant**

-v-

Kenneth Dyason **Defendant**

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Mr Calum Lamont (instructed by Paul Davidson Taylor, Chancery Court, Queen Street, Horsham, West Sussex, RH13 5AD, DX 57617 Horsham) appeared on behalf of the claimant.

Ms Lisa Sinclair (instructed by Roiter Zucker, Regent House, 5 – 7 Broadhurst Gardens, Swiss Cottage, London, NW6 3RZ) appeared on behalf of the defendant.

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JUDGMENT

1. Introduction

1. This is a claim that is brought under a building contract by a building contractor ("Domsalla") against the named employer under that contract, Mr Dyason who is a residential occupier as defined by section 106(1) of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA"). Domsalla seeks to enforce an adjudicator's decision made under a construction contract with that residential occupier. Part II of the HGCRA does not apply to such contracts but the contract incorporated the 1998 edition of the JCT Minor Building Works standard form of contract. This contract contains an adjudication clause in Article 6, clause 8 and Appendix D. It also contains contractual terms in clause 4.4 which preclude Mr Dyason from exercising a set off or counterclaim against a claim for payment under each interim or final certificate issued under the contract unless he has served on Domsalla notices in the form and within the timescale following the issue of that certificate that are provided for in clause 4.4. The principal issue raised by these enforcement proceedings is whether Mr Dyason can rely on regulation 8 of the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR") by showing that the adjudication clause or the material parts of clause 4.4 are not binding upon him.

2. **Domsalla's Claim**. Mr Dyason and his family lived at 54 The Street, West Horsley, Leatherhead, Surrey, KT24 6AK. This property was severely damaged by fire in January 2003. The property was insured under a buildings insurance policy issued by Lloyds TSB General Insurance Limited and Zurich Insurance Company ("the insurers") who accepted liability under that policy in relation to the reinstatement of the property following the fire. The insurers appointed GAB Robins UK Ltd ("Robins") as loss adjusters and to provide surveying services. These surveying services included the preparation of tender documents including a specification for the reinstatement works, securing tenders for those works, preparing contract documentation and acting as contract administrator and quantity surveyor under the contract. The individual loss adjustor appointed by Robins was Mr Goring and the contract administrator was Mr Thorson, a chartered building surveyor. Both Mr Goring and Mr Thorson were employed by Robins. On Robins' advice, the contract was entered into between Mr Dyason and Domsalla in the sum of £197,620.00. The contract was dated 12 September 2003.

3. The works were not complete by May 2004 although the contractual date for completion was 28 May 2004. Mr Dyason became increasingly dissatisfied with Mr Thorsen's performance and he was replaced at Mr Dyason's request as contract administrator by Mr John Gordon, a chartered surveyor, on 27 September 2004. This appointment was notified by Mr Dyason to Domsalla in a letter dated 6 October 2004 and was approved by Mr Goring on behalf of Robins when he formally notified Domsalla of Robins' approval to this appointment in a letter sent by email on 7 October 2004, albeit that the letter was wrongly dated 25 May 2004. The works were suspended by Domsalla in April 2005 with the works unfinished due to on-going disputes about Domsalla's performance and Mr Dyason's non-payment of certified sums. No further work was subsequently carried out by Domsalla.

4. Four interim certificates were issued by Robins between October 2003 and July 2004 and the sums certified for payment were paid in full. Three further interim certificates were issued by Mr Gordon, being those issued on 5 January and 26 March 2005 before the works were suspended and on 6 June 2005 following that suspension. No part of the sums certified in these three certificates for payment, totalling £127,871.33, was paid. This non-payment was alleged to have been because of Mr Dyason's cross claims for defects and delay in completion. These allegations were strenuously contested by Domsalla who contended, with some support from Mr Gordon, that the delays had been caused by Mr Dyason's interference with the work and by his repeated insistence

on additional unnecessary work to higher standards than provided for in the specification. Notwithstanding these cross claims put forward by Mr Dyason, no withholding notices were served under clauses 4.2 and 4.3 of the conditions of contract.

5. Domsalla issued a Notice of Intention to Refer the disputes arising from non-payment to adjudication pursuant to clause D2.2 of Supplemental Condition D to the conditions of contract. In the adjudication, Domsalla claimed the total sum certified in the three interim certificates issued by Mr Gordon and Mr Dyason contended that the adjudicator had no jurisdiction to undertake the adjudication, that the adjudication clause and clause 4.4 were not binding on Mr Dyason as a result of the UTCCR and that the relevant certificates were not issued in accordance with the contractual requirements and did not in consequence trigger Mr Dyason's payment obligations. The adjudicator dismissed all these contentions and awarded Domsalla its claims in full which, with interest, totalled £144,040.88 plus the adjudicator's fees and expenses of £6,991.25 inclusive of VAT which Domsalla has paid to the adjudicator and which it now claims reimbursement from Mr Dyason. These sums have not been paid and Domsalla issued proceedings on 21 August 2006 claiming theses sums and also issued an application for summary judgment.

6. Mr Dyason now contends that the sums claimed are not due on three grounds: (1) there was no adjudication clause incorporated into the contract; (2) that the adjudication and withholding notice clauses were not binding on Mr Dyason; and (3) that the decision is unenforceable due to an alleged serious breach of the principles of natural justice by the adjudicator. Ground (1) and (2) were similar to those relied on before the adjudicator.

7. The summary judgment application was heard on 20 November 2006. Having reserved judgment, I concluded that certain issues of law and fact required further argument. I therefore issued two directions to the parties, dated 1 and 13 December 2006 to this effect:

> (1) The parties should have the opportunity of serving further evidence and submissions in writing to address the issues requiring further argument that were identified in the directions.
>
> (2) The court would then determine the claim at a full trial pursuant to CPR 8 without further oral evidence or submissions but based on the documents adduced both for the hearing and pursuant to the directions and also based on the written and oral submissions put forward by counsel at the hearing on 20 November 2006 and pursuant to the directions.

8. The parties complied with the directions. However, counsel in their further submissions contended that the hearing had started as a summary judgment application under CPR 24 and it should not be transformed into either a full trial of Domsalla's adjudicator's enforcement action or into a Part 8 claim. In view of the difficulties raised by this application, I accept those submissions and have therefore continued to determine this application as a summary judgment application.

2. Issue 1 – Jurisdiction

9. **The issue.** The first issue is a purely jurisdictional issue. Mr Dyason contends that the terms of the JCT Minor Works contract do not, on their true construction, incorporate or provide for adjudication in a case where, as here, the construction contract relates to work for a residential occupier.

10. The contention can only be understood if certain provisions of the HGCRA and the contract conditions are considered.

11. The HGCRA provides in section 108(1) that a party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with section 108. However, the relevant part of the HGCRA does not apply to a construction contract with a residential occupier being a contract principally relating to operations on a dwelling which one of the parties to the contract occupies or intends to occupy as his residence.

12. The JCT Minor Works contract provides for adjudication in the following terms:

(1) Article 6: "If any dispute or difference arises under this Agreement either party may refer it to adjudication in accordance with the procedures set out in Supplement Condition D. …"

(2) Clause 8: "Settlement of disputes.

Adjudication

8.1 Pursuant to article 6 the procedures for adjudication are set out in Supplemental Condition D. …"

(3) Supplemental Condition D:

"D: ADJUDICATION

Clause 8.1

Application of Supplemental Condition D

D1 Supplemental Condition D applies where, pursuant to article 6, either party [i.e. the Employer or the Contractor] refers any dispute or difference arising under this Agreement to adjudication. …

D2.2 … Upon agreement by the parties on the appointment of the Adjudicator … the parties shall thereupon execute with the Adjudicator the JCT Adjudication Agreement. …

Conduct of the adjudication

D5.1 The Adjudicator shall immediately upon receipt of the referral and its accompanying documentation confirm that receipt to the parties.

D5.2 The party not making the referral may, by the same means stated in clause D4.2, send to the Adjudicator within 7 days of the date of the referral, with a copy to the other party, a written statement of the contentions on which he relies and any material he wishes the Adjudicator to consider.

> D5.3 The Adjudicator shall within 28 days of the referral under clause D4.1, and acting as an Adjudicator for the purposes of S.108 of the [HGCRA] and not as an expert or an arbitrator, reach his decision and forthwith send that decision in writing to the parties. …".

13. On 28 June 2006, Paul Davidson Taylor, solicitors acting for Domsalla, sent to Roiter Zucker, solicitors acting for Mr Dyason, a notice that Domsalla intended to refer the dispute between the parties to adjudication. A Notice to Refer was attached. The letter then proposed the names of four possible adjudicators and included the curriculum vitae of these proposed adjudicators. The Notice to Refer gave full details of the claim being made and of the redress sought. Roiter Zucker answered that letter with a letter dated 5 July 2006 as follows:

> "We thank you for your letter dated 4 July 2006 (sic). We have considered the CVs you sent us last week and would propose [one of those proposed by Paul Davidson Taylor] act as adjudicator."

It is clear that the date 4 July 2006 referred to in the letter was a mistake and it should have referred to Paul Davidson Taylor's letter dated 28 June 2006. In reply to that letter, Paul Davidson Taylor wrote in a letter dated 5 July2006:

> "Thank you for confirming you agree the appointment of [the proposed adjudicator] as Adjudicator. Accordingly we hereby serve the Referral Notice and Witness Statement of Steve Domsalla. …".

14. On 13 July 2006, Mr Dyason signed a copy of the JCT Adjudication Agreement and sent a signed copy to Domsalla's solicitors and a top copy to the adjudicator for him to sign. Mr Dyason's solicitors' letter asked Domsalla's solicitors to let them have a copy of the JCT Adjudication Agreement signed by Steve Domsalla. The letter also enclosed a copy of Mr Dyason's Response to the Referral Notice which stated in paragraph 4 that it was lodged without prejudice to the fact that Mr Dyason contended that the Adjudicator had no jurisdiction to conduct the Adjudication. The alleged lack of jurisdiction was, essentially, that the adjudication and withholding notice clauses in the contract were unenforceable as a result of the application of the UTCCR. These contentions do not, strictly speaking, raise a jurisdiction issue in relation to the withholding notice clauses of the contract since these remain in force until held not to be binding on a consumer by a court or tribunal and an adjudicator has jurisdiction to determine, for the purposes of deciding a dispute referred to him, whether particular clauses in it should not be binding on the consumer by virtue of the UTCCR.

15. In a letter dated 14 July 2006, Mr Dyason's solicitors wrote again to Domsalla's solicitors and stated:

> "For the avoidance of doubt, we should point out that our client's signing the JCT Adjudication Agreement is without prejudice to the matters raised by our client in his Response to Referral Notice concerning the Adjudicator's jurisdiction to conduct the adjudication…"

16. No reference was made in the Response to the Referral Notice served on behalf of Mr Dyason to the contention that the terms of clause 6 and Supplemental Condition D of the JCT Minor Works contract conditions did not, as a matter of construction or of the interpretation of their wording,

provide for adjudication for a dispute involving a residential occupier. This ground of defence was only raised for the first time in Mr Dyason's written submissions served on 21 July 2006 in reply to Domsalla's submissions on jurisdiction.

17. **Parties' submissions.** Ms Sinclair's submission on behalf of Mr Dyason was that Part II of the HGCRA did not apply to any dispute arising under this contract since Mr Dyason was a residential occupier. Thus, the parties had no statutory entitlement to refer such disputes to adjudication. The contractual provisions for adjudication were not applicable because clause D5.3 provided that the Adjudicator validly appointed under the contract should: "within 28 days of the referral under clause D4.1, **and acting as an Adjudicator for the purposes of S.108 of the [HGCRA] and not as an expert or an arbitrator**, reach his decision and forthwith send that decision in writing to the parties" (emphasis added). Thus, it was only when an adjudicator was acting for the purposes of section 108 of the HGCRA that he could validly reach a decision in relation to disputes arising under the contract. The adjudicator could only act for such purposes if he was also acting in relation to disputes to which that section provided a right to adjudicate. In other words, the clause was not referring to, and an adjudicator could not be appointed in relation to, disputes involving a residential occupier since such an adjudication could no arise under section 108.

18. Mr Lamont's submission on behalf of Domsalla was that clause D4.1 was not defining the type of dispute which could be referred to adjudication under the contractual provisions of the contract but was a procedural clause defining the powers of the adjudicator once he had been validly appointed. Such powers included all the powers and duties possessed by an adjudicator appointed under section 108 of the HGCRA including the obligation to reach and publish his decision within 28 days of the referral.

19. **Conclusion – Issue 1**. In my view, Mr Lamont's submission is correct. The primary contractual provision containing the contractual right to refer disputes to adjudication is contained in article 6 and clause 8. These provide that if any dispute or difference arises under the contract, either party may refer it to adjudication in accordance with the procedures set out in Supplemental Condition D. Thus, the Supplemental Conditions are consequential procedural provisions intended to provide the procedure under which the adjudication will proceed that has already been invoked by a party who has already exercised its primary right to apply for the appointment of an adjudicator to resolve a contractual dispute that has arisen. Thus, clause D4.1, although not happily drafted, is clearly concerned with how and when the adjudicator's decision will be sent to the parties. This procedural requirement is achieved by incorporation, by using a clumsy verbal formula, the powers and obligations relating to the decision-making process possessed by a different type of adjudicator, namely one whose powers are derived from appointment following the exercise of a party's statutory right to an adjudication pursuant to section 108 of the HGCRA.

20. There is a further reason why this adjudication was within jurisdiction. Assuming Ms Sinclair's submission is correct as a matter of contractual interpretation, it would follow that an adjudicator could not be appointed under the contract at all. There is, however, nothing to prevent the parties agreeing after a dispute has arisen that it will be referred to an ad hoc adjudication set up by agreement following the crystallisation of that dispute. In this case, the parties did enter into an ad hoc adjudication agreement since it was agreed on behalf of Mr Dyason that the adjudicator should be appointed by the parties to adjudicate their dispute. This agreement was notified to Domsalla's solicitors in Mr Dyason's solicitors' letter dated 5 July and by Mr Dyason signing a copy of the adjudication agreement which was sent with his Response document to Domsalla's solicitors with a letter dated 13 July 2006.

21. Mr Dyason, therefore, agreed to subject himself to an adjudication if, as occurred, Domsalla and the adjudicator signed the same agreement. Although Mr Dyason reserved his position in relation to matters of jurisdiction in the Response document served with the letter of 5 July, the reservation only related to those jurisdictional matters that had been raised in the Response to the Referral Notice. Those jurisdictional matters did not include the contention that the wording of clause D4.1 excluded non-statutory adjudications involving residential occupiers. Thus, the adjudicator was validly appointed by the ad hoc agreement of the parties to resolve all existing disputes, save that arising out of the application of the UTCCR to any adjudication clause. He did not need to found his jurisdiction on the terms of clause D4.1, save only for the dispute as to whether the adjudication clause was to be considered as being not binding on Mr Dyason by virtue of the UTCCR..

22. It follows that the adjudicator's appointment was valid to enable him to determine all disputes referred to him save for the question of the binding nature of the contractual adjudication clause pursuant to the UTCCR both because it was subject to an ad hoc agreement and because it was a valid contractual appointment authorised by article 6, clause 8 and the procedural provisions contained in Supplemental Condition D of the contract conditions..

3. Issue 2 – UCCT Regulations

23. **The issues.** The application of the UTCCR to the adjudication and withholding clauses of the contract raise difficult questions in relation to the unusual facts of this case. These issues may be summarised as follows:

(1) On what factual basis should the potential application of the UTCCR be considered (issue 2.1)?

(2) On what legal basis should the potential application of the UTCCR be considered (issue 2.2)?

(3) Were (i) the adjudication provisions and (ii) the withholding provisions unfair contractual terms as defined by regulations 3, 5(1) and 8(1) of and Schedule 2 to the UTCCR (issue 2.3)?

(4) The adjudicator decided both parts of question 2 adversely to Mr Dyason. These decisions, and certainly that concerned with the applicability of the withholding notice clauses, were decided by the adjudication within his jurisdiction. Therefore:

(i) Is the non-reviewable rule relating to errors within jurisdiction which is applicable to adjudications subject to the HGCRA also applicable to purely contractual adjudications; and

(ii) Does any rule limiting review of errors made within jurisdiction apply to errors as to the applicability of the UTCCR (issue 3)?

(5) What is the effect on Domsalla's enforcement application if Mr Dyason succeeds on issues (2) and (3) (issue 4)?

4. Issue 2.1 - The factual basis on which the application of the UTCCR be considered

24. **Background to building contract.** Mr Dyason and his wife bought their house, 54 The Street, West Horsley, Surrey in 1991. This property was approximately 250 years old and comprised a timber frame with brick infill. Substantial extensions were constructed to this property between 1993 and 1995. In October 2002, Mr Dyason insured the buildings and contents with the insurers for a total of £293,000 divided as to £250,000 for the structure and £43,000 for the contents. This cover included cover against loss or damage by fire. During the night of 10 -.11 January 2003, a fire broke out at the property which was so extensive that the residue of the building had to be demolished and a new building constructed.

25. Mr Dyason claimed on the policy and this claim was accepted. Mr Dyason was informed that the claim would be dealt with by Robins and Mr Dyason had no input into the preparation of the documents containing the details of the work or as to how the project would be organised or contracted. He merely responded to Robins' various proposals and documents that were sent for comment or signature.

26. Mr Dyason's claim was for the cost of demolishing and rebuilding the structures and the replacement of the contents and for the cost of temporary accommodation for Mr Dyason, his wife and four children. The insurers initially appointed Robins as loss adjusters to oversee the reconstruction. Robins provide a comprehensive service to insurers involving loss adjustment and project management and surveying services in relation to reinstatement, rebuilding and reconstruction work resulting from fire and other insured perils where insurers are reinstating or funding that work pursuant to insurance cover they have provided. Robins' Maidstone office was instructed and Mr Paul Goring was appointed as loss adjuster in relation to Mr Dyason's claim. Robins, in turn, appointed Mr Paul Thorsen, a chartered building surveyor, of its Brighton office to provide all necessary project management and surveying services in relation to the claim.

27. It would appear therefore that, from the outset, the insurers intended to meet its obligations in relation to the claim by arranging, through Robins, for the necessary work to be designed by or through Robins, for Robins to prepare the contract documents and obtain tenders, to enter into the necessary building contract and to provide all necessary services as the contract administrator including the issuing of instructions to the contractor, valuing the works, inspecting the works and issuing all necessary certificates. These services were paid for by the insurers as part of the fee arrangement for the overall service that Robins was providing. The terms of the engagement between the insurers and Robins were never disclosed to Mr Dyason and it is to be presumed that these were the same as those governing the many previous commissions provided to Robins by those insurers. Indeed, Mr Dyason never entered into a contract with Robins in their capacity of surveyors and contract administrator at all.

28. Robins prepared details of the work in readiness for the obtaining of tenders. These details were set out in drawings, a specification and a schedule of works. Mr Dyason was not involved in this design and detailing work although he must have been shown the drawings before they were sent out for tender. This was not surprising since his claim, and Robins' brief from the insurers, was to reinstate the property as closely as possible to the original within the constraints of having to replace a 250-year old house with a new one. Robins also dealt with the necessary planning and building regulations applications and associated paperwork. Since the fire policy provided, or was intended to provide, a complete indemnity in relation to the works which were intended to be a replacement for the original property destroyed by the fire, the design and detailing work was undertaken by Mr Thorsen with little input from Mr Dyason.

29. The specification and schedule of works document was entitled as being: "for and on behalf of GAB Robins UK Ltd" and the title page stated that: "Insured: Mr Dyason" and that the works comprised: "demolition and reconstruction following fire damage". The works were similarly described in the contract conditions as: "complete demolition and reconstruction of fire damaged dwelling". The employer was stated, in the section entitled "Project Details", to be: "the policyholder".

30. The first tender obtained by Robins, for about £330,000, was rejected by them and the work was put out to re-tender. Robins sent out the tender documents to three prospective tenderers under cover of their letter dated 2 July 2003 and, by a further letter dated 2 July 2003, sent a copy of the specification, schedule of works and drawings to Mr and Mrs Mr Dyason for their information. Details of which standard form of contract was to be used were contained in the specification but, in conformity with normal practice, the contract terms were not reproduced in the specification.

31. Robins' letter of 2 July 2003 letter to Mr and Mrs Dyason continued:

> "Once we are in receipt of tenders, we will forward our tender analysis to the adjuster, Paul Goring, and we will await his further instructions before being able to proceed with the works. As soon as we are in receipt of his agreement to proceed, we will contact you with the details of the tender returns, and our further recommendations."

Robins wrote again to Mr and Mrs Mr Dyason on 15 August 2003 with a summary of the tender returns. The letter recommended acceptance of Domsalla's tender. It continued:

> "Before we are able to appoint Domsalla on your behalf, we are required to seek both yours and the Loss Adjuster's approval, as it is the Loss Adjuster who is dealing with the insurance aspect of your claim. … we are currently awaiting his approval to proceed to the next stage. Although we are assured that he will be providing your Insurance Company with a full report."

32. The letter also enclosed two forms for Mr and Mrs Mr Dyason to sign. The first was an "Instruction Confirmation Form" which was addressed to Paul Thorsen at Robins and stated:

> "INSTRUCTION CONFIRMATION FORM
>
> We are in agreement with the proposed scope of the works and authorise you to instruct Domsalla on our behalf."

The second form was similar and was a payment mandate which stated:

> "PAYMENT MANDATE
>
> We confirm that we agree for Robins shall act as Contract Administrators with regard to the insurance related works being undertaken at 54 The Street, West Horsley, Leatherhead, Surrey, KT24 6AX
>
> We agree that Insurers may issue payment directly to the Contractor or any other Party under the direction of Robins."

The letter stated that the Instruction Confirmation Form would allow Robins "to formally instruct Domsalla on your behalf" and the Payment Mandate would allow "payment to be made direct from your Insurers to Domsalla". The letter continued:

> "Once we are in receipt [of the two signed forms from Mr and Mrs Mr Dyason], and the Loss Adjuster's approval, we will notify the contractor and agree with you the earliest possible start date. A pre-contract site meeting will also be arranged before the works commence, to discuss the programming of the works and clarify any queries that you may have.
>
> We trust the above and enclosed clarifies the position of the building element of your claim at this stage."

33. It is to be noted that Mr and Mrs Dyason were being provided with details of the tenders received by Robins and of their recommended acceptance of Domsalla's tender for information and comment but that the decision as to whether a tender should be accepted and which tender should be accepted was to be taken by the loss adjuster and not by Mr and Mrs Dyason.

34. Mr and Mrs Dyason signed both forms and returned them to Robins. On 4 September 2003, Robins wrote to Domsalla informing it that its tender had been accepted. The letter also contained these instructions:

> "Please note that invoices throughout the contract period should be addressed to Mr and Mrs Dyason c/o GAB Robins UK Ltd Surveying Services and forwarded to GAB Robins UK Ltd Brighton for onward transmission to Insurers, for direct payment to be made to you in accordance with the signed payment mandate we have obtained.
>
> We would also like to remind you that any variations to the agreed scope or cost of the works from that specified will require our approval before payment can be made."

35. The pre-contract meeting was held on site on 12 September 2003 and this was attended by Mr Domsalla, Mr and Mrs Dyason, Mr Thorsen and the loss adjuster, Mr Goring. The JCT Minor Works standard form of building contract was produced by Mr Thorsen for signature and both Mr Dyason and Mr Domsalla signed that copy. Mr Dyason was named and signed as "the Employer". These signatures are placed as follows:

> "**AS WITNESS THE HANDS OF THE PARTIES HERETO**
>
> Signed by or on behalf of the Employer [Mr Dyason's signature]
>
> in the presence of: As Agent
>
> Signed by or on behalf of the Contractor [illegible signature, possibly Mr Domsalla's]
>
> in the presence of: As Agent"

36. Clearly, whoever signed on behalf of Domsalla, unless it was Mr Domsalla, was signing as agent for Domsalla. However, Mr Dyason, as an individual, could only be signing as agent if the principal, for whom he was acting, was someone else. This signature was placed in this way on the contract in the presence of both representatives of Robins who were acting for the insurers, being the contract administrator and the loss adjuster. Thus, Mr Dyason was holding himself out as the insurers' agent in signing the contract and was doing so in the presence of Domsalla's agent and the loss adjuster who had the insurers' full authority to authorise that basis of signing on behalf of the insurers.

37. These decisions as to the use of the JCT form of contract and as to when, where and how the contract was signed were taken by Robins in conjunction with the insurers.

38. It would appear, therefore, that the first knowledge that Mr Dyason had of the proposed use of the JCT Minor Works agreement or of the specification and schedule of works was when the complete set of specification, schedule of works and drawings was sent to him by Mr Thorsen on 2 July at the time they were sent out to tender. The covering letter stated that it was hoped that these documents met with his approval. A copy of the JCT Minor Works agreement was not included with these documents and it would appear that Mr Dyason first saw this document when it was presented to him and a representative of Domsalla by Mr Thorsen for signature at the first site meeting held on 12 September 2003. There was no discussion about the individual clauses of the contract and the signing was apparently undertaken quickly and as a formality. Mr Dyason stated in his witness statement that:

> "When the contract was being negotiated I was not involved nor given any opportunity to be involved. The insurance company which was initially funding the contract insisted on complete control. It appointed Robins to be the loss adjuster and contract administrator. I was presented with a fait accompli in the form of the document I was obliged to sign. I received no advice as to the terms of the document from neither the insurance company nor Robins in either capacity. As to the latter, this is hardly surprising as Robins in its capacity as loss adjuster was acting for the insurance company and as contract administrator relied on Domsalla to request payment rather than inspect on a regular basis and satisfy itself that payment was appropriate."

39. **Course of work.** The contract provided that the start date was to be 6 October 2003 and that the work was to be completed by 28 May 2004, an overall period of 32 weeks. Work did not proceed smoothly or to time. According to Mr Dyason, the problems that occurred were the result of failures by Domsalla to produce a programme or to provide sufficient labour on site, themselves failures caused by Domsalla's inexperience in this kind of work. These problems were compounded by failures by the contract administrator, Mr Thorsen, to visit the site, to supervise the work or to keep Domsalla up to the mark. According to Domsalla, the failings were the result of the extensive number of different people issuing it with instructions, particularly Mr Dyason but including Mr Thorsen, the loss adjuster and the building and NHBC inspectors. Initially, the continuing delays in completion were attributed by the contract administrator to Domsalla. On 22 April 2004, Mr Thorsen wrote to Domsalla noting changes to the work imposed by the building inspector and granting Domsalla an extension of time of 9 weeks until 30 July 2004. He then informed Domsalla:

> "Please note, any delays beyond 30 July 2004 will entitle the employer for the benefit of the Insurance Company, to either recover liquidated damages of £1,000 per week from you as a debt, or deduct liquidated damages from any monies due to yourselves under the contract, provided a notice of deduction pursuant to clause 4.4.2 or clause 4.5.13 has been given.

> You will be aware that Robins is acting as employer's agent, this means it will be us who will make any necessary deductions for liquidated damages, should you overrun the 30 July 2004 deadline."

It is to be noted that Robins refers to itself as "employer's agent" rather than the narrower term "contract administrator" and that, in context, Robins are holding themselves out as agent for the insurers.

40. This letter also shows what the arrangements were when variations or increased costs were being discussed. The particular changes referred to were changes to the size of the roof joists asked for by Building Control. The necessary changes were discussed between Domsalla, Mr Thorsen and Mr Goring on site and the changes were requested and approved by Mr Goring without any involvement by Mr Dyason.

41. Payment to Domsalla proceeded as agreed. For the four interim certificates issued by Robins, Domsalla issued and sent an invoice addressed to Mr and Mrs Dyason directly to Robins, addressed to them c/o Robins. In turn, Robins issued an interim certificate to the loss adjuster who arranged for this to be paid direct by the insurers to Domsalla. Copies of these interim certificates were, of course, sent to Mr and Mrs Mr Dyason and to Domsalla.

42. Work continued long after 30 July 2004 although further extensions of time may have been granted for a limited further period. These extensions, if they were granted, were not put in evidence. In late September 2004, Mr Dyason complained to Lloyds TSB about the performance of Mr Thorsen as contract administrator and contended that the great delay to the works, had that occurred, was the result of both Domsalla's and Mr Thorsen's alleged incompetence. He asked Lloyds TSB to arrange for another contract administrator to be appointed. At the same time, Domsalla wrote to Mr Goring, the loss adjuster, in a letter dated 1 October 2004 giving notice that it intended to determine the contract due to Mr Dyason's interference with the work, with his repeated instructions to change the work and by his liaising with subcontractors directly.

43. Lloyds TSB informed Mr Dyason that he could select a surveyor to take over as contract administrator and that it would then direct that that surveyor should replace Mr Thorsen. The insurers would then engage that new surveyor on the same basis as it had engaged Robins to act as contract administrator. Mr Dyason selected Mr Gordon, a chartered surveyor in private practice, and this change was notified to Domsalla officially by Mr Goring in a letter sent to Domsalla on 7 October 2004. Mr Goring remained as loss adjuster to the claim.

44. A site meeting with Domsalla was held with Mr Domsalla, Mr Dyason, Mr Goring and Mr Gordon all present. At that meeting, Mr Domsalla agreed that Domsalla would continue with the work under the new contract administrator. Mr Gordon familiarised himself with the contract to date and, on 8 October 2004, wrote a long letter to Domsalla suggesting that the delays to date were almost entirely Domsalla's contractual responsibility and that no more than about 6 – 7 weeks were required to complete them. The letter informed Domsalla that:

> "We are therefore in the position of either dismissing your company from the contract on the grounds of shoddy workmanship, safety malpractice and generally and consistently poor site management with a very clear legal damages claim to follow or we sit down and negotiate detailed terms for a very quick and thorough completion of this contract by the end of November at the very outside."

45. Mr Gordon also obtained a report from a consulting engineer who reported on 10 November 2004 a number of structural faults including:

> "A total disregard for the original design aspect of the roof, the stability of the dwelling above first floor level, and removal of load bearing walls at ground floor."

46. Domsalla sent Robins an invoice dated 24 November 2004 for a fifth interim payment in the sum of £28,500. This was the first invoice that had been sent since the fourth invoice had been sent on 7 July, over 4 months earlier. Mr Gordon, meanwhile, wrote to Domsalla on 1 December 2004 and suggested that Domsalla had deliberately tried to deceive him about various alleged causes of delay and giving notice of possible determination by the Employer if certain remedial works were not carried out within ten days. The letter continued:

> "I must advise you that I regard the penalty provisions in the contract related to the failure to complete the works in due time as having been triggered. Whether the Employer wishes to take advantage of this is of course up to him but you should be fully aware of the fact."

47. In that context, Mr Gordon's reference to the Employer in both notices could only have been a reference to the insurers since only that company could decide to activate the provision entitling the employer to determine the contract following the contractor's default or take advantage of the liquidated damages provisions of the contract, as Mr Thorsen had already previously notified Domsalla in April 2004. Both Domsalla and Mr Dyason knew that Mr Gordon was engaged by the insurers and that Mr Dyason had no authority to take any decisions about payment, liquidated damages or termination.

48. Mr Dyason was sufficiently concerned with the state of the defects in the work that he commissioned his own surveyor's report from Bray Building Services. This was received in late December 2004 and it concluded that the property was incapable of habitation and that extensive remedial works were required. This report was sent to Mr Gordon who took considerable exception to its contents. He emailed Mr Dyason on 5 January with a detailed list of comments to many of the suggested defects that Mr Bray had drawn attention to in his report and informed him that he would be meeting Domsalla on site on 11 January 2005. Mr Gordon also issued the sixth interim certificate pursuant to Domsalla's invoice of 10 November 2005, the first of the interim certificates that was dealt with by the adjudicator. This certificate was for £28,500 against the invoice sum of £56,913.55. The certificate was due for payment by the insurers within 14 days of 5 January 2005 but it was sent, no doubt in error, to Mr Dyason.

49. **Breakdown of relationships.** On 20 January 2005, Mr Gordon wrote a long letter to Mr Goring which he did not copy to Mr Dyason. The gist of this letter was that it had come to Mr Gordon's notice that Mr Dyason and his family were living in another property which it appeared Mr Dyason owned notwithstanding the on-going claim being met by the insurers for the weekly cost of renting alternative accommodation. He also reported that, as he saw the situation, Mr Dyason was attempting to slow the contract down by not providing necessary information to him or Domsalla with the intent of securing a determination of the contract. Mr Gordon issued a sixth interim certificate on 24 March 2003 in the sum of £67,033.39.

50. Because Domsalla had not been paid either interim certificate 5 or 6, it apparently suspended work sometime in April 2005 although no contractual notice of suspension was put in evidence.. A further reason for work to have stopped may have been that the locks were changed but there was

conflicting evidence in the documents adduced for the hearing as to whether this occurred at all and, if it did, whether the change was effected by Mr Dyason or Domsalla. On 6 May 2005, solicitors acting for Domsalla wrote to solicitors acting for Mr Dyason asking for payment by Mr Dyason of both unpaid interim certificates. The letter stated that the solicitors had contacted Robins and Lloyds TSB in order to find out why these certificates had not been paid by Lloyds TSB and had been led to understand that Lloyds TSB had put a hold on the payments. Mr Dyason's solicitors were asked why this had happened.

51. The reason why a hold had been placed on these payments was because the loss adjuster and Lloyds TSB were considering the insurers' position having received the confidential letter from Mr Gordon. The insurers notified Mr Dyason on 26 April 2005 that they were avoiding the policy ab initio on the grounds of fraud, thereby discharging all liability to Mr Dyason and claiming entitlement to recover all monies paid out under the policy then totalling £332,187.91. The insurers subsequently sent Mr Dyason draft particulars of claim, in September 2005, and according to the written submissions of Mr Calum Lamont, the claim was settled in a settlement reached between Mr Dyason and the insurers before these proceedings were issued. The court had originally been sent a copy of the insurers' draft particulars of claim by solicitors acting for Domsalla as an exhibit to a witness statement served pursuant to my order that the parties should serve additional evidence if so minded but strenuous objection was taken by solicitors acting for Mr Dyason both as to the manner in which this document had been obtained by Domsalla's solicitors and as to its admissibility. The document was therefore withdrawn by Domsalla's solicitors without prejudice to their contention that the document was obtained wholly properly and was admissible. I have not investigated the rights or wrongs, if any, surrounding the obtaining and use of a copy of this draft pleading nor have I seen this document. I have proceeded on the basis of the brief summary of its contents contained in counsel's submission which I have summarised in full.

52. Mr Gordon, without any other contact with Mr Dyason, inspected the works in early June 2005 and then issued a seventh interim certificate on 6 June 2005 in the sum of £32,337.94. The accompanying letter sending this certificate to Mr Dyason stated:

> "… by virtue of the works by Domsalla not being able to continue further, this latest certificate is based on a 97.5% valuation, as would be the case with a normal completion."

53. Domsalla issued a statutory demand on 9 June 2005 relating to the unpaid certificates. Mr Dyason's solicitors informed Domsalla's solicitors on 22 June 2005 that this demand should be set aside on the grounds that the debts created by the unpaid certificates were not due as a result of many outstanding defects in the property which required remedying at a cost of about £100,000 and of the delay and significant unpaid liability for liquidated damages. These two heads of claim against Domsalla more than extinguished the debts created by the interim certificates by way of set off and cross claim. In support of the allegations of defective work, the solicitors relied on the contents of a further surveyor's report that Mr Dyason had commissioned from a different surveyor, Mr Nigel Baxter, dated 21 June 2005.

54. The statutory demand was not preceded with but no further step was taken by Domsalla to pursue its claims based on the interim certificates until the service of an intention to refer the dispute arising from non-payment to adjudication dated 28 June 2006.

5. Issue 2.3 - The legal basis on which the application of the UTCCR should be considered

1. Fire policy

55. The background to the contract between Mr Dyason and Domsalla out of which the adjudication enforcement action arises is the claim made by Mr Dyason on his household policy in relation to the disastrous fire that occurred in January 2003. The relevant cover is ordinarily described as fire cover and that part of the policy as a fire policy, namely a policy of indemnity insurance covering loss and damage caused by fire. A fire policy is subject to particular features of insurance law that relate to the way that insurers are entitled to deal with admissible claims based on reinstatement of partial or total loss. These are set out in **MacGillivray on Insurance Law**[1].

56. A fire policy will almost invariably provide that the insurer shall have the right of replacing or repairing the property instead of paying a money indemnity to the assured. These provisions will allow the insurers the option of paying a money indemnity or restoring to the assured in specie the property that has been destroyed. The latter right is not merely to lay out the insurance money in reinstatement but to reinstate completely. If the insurer elects to reinstate, its liability is transformed into a liability completely to reinstate the damaged or destroyed property and it is not limited to the amount insured, the amount of the damage or the assured insurable interest. If this option is elected by the insurer, for whose interest the law provides the option in the first place, it cannot subsequently change its mind and, on making this election, the insurance contract ceases to be a contract of indemnity and becomes one to reinstate and is, in reality, transformed into a building contract. Any failure to perform this contract adequately gives rise to a claim for damages by the assured against the insurer. The insurers' obligation is to put the premises in substantially the same condition as it had been before the fire.

57. A further feature of a fire policy is that most fire policies invariably provide that the insurer can insist that any money paid out following a claim pursuant to its obligation to indemnify must be spent on reinstatement.

2. Subrogation

58. These principles often combine with the insurer's rights of subrogation. These rights are to the effect that the insurer, having met a claim, is entitled to the benefit of all rights and remedies of the assured against third parties which, if satisfied, will extinguish or diminish the ultimate loss sustained. The insurer may, in consequence, exercise in the name of the assured whatever rights the assured possesses to seek compensation for the loss from third parties. Thus, for example, these insurers would be entitled to insist that Mr Dyason sued Domsalla in his name for liquidated damages payable for delayed completion and then pay such recovered damages over to the insurers since such damages would diminish the insurer's loss represented by the monies paid out to enable Mr Dyason to rent alternative accommodation during the reinstatement works.

3. Reinstatement not indemnification

59. In this case, the fire policy was not put in evidence but the insurers had clearly exercised their option to reinstate, thereby transforming their obligation to Mr Dyason from one of indemnification to one of reinstatement. This was clear from the draft pleading served by the insurers on Mr Dyason which Domsalla placed before the court at the costs determination following the handing down of

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[1] Ninth Edition (1997), edited by Legh-Jones QC, Sir Andrew Longmore, Birds and Owen. This summary is taken from paragraphs 21-1 21 – 6 and 21-24.

judgment. This stated in paragraph 12 that the insurers had incurred expenditure on "the repair and reinstatement of the property. The effect of this was to require the insurers to pay out a sum greatly in excess of the limit of cover by the time it avoided the policy. It had claimed to have paid out £332,187.91 under a policy providing cover limited to £293,000. Moreover, Domsalla was still claiming unpaid sums totalling £127,871.33. The insurers had decided to undertake this reinstatement obligation, which is one akin to that of a building contractor, by requiring Mr Dyason to enter into the contract with Domsalla as employer. However, the insurers procured two mandates from Mr Dyason as a pre-condition to instructing him to enter into the building contract with Domsalla and, in doing so, procured a collateral contract from Mr Dyason. The effect of these mandates was that all monies to be paid to Domsalla under the building contract had to be invoiced directly to the insurers and paid by it directly to Domsalla. Furthermore, Robins, as contract administrator, acted for, and dealt with, Robins acting as the insurers' agents. Robins could formally issue instructions on behalf of Mr Dyason but Mr Dyason had no authority to require variations or additional expenditure to be incurred. The contract administrator took his instructions in relation to the issuing of variation and other instructions from the loss adjuster and Mr Dyason was not entitled, without the insurers' prior authority, to issue withholding notices relating to non-payment. Indeed, Mr Dyason's evidence was that he was not involved in the invoicing and payment process and was unaware of the withholding notice provisions of the contract until the adjudication process started.

4. Agency

60. Because the contract was entered into in this way, the question arises as to whether Mr Dyason entered into it as agent for the insurers.

61. The relevant principles are:[2]:

(1) The relationship of principal and agent will arise by the express or implied agreement of both parties. The agreement must cover the scope of the authority that the principal is vesting in the agent.

(2) An agent enters it a contract with a third party as agent if that contract changes the legal relations of the principal, such as the insurers, vis-à-vis the third party, such as Domsalla. This occurs if the contract creates legally enforceable obligations and benefits that the principal and the third party can enforce directly against each other.

(3) A principal may be either disclosed or undisclosed. The principal is disclosed if he is known by the contracting third party to be connected with the particular transaction being entered into.

(4) A disclosed principal is bound by, and is entitled to the benefit of, a contract made within the scope of the agent's actual authority on behalf of the principal.

(5) An agent is liable and may sue on a contract which he has entered into on behalf of his principal if this is permitted by the terms of the contract and he has not expressly or by implication negatived personal liability.

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[2] **See Chitty on Contracts, Volume 2, twenty-ninth edition, chapter 31 edited by Professor Reynolds, paragraphs 31 – 21, 31 – 25; 31 – 00; 31-061; 31-054; and 31-083.**

5. Lloyds TSB's rights and obligations under the building contract

62. **Agency agreement.** The question of whether Mr Dyason was acting as the insurer's agent when entering into the contract must be determined at the time the contract was made. This is not a case where the contract could have been entered into by Mr Dyason acting solely as a principal which was subsequently ratified by the insurers who, from that later point, became liable under it.

63. There was no express agreement between the insurers or by Robins on its behalf, with Mr Dyason that he should contract with Domsalla on its behalf. There were, however, several clear indications that such an agreement was reached or should be implied.

64. Firstly, Mr Dyason's evidence was that he was instructed to enter into the contract and had no option. It is likely that such an instruction was given since the insurers, pursuant to their entitlement under the express or implied terms of the fire policy could readily have imposed such a requirement on the assured as an adjunct to the insurers' obligations of reinstatement or indemnification. Moreover, this explanation is consistent with the way in which both Robins' personnel and Mr Dyason acted in the period leading up to the signing of the contract.

65. Secondly, Mr Dyason signed the contract "as agent" and, in context, the only legal person he could have been signing for in that capacity was the insurers. That formulation was probably suggested by Mr Goring or Mr Thorsen and the contract was signed by Mr Dyason at the pre-contract meeting with both of these Robins personnel being present. Both of them had the insurers' express authority to finalise the contractual arrangements for the reinstatement works. It would have been in the insurers' interest for it to arrange for the building contract to be entered into by the assured on its behalf since such an arrangement carried with it a number of advantages. These included the following: (1) the need for NHBC cover to be arranged for the owner and occupier of the new house. This would only be available to a building owner who was also the employer under the building contract; (2) the need to facilitate access to and possession of the site by the builder. This could only be ensured if the building owner was also the employer under the building contract; (3) the need to preserve the rights of mortgagees and others with an interest in the property and the site. This required the building contract employer to be in direct contractual relationship with the mortgagee; (4) the need to reinforce the insurers' rights of subrogation if they arose in relation to such matters as the recovery of damages from the contractor; and (5) the undesirability of the insurers acquiring property rights in the property being reinstated.

66. Other indications that there was an agreement between the insurers and Mr Dyason for there to be a principal-agent relationship included the following: (1) until the building contract was entered into, Robins owed no duty to Mr Dyason in tort; (2) Robins undertook all the design and contract procurement work on behalf of the insurers and not on Mr Dyason's behalf; (3) The insurers, through Robins, took the decision that the contract was to be entered into with Domsalla. Mr Dyason had no say in that decision but was merely invited to make any comments about the proposed contractual arrangements. Robins could have, but were not obliged to, take any such comments into account; and (4) the insurers engaged Robins to act as designer and contract administrator and paid them. There was no contractual relationship between Mr Dyason and Robins and Mr Thorson did not owe him any duty in relation to payment or financial matters generally.

67. The final indication of there being an agreement for an agency arrangement was provided by the fact that Robins required Mr Dyason, by means of a collateral contract, to provide mandates in favour of the insurers. One of these mandates provided that payment to Domsalla would be made

directly by the insurers and a second provided that Mr Dyason authorised Robins to instruct Domsalla on his behalf. This second mandate was described by Mr Thorsen as enabling Mr Dyason "to formally instruct Domsalla on your behalf". Had Mr Dyason been a sole principal contracting party, there would have been no need for such a mandate and any instructions issued by Mr Thorsen would not have been "formally" issued on Mr Dyason's behalf. Thus, these mandates were evidence of an existing principal – agency relationship in place between the insurers and Mr Dyason.

68. Although not strictly admissible as evidence of the existence of an agency contract or of evidence that Mr Dyason was contracting with Domsalla as the insurers' agent, the conduct of the parties once the contract work started does support the analysis that those parties entered into the contract on that basis. Throughout the contract, both contract administrators acted on the basis that any variation or increase in price could only be authorised by the contract administrator following the approval of that step by the loss adjuster. All site meetings were attended by the loss adjuster and all questions of payment were dealt with by the contract administrator as agent for the insurers without any involvement of Mr Dyason. Delay and any liquidated damages to be deducted were discussed between the contract administrator and Domsalla on the basis that the liquidated damages that might be payable would be paid or deducted for the benefit of the insurers. When Mr Dyason became dissatisfied with the delays to progress and Domsalla's quality of work, and felt he was unable to get the contracts administrator to address these concerns with Domsalla, he went straight to Lloyds TSB and sought their agreement for the replacement of Mr Thorsen. The insurers agreed to this course and permitted Mr Dyason to select a replacement surveyor. However, the decision to dismiss Mr Thorsen and the decision to engage the replacement surveyor chosen by Mr Dyason were taken by the insurers and it was the insurer who engaged Mr Gordon. After his appointment, Mr Gordon acted in the same way as Mr Thorsen did, namely to deal directly with the loss adjuster and merely liaise with Mr Dyason about, and consider his representations about, Mr Dyason's perceived defects in the building. Mr Gordon did not regard himself as being answerable to Mr Dyason in relation to these defects, his role was to act as contract administrator for the insurers with a subsidiary role to act for Mr Dyason in relation to the inspection of the quality of work and to take his views into account. To that end, Mr Dyason became so dissatisfied with the quality of work that he engaged, and paid for, two separate surveyor's reports, in December 2004 and June 2005, from separate surveyors. The views of each supported his concerns about the quality of work and he provided them to Mr Gordon but these opinions were not accepted by him when valuing the works and issuing each of the last three interim certificates for payment by the insurers.

69. **Disclosed principal.** It is clear that Domsalla was well aware that the insurers were involved in the contract. The contract documents made it clear that the works were reinstatement works being carried out for an assured as part of an insurer's obligation to reinstate works. The contractual payment arrangements involved the submission of invoices directly to the insurer via its loss adjuster and the contract administrator was obviously acting principally for the loss adjuster rather than for Mr Dyason. Finally, as Mr Domsalla informed the loss adjuster in a letter dated 1 October 2004: "I have many years of experience working with Insurance Claims & Policyholders". He was also well aware that the contract involved insurance reinstatement works being carried out at the behest of insurers. He was also aware that it was the loss adjuster and not Mr Dyason who needed to approve any additional expenditure. Mr Domsalla might not have known the identity of the insurers but that alone would not have made the insurers undisclosed principals.

70. **Mr Dyason's liability.** Although Mr Dyason entered into the contract as an agent for the insurers, it is clear from the wording of that contract and from the surrounding circumstances at the time it was entered into that the contracting parties intended him to be liable on that contract as

well. Indeed, it was possible, that although the contract was for the complete reinstatement of the property, some work by way of a variation to that contract might be undertaken for which only Mr Dyason would be liable. Thus, the relationships were such that Mr Dyason and the insurers could each sue Domsalla and be sued by Domsalla on that contract and, additionally, Domsalla could sue the insurers directly on the collateral contract incorporating the direct payment mandate.

71. **Conclusion – Issue 2.2.** It follows that Mr Dyason entered into the contract with Domsalla as agent for the insurers who were disclosed principals. Given the terms of that contract, Mr Dyason was liable to Domsalla under the building contract as principal and as agent. Furthermore, the insurers could both sue Domsalla and be sued by Domsalla under the building contract. Given that the collateral contract incorporating the payment mandate provided by Mr Dyason to the insurers was one intended to favour Domsalla, that company could also have enforced the insurers obligation to make direct payment to it of monies due to it under the contract by relying on section 1(1)(b) of the Contracts (Rights of Third Parties) Act 1999.

6. Issue 2.3 – Unfair Terms in Consumer Contracts Regulations

72. **Issues**. In considering whether the UTCCR are applicable, it is first necessary to determine in what circumstances the UTCCR are applicable, what the applicable test is and whether that test is such as to render either the adjudication provisions or the withholding provisions as being not binding on Mr Dyason by virtue of regulations 3, 5(1) and 8(1) of and Schedule 2 to the UTCCR.

73. **UTCCR**. The UTCCR were first introduced in 1994 to give effect in the United Kingdom to the Unfair Terms in Consumer Contracts 1992. They were superseded in 1999 by the present Regulations which are, in all material respects, very much to the same effect. The UTCCR take effect throughout the United Kingdom. The Directive was made under the common market provisions of the EC Treaty and its objective, which the UTCCR seek to implement, is three-fold: (1) to reduce distortion in competition between sellers of goods and suppliers of services caused by differences across the European Union in rules governing terms in consumer contracts; (2) to create effective uniform legal protection for consumers from the imposition of unfair contract terms; and (3) to enhance the awareness of consumers as to the rules of law which govern consumer contracts in other Member States since otherwise they will be deterred from entering into transactions with suppliers in other Member States. The Directive, for these purposes, sets minimum requirements. In giving effect to the Directive, when applying the UTCCR in the domestic courts, the English courts must seek to give effect to both the terms of the UTCCR and the Directive as well as to the purposes of the Directive. This is to be done by giving a purposive interpretation to the UTCCR.

74. The UTCCR therefore provide protection to consumers who enter into consumer contracts. A consumer is any natural person who, in contracts covered by the UTCCR, is acting for purposes which are outside his trade, business or profession. The Directive and the UTCCR are, therefore wide-ranging in scope. The requirements of the Directive are, no doubt, a primary reason for the compulsory provisions of the HGCRA not extending to residential occupiers since such occupiers would be subject to adjudications arising under construction contracts as consumers.

75. The UTCCR apply to unfair terms in contracts concluded between a seller or a supplier and a consumer. Regulation 5(1) provides:

> "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

Regulation 5(5) provides that Schedule 2 to the Regulation contains an indicative and non-exhaustive list of the terms which may be regarded as unfair, the so-called grey list.

76. The assessment of unfair terms is provided for in Regulation 6 which provides:

> "(1) … the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all other terms of the contract or of another contract on which it is dependent.
>
> (2) In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate-
>
> (a) to the definition of the main subject matter of the contract, or
>
> (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange."

77. It follows that in determining whether the UTCCR have the effect of making the adjudication and withholding provisions of the contract, which have not been individually negotiated, are unfair, I must determine whether, contrary to the requirement of good faith, the term causes a significant imbalance in Mr Dyason and Domsalla's rights and obligations arising under the contract to the detriment of Mr Dyason. I must first determine that these terms are not core terms, since these are excluded from the ambit of the UTCCR by Regulation 6(2). The test is to be applied by reference to all the circumstances as they stood at the time the contract was entered into on 12 September 2003 and by reference to the terms of the collateral contracts incorporating the mandates and to the insurance contract of reinstatement and the contract relating to Mr Dyason's agency made between him and the insurers since these were also contracts on which the contract was dependent.

78. The principal English authority which provides guidance as to the applicability of the UTCCR is the decision of the House of Lords in **Director General of Fair Trading v First National Bank plc**[3]. That case, and the general principles applicable to the way in which the UTCCR should be interpreted and applied, show that the test of unfairness is a complex and composite one. The approach I should adopt is clearly summarised in Chitty on Contracts as follows:

> "It can be seen, therefore, that the basis on which the courts must review the terms of consumer contracts is a composite test, comprising a number of elements. The overall requirement is one of fairness and for this purpose the starting point is the criterion of "significant imbalance," this then being qualified by the need to ensure the evaluation of all interests involved (under the requirement of good faith). The Directive (and the Regulations) then go further and specify a number of factors to be taken into account in determining the issue of fairness (the nature of the goods or services, all the circumstances attending the

[3] [2002] 1 AC 481, HL(E).

conclusion of the contract and all the other terms of the contract or of another contract on which it is dependent) and finally providing a list of illustrative terms which may be unfair."[4]

79. This approach is supported by the speeches of Lord Bingham, Lord Steyn and Lord Hope in the **Director General of Fair Trading** case as these passages demonstrate. Firstly, quoting from Lord Hope's speech:

> "… The meaning to be given to the word "unfair" in this context is laid down in Regulation 4(1) of the 1994 Regulations [which is in identical terms to Regulation 5(1) of the 1999 Regulations]. Guidance as to how the words used in that paragraph are to be understood is to be found in the sixteenth recital to the Directive. The recital explains what "constitutes the requirement of good faith". It states that an assessment of the unfair character of unfair terms must be supplemented by an overall evaluation of the different interests involved. Regulation 4(2) indicates the wide range of circumstances to be taken into account in the assessment. It provides that the assessment is to be done at the time of the conclusion of the contract. But an appreciation of how the term will affect each party when the contract is put into effect must clearly form part of the exercise. It has been pointed out that there are considerable differences between the legal systems of the member states as to how extensive and how powerful the penetration has been of the principle of good faith and fair dealing: **Lando & Beale, Principles of European Contract Law, Parts I and II** (combined and revised, 2000) p116. But in the present context there is no need to explore this topic in any depth. The Directive provides all the guidance that is needed as to its application."[5]

80. This approach is also found in the speeches of Lord Bingham of which I need only quote a small part, albeit that the entire speech is illuminative:

> " … Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British Lawyers. It looks to good standards of commercial morality and practice. Regulation 4(1) lays down a composite test, covering both the making and the substance of the contract, and must be applied bearing clearly in mind the objective which the Regulations are designed to promote."[6]

81. Finally, the conclusion of Lord Steyn:

> "… It is, however, also right to say that there is a large area of overlap between the concepts of good faith and significant imbalance."[7]

82. **Adjudication and withholding provisions.** The adjudication provisions of the contract have already been summarised[8]. The relevant withholding provisions are contained in clause 4.4 which provides:

> **"***Notices of amounts to be paid and deductions*

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4 Volume I, General Principles, Twenty-ninth Edition, Chapter 15, Dr Whittaker, paragraph 15-049).

5 Ibid., paragraph 45.

6 Supra, paragraph 17 above.

7 Ibid., paragraph 37.

8 See paragraph 12 above.

4.4.1 Not later than 5 days after the issue of a certificate of payment pursuant to clauses 4.2.1 and 4.3 the Employer shall give a written notice to the Contractor which shall specify the amount of the payment proposed to be made in respect of the amount stated as due in that certificate.

4.4.2. Not later than 5 days before the final date for payment of the amount due pursuant to clause 4.2 or clause 4.3 the Employer may give a written notice to the Contractor which shall specify any amount proposed to be withheld and/or deducted from that notified amount, the ground or grounds for such withholding and /or deduction and the amount of the withholding and/or deduction attributable to each ground.

4.4.3. Where the Employer does not give a written notice pursuant to clause 4.4.1 and/or to clause 4.4.2 the Employer shall pay the amount stated as due in the certificate."

It is also necessary to read this provision with clause 4.8:

4.8. If, subject to any notice issued pursuant to clause 4.4.2, the Employer shall fail to pay the amount duly certified under either clause 4.2.1 or clause 4.3 in full by the final date for payment as required by this Agreement and such failure shall continue for 7 days after the Contractor has given to the Employer, with a copy to the Contract Administrator, written notice of his intention to suspend performance of his obligations under this Agreement to the Employer and the ground or grounds on which it is intended to suspend performance, then the Contractor may suspend such performance of his obligations under this Agreement until payment in full occurs.

83. These provisions were inserted into the JCT Minor Works agreement so that the contract mirrored the requirements of the HGCRA. These statutory provisions impose requirements on all construction contracts, save for those where the employer is a residential occupier and certain other limited categories, to the effect that they must contain, or be taken to have inserted into them, provisions for adjudication, for withholding notices to be served as a precondition to withholding or deducting from certificates, for payment at defined times during and at the completion of the work, for the contractor to have an entitlement to suspend work for non-payment and for a prohibition against conditional payment provisions. The objective of the legislation was to provide a means whereby contractors, subcontractors and other contractors in the contractual chain could obtain prompt and regular payment during and after the work with no unauthorised or unfair deductions. Until the legislation was introduced in 1996, there was a perceived and growing need to find means to combat the problem of those lower down the contractual chain being starved of cash flow by those higher up the contractual chain withholding payment on unsatisfactory grounds.

84. The means of speeding up cash flow adopted by the HGCRA so as to remedy the problem of cash flow difficulties was to provide that the payment provisions of construction contracts contained appropriate machinery for prompt and regular payment and to provide that sums could only be deducted from interim payments if there were good grounds that had been identified in withholding notices served within a short time of the issue of the particular interim certificate in question. These provisions, in effect, adapted the rules of set off by providing that the right to set off could only be exercised if the appropriate notices had been served in time. These provisions were then supported by a statutory adjudication scheme providing for rapid, informal but temporary means of resolving disputes about sums being withheld and other matters relating to payment. The adjudicator's decision, rendered in 28 days from the inception of the dispute, had to be paid without

further deduction, save where valid withholding notices had been served, but the decision was not final in the sense that it could be challenged in subsequent litigation or arbitration. Such a challenge was not, however, to hold up payment in the meantime.

85. The legislation could have confined construction contract adjudications to disputes about interim payments, which was the stated objective of the legislation. However, the Government extended the adjudication provisions to all kinds of dispute and to disputes arising both during and after the completion of the work.

86. Clearly, all these provisions are capable of being given effect to by terms of a contract even if the statutory scheme is not applicable because the employer is a residential occupier, as in this case. If the contract is of that kind, it will operate without statutory backup but it will be subject to the overriding principles of contract interpretation and to the UTCCR.

7. Applicable background for determination of potential UTCCR unfairness

87. **Mr Dyason's contentions.** On behalf of Mr Dyason, Ms Sinclair contends that the provisions are unfair because he was not instrumental in negotiating the contract or in determining its format. He was merely a titular employer with no control over the contract. He received no advice about the existence or necessity of using the withholding provisions. He was unable to prepare or serve a withholding notice. The contract administrator was appointed by the insurers who owed professional duties to the insurers relating to valuation and payment but did not owe any such duties to Mr Dyason. In short, Mr Dyason is a consumer who did not proffer the contract, but, instead, was required to enter into it in order to obtain the reinstatement of his property that his insurance policy entitled him to.

88. **Domsalla's contentions.** Domsalla's contentions mirrored the reasons provided by the adjudicator for deciding that the UTCCR did not apply so as to rob the adjudication and withholding provisions of their binding nature. These reasons and contentions were based on a number of essential disputed matters. The material matters were these:

(1) Robins acted as agent for both the insurer and Mr Dyason in selecting the JCT Minor Works Agreement and in administering its terms. Thus, these terms were proffered by or on behalf of Mr Dyason.

(2) Mr Dyason could and should have read the terms of the contract and sought advice as to those terms before he signed it and, furthermore, could and should have sought advice as to his rights from the contract administrator during the course of the work.

(3) Mr Dyason was not a purely titular employer who had no control over the contract at any time and was not in a position to prepare or serve a withholding notice.

(4) Mr Dyason obtained the two independent surveyors' reports advising him of the defects in the property. The first was obtained before any of the three disputed certificates were issued and the second was obtained at the time the third was issued.

(5) The withholding provisions did not cause any imbalance in the rights and obligations of Mr Dyason compared to those of Domsalla. This was so given that the contract

administrator could have issued certificates which took account of the defective work and Mr Dyason could then have issued the appropriate withholding notices.

(6) Domsalla was not guilty of any lack of fair dealing. He did not proffer the contract terms which were clear and legible with no concealed pitfalls.

89. **Decision – general.** It can be seen that the difference between the parties as to whether the relevant terms were unfair is principally a difference relating to the factual background to the contract and to the respective roles of the contract administrator and Mr Dyason as employer. In the light of my findings, based on the considerable body of documentary evidence submitted in both the adjudication and the summary judgment application, it can be seen that I have concluded that Mr Dyason's factual approach to the contract is correct and that the factual basis of both the adjudicator's decision and Domsalla's contentions is incorrect. Furthermore, Domsalla was aware of the factual basis underlying Mr Dyason's signature on the contract. The insurers were disclosed principal. Moreover, Domsalla knew, when Mr Dyason signed the contract, that he was signing as agent for the insurers, that he had no right to instruct the contract administrator, that he had no authority to issue withholding notices himself, that all payments would be made direct by the insurer, that Mr Dyason had not been involved in selecting the contract documents and had not received any, or any significant, advice as to their terms

90. The parties did not make any detailed submissions about the legal background to the contract or to the insurance contract or collateral contract on which it was dependent although Mr Dyason's principal submission before the adjudicator and in the enforcement proceedings was that he was a shadow contracting party with no entitlement to enforce the terms of the contract. Thus, the full significance of the legal relationships involved was not taken into account by the adjudicator or by Mr Lamont's submissions. The application of Regulations 5, 6 and 8 must take account of the fact that the insurers had agreed to reinstate the works when opting to reinstate and not indemnify, that that had transformed the policy from being a contract to indemnify into a quasi-building contract with the insurer as contractor, that the insurer had exercised its entitlement to decide on the means of putting its reinstatement obligations into effect using a JCT Minor Works agreement with Mr Dyason as titular employer, that it had powers of subrogation in relation to remedies against Domsalla, that the payment mandate was a collateral contract between the insurers and Mr Dyason which gave it enforceable direct rights against the insurers and that the relationship between the insurers and Mr Dyason in relation to the contract was that of principal and agent with the contract administrator owing exclusive duties to the insurer in relation to payments, certificates and claims. Furthermore, the contract administrator was not engaged by Mr Dyason and only owed him limited duties relating to design and inspection. Finally, and crucially, the parties did not make reference to the basis on which Mr Dyason became employer under the contract, namely that he was acting as agent for a disclosed principal who was contracting on the basis that he could also sue and be sued under the contract, albeit that he would be accountable to the insurer under both the terms of the policy and the agency and subrogation arrangements governing their somewhat complex myriad of legal relationships. However, all these matters are relevant in applying the complex composite test of unfairness imposed by the UTCCR to the background facts.

91. **Unfairness – adjudication clause.** Notwithstanding the background facts and underlying dependent legal relationships that I have summarised, I do not find that the adjudication provisions of the contract are unfair. The basis of unfairness, as contended for by Ms Sinclair, was that the adjudication provisions entailed a very speedy timetable by an adjudicator who might have no legal training. It makes no provision for the payment of costs to the successful party. The decision of an

adjudicator only had temporary finality and it might put unreasonable pressure on the consumer because the decision had to be paid in full notwithstanding possible overpayment.

92. The adjudication provisions in the JCT Minor Works contract have been considered in the context of the UTCCR in a number of cases culminating in the decision of the Court of Appeal in **Bryen & Langley v Boston**[9]. The effect of these decisions is that the adjudication provisions, even if proffered by the contractor in circumstances which would make it procedurally unfair for the contractor to rely on them vis-à-vis a consumer, do not cause a significant imbalance in the parties' rights and obligations. The procedure is, in essence, a rapid, cheap and temporary legal process which determines the parties' rights. It must be conducted pursuant to minimum standards of fairness and impartiality and is one which is similar to the summary judgment procedures available in court but capable of being undertaken more speedily and economically. Although the adjudicator may not be a lawyer, he or she will have had some professional training relevant to the determination of construction disputes and, as with arbitration, a legal background is not an essential prerequisite of a fair and impartial procedure. Finally, any decision may be overturned in a subsequent arbitration or piece of litigation.

93. I conclude that, in this case, although it is potentially unfair for Domsalla to rely on the adjudication provisions, such reliance is not rendered unfair by the UTCCR because it does not substantially alter the balance of the parties' rights and obligations.

94. **Unfairness – withholding notice clause.** Although not strictly relevant, I first observe that the first two relevant interim certificates were issued at a time when the contract had not been avoided by the insurers but after they had been notified by Mr Gordon of possible grounds for avoidance and were considering their position. They clearly had decided that no further monies would be paid out pending a decision as to whether or not they would avoid the policy. The third interim certificate was issued in early June 2005, some five weeks after the insurers had notified their intention to avoid the policy and some five or so weeks after Domsalla had suspended work due to non-payment of the first two unpaid certificates. These certificates were issued without reference to Mr Dyason and none of them could have taken into account the contents of the second surveyor's report commissioned by Mr Dyason since that was sent out on 21 June 2005, some 15 days after the third unpaid certificate was issued.

95. I am satisfied that, in the unusual circumstances of this case, the withholding notice clause is unfair. In summary, my reasons are:

(1) Mr Dyason had no hand in proffering or selecting the clause, no advice as to its existence, meaning or effect and no means of ascertaining that it was contained within the contract since he was not shown the contract conditions until he was provided with a copy to sign without being given any opportunity to read or consider them.

(2) Mr Dyason was not involved in certification or payment and all payments were to be made by the insurers. He was not entitled to issue withholding notices, it was the insurers and their agent the contract administrator who were concerned with whether, when and in what terms such notices should be issued.

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[9] [2005] EWCA Civ 973, CA. Other cases cited included Picardi v Cuniberti and Cuniberti [2003] BLR 487, Judge Toulmin QC; Lovell Projects Ltd v Legg and Carver [2003] BLR 452, Judge Moseley QC; Westminster Building Company Ltd v Beckingham [2004] BLR 163, Judge Thornton QC and Allen Wilson Shopfitters v Buckingham [2005] EWHC 1165 (TCC), Judge Coulson QC.

(3) Mr Dyason's entitlement under the contract was to receive a reinstated home as close in design and construction to his original home as was possible. The workmanship was to be both good and in conformity with the standards of the contract. All money claims against Domsalla available for breach of contract, whether for defects or delay, would be made in Mr Dyason's name but would inure to the benefit of the insurers.

(4) Domsalla could sue the insurers directly if so advised and, if they sued them through the medium of Mr Dyason, could utilise the adjudication provisions of the contract.

(5) If a situation arose whereby Mr Dyason became personally liable under the contract, the effect of the withholding provisions could substantially affect his rights. This is because they would not have been operated in his favour or to his advantage since they were only capable of being operated in favour of the insurers and Mr Dyason was not able or entitled to operate them himself.

(6) Thus, Mr Dyason would be unable to avoid the effect of an adverse adjudication decision relating to unpaid certificates even where there were good cross-claims for defects or delay because no withholding notices would have been served. This situation would arise in a contract which he would not ordinarily expect to pay out anything, where the insurers would expect to be able to rely on withholding notices in a similar situation and in which Mr Dyason was only in the position of being an employer under a building contract because that was the way that his insurers had insisted that his entitlement to full reinstatement under his policy could be provided. He was not a voluntary employer, merely the agent of the insurers who did not wish to act as employer themselves notwithstanding the fire insurance reinstatement nature of the work being performed.

(7) Domsalla could still rely on their rights to suspend work, as they apparently did, and could still proceed against the insurers directly. Thus, their rights would not be adversely affected if the withholding notice clause was held not to be binding whereas Mr Dyason's rights and obligations would be very substantially affected if the clause remained binding against him.

96. I also conclude that certain of the grey terms set out in Schedule 2 to the UTCCR are applicable to provide a further indication that the withholding notice clause is unfair to and not binding on Mr Dyason. The Schedule 2 terms are stated to be terms which may be regarded as unfair. The relevant terms are:

"(1) The following terms which have the object or effect of-

(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the supplier in the event of total or partial non-performance or inadequate performance by the supplier of any contractual obligations, including the option of offsetting a debt owed to the supplier against any claim which the consumer may have against him.

(i) irrevocably binding the consumer to terms which he had no real opportunity of becoming acquainted before the conclusion of the contract;

(o) obliging the consumer to fulfil all his obligations where the supplier does not perform his;

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, … unduly restricting the evidence available to him … ."

97. **Conclusion – withholding notice.** I conclude that the provisions of clause 4.4.1 – 4.4.3 of the contract are not binding on Mr Dyason.

Issue 3 – Effect of the Adjudicator's Decision

98. **Domsalla's contentions.** It was contended on behalf of Domsalla that I could not give Mr Dyason permission to defend the claim even if I concluded that the withholding notice provisions of the contract were not binding on him because the adjudicator had decided that they were binding and that decision was one, even if erroneous, that was made within his jurisdiction and was, therefore one that I could not go behind. Moreover, it was not possible to set off or delay payment of a sum decided as due and directed to be paid forthwith by an adjudicator. This was so even though the adjudication was a purely contractual adjudication.

99. **Conclusion – Issue 3.** I cannot accept these contentions of Domsalla for these reasons:

(1) They presuppose that an adjudicator can, by an erroneous decision that a particular term is fair, preclude a consumer exercising his statutory entitlement to set aside the binding nature of that term so that, in the enforcement proceedings, the court must proceed on the basis that the relevant term is fair when, in reality, it is unfair.

(2) They ignore the fact that the adjudicator, by deciding that the withholding provisions of the contract were binding on Mr Dyason and had not been operated, shut out considering Mr Dyason's defence of abatement and set off although this was before him and was one which had a prospect of success. This was both procedurally unfair and resulted in his not deciding all matters referred to him for decision.

(3) They ignore the fact that the adjudication provisions arise in a purely contractual context. The doctrine of unreviewable error of an adjudicator within jurisdiction is only applicable to statutory adjudications. The authority cited to the contrary, **Rupert Morgan Building Services Ltd v David Jervis and Harriet Jervis**[10], was not a case involving a residential occupier since the Court of Appeal applied section 111 of the HGCRA relating to withholding notices. Mr Lamont contended that this case was in fact based on the employers being residential occupiers and on Part 11 of the HGCRA not being applicable but that contention flies in the face of the Court of Appeal's reliance on section 111 of the HGCRA. Thus, the absence of a withholding notice was fatal to the employers' attempt to set off their cross claims against claims based on certificates in both an adjudication and the subsequent enforcement proceedings. Although the property in question was a cottage owned by the employers and involved work to that cottage, the employers were not residential occupiers for the reason I have set out.

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10 [2004] 1 BLR 18, CA.

(4) They ignore the fact that the unreviewable error doctrine arises because of the statutory underpinning of adjudication and so as to give effect to the statutory policy of maintaining a contractor's cash flow. A consumer contract is not subject to that statutory policy and, instead, is subject to the law of contract as it exists in the absence of the provisions of the HGCRA.

(5) They ignore the fact that, in view of the finding that the withholding notice provisions of the contract are not binding on Mr Dyason, this contract is to be treated, in relation to claims against Mr Dyason as not containing a contractual bar to a set off or cross claim being raised against sums certified in favour of Domsalla.

(6) Finally, they ignore the fact that, in **Gilbert-Ash (Northern) Ltd v Modern Engineering**[11], the House of Lords held that an employer could set off against sums certified under a building contractor as due to the contractor cross claims for defects and delay unless the contract expressly excluded that right. Thus, in summary judgment, or adjudication proceedings not subject to the HGCRA, a cross claim may be put up against a claim on interim certificates unless the contract also contains withholding notice provisions which have not been operated. In this contract, so far as Mr Dyason is concerned, the contract is to be treated as not containing any withholding provisions.

100. Thus, the adjudicator was in error in excluding consideration of Mr Dyason's cross claim. This error is one giving rise to both procedural unfairness and the added unfairness of his not being able to take advantage of his right provided by the application of the UTCCR that he should not be bound by the withholding provisions of the contract. It is also an error which shut out his entitlement to rely on his contractual right of set off.

Issue 4 – Effect on the Enforcement Proceedings of the Decisions in Issues 1 – 3

101. It is clear from the most recent, and third, surveyor's report obtained by Mr Dyason, from Mr Terence Northwood dated January 2007, that Mr Dyason has cross claims for defective and incomplete work of approximately £100,000 and also has a cross claim for delayed completion for liquidated damages for at least 50 weeks. These claims are accepted in the written submissions of Mr Lamont as being arguable although the merits of the claims are disputed and will, if necessary, be staunchly defended. It is also clear that the adjudicator's decision cannot be enforced summarily since it appears to suffer from the series of defects outlined above[12]. These make the decision one arrived at in breach of the requirements of fairness and which is incomplete and fails to take account of arguable cross-claims, abatements and setoffs.

102. This judgment has taken account of a number of legal authorities and principles which were not referred to in argument and has not considered whether the conduct giving rise to the insurers' avoidance of the policy affects Mr Dyason's entitlement to rely on the UTCCR or whether the subsequent settlement affects the conclusions arrived at in this judgment.

103. I therefore give permission to defend.

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11 [1974] AC 689, HL.

12 See paragraph 99 above.

104. I will need to consider with the parties whether I can and should give final judgment in relation to any of the issues dealt with in this judgment, whether there should be a trial of any of these issues and whether Mr Dyason may cross claim any of his claims or use them to setoff or abate against the claim on the adjudicator's decision. Equally, I will need to consider whether, if Domsalla wish to do so, it may seek judgment on the basis of the interim certificates evidencing a clear entitlement to all or part of the sums certified and claimed. I will also need to consider any application for costs.

HH Judge Thornton QC