

JUDGMENT : Mr Justice Akenhead: TCC. 10th December 2008

Introduction

1. This case relates to an adjudicator's decision dated 17 September 2008, which the Claimant, Air Design (Kent) Ltd ("Air Design"), a small mechanical services company based in Yalding, Kent seeks to enforce against the main contractor, Deerglen (Jersey) Ltd, which employed Air Design as a sub-contractor on a project known as Liberty Wharf Phase 3 in Jersey in the Channel Islands. Issues are raised to the effect that the adjudicator had no or insufficient jurisdiction because there were two, three or four sub-contracts between the parties and there were multiple disputes. If the decision is enforceable, Deerglen seeks a stay of execution.

The factual and contractual background

2. Deerglen was the main contractor employed in August 2006 by Islands Development Ltd ("IDL") to design and build a 6 storey office building known as Liberty Wharf Phase 3. The standard form JCT with design contract was subject to the Law of Jersey.
3. Following the provision of quotations and some negotiation, Deerglen and Air Design entered into a written contract dated 16 April but signed on 17 April 2007 whereby Air Design undertook to carry out mechanical services work for this project; these works were sometimes referred to as the "basebuild" works. The contract ("the Basebuild Contract") was in relatively simple terms set out on one page headed "Scope of works for the mechanical installations" and there was listed a number of documents which were to be incorporated as well as some simple terms such as that "all works shall be completed by the end of September 2007". The "contractual basis" was stated to be "JCT intermediate". There was a mild argument as to whether this was the 1998 or the 2005 version. Nothing turns on that point but the parties accepted that English Law applied. It is accepted that the First Sub-Contract contained an adjudication clause which incorporated the statutory Scheme.
4. A letter dated 30 March 2007 "with handwritten amendments" from Air Design to Deerglen was one of the documents incorporated in to the First Sub-Contract and it confirmed that the agreed price was £1,358,950 and that this price did not "form part of CPA fitout". This was a reference to the fact that one of IDL's tenants, for the 3rd to the 5th floors, was to be CPA and presumably the let areas were to be fitted out as agreed with the tenant. Another incorporated letter was dated 21 March 2007 from Air Design to Deerglen which spelt out what work was to be done from the basement to the roof. The First Sub-Contract works duly commenced.
5. Several months later, Deerglen asked Air Design to quote for the mechanical services work for and in connection with the CPA fitting out works which were to be added as a variation to their main contract with IDL. Tender drawings (dated 6 February 2007), provided by IDL's engineers Janowski, and specifications provided by CPA were given to Air Design upon which to quote. Air Design quoted the sum of £325,000, which was confirmed in their letter dated 23 May 2007 to Deerglen; that letter confirmed that on 21 May 2007 Deerglen had instructed Air Design to proceed with these CPA works. This letter was repeated almost verbatim in a later letter dated 29 May 2007. Both letters provided a financial breakdown of the sum of £325,000 and went on to say:
"...we have made no allowance for the following...:
1...7
8. Building Management System
9. No leak detection has been allowed. [This was added by the later letter]
Our contract conditions are based upon the original base build contract and the figures stated above offers [sic] no reduction to base build prices and includes additions only. Please refer to previous correspondence regarding CPA contract. We refer to the recent base build contract and technical submissions."
6. On 24 May 2007, Deerglen sent a "Letter of Intent" to Air Design. It was entitled "Liberty Wharf Phase 3-CPA Fit Out-Letter of Intent" and went on:
" We herewith assign you to perform the Mechanical Installations for the CPA mechanical fit out for the above named building project.
The scope of the work is:
1. The tender documents, drawings (as listed in the attachment) provided by Janowski... and the specifications 'Part D' provided by CPA.
2. The value of this contract is £325,000 as a lump sum...
Notwithstanding that we are not in a position to present you with a formal contract for implementation, it is our intention to instruct you to carry out various elements of the proposed work.
Should, for any reason whatsoever, a formal contract not be implemented our liability pursuant to this letter will be limited to the reimbursement of the net cost reasonably and necessarily incurred by you in respect of this work.
I confirm that in the event that a formal contract will be signed, any money that may have been paid to you pursuant to this letter of intent shall be deemed to be interim payments and will be deducted from the contract sum.
I would be grateful if you would sign this letter as confirmation of your agreement to its terms and return a copy back to me"
Air Design duly signed and returned the letter on 15 June 2007. I will refer to this as the "CPA Arrangement".
7. On 12 September 2007, Deerglen sent to Air Design a letter entitled "Liberty Wharf Phase 3 BMS and Comms Room Cooling" which materially stated:
"I hereby assign you to perform the following services in extension of the existing contract.

1. Building Management System

The scope of the works is based on the quote from 25/6/07 but not necessarily limited to this. The contractor shall design, deliver, install, test and commission a complete and functionable building management system, minimum comprising the following...

2. Cooling CPA comms room

The contractor shall design, deliver, install, test and commission a complete and functionable second cooling system for the comms room on 4th floor according to the tenants (CPA) specifications, minimum comprising the following...

3. Cooling CPA build room

The contractor shall design a complete and functionable cooling system for the build room on 4th floor according to the tenants (CPA) specifications...

4. Price agreement

The total price for all the above listed works is agreed to be £53,500...

Please sign a copy of this instruction as confirmation of your acceptance of the conditions outlined therein and send it back to us."

The letter was duly returned signed by Air Design. I will call this the "BMS Arrangement".

8. There were separate invoices provided by Air Design for the Base build, CPA and BMS works.
9. On 29 November 2007, the parties entered into a supplementary agreement "the Supplementary Contract" which expressly concerned "Office Building "Liberty Wharf Phase 3" Jersey Mechanical Installations". It stated as follows:
"Main Contract

AKL [Air Design] is assigned by Deerglen as follows:

Base-built £1,358,950.00

CPA fit-out £ 325,000.00

BMS £ 53,000.00

Total £ 1,736,950.00

An amount of £1,559,303.71 out of this contract sum has been paid by Deerglen, the remaining amount is £177,646.28. Deerglen will pay this remaining amount reduced by £13,500 when AKC has cleared all major defects, carried out all remaining works, set all systems to proper operation and handed over the documentation...

The remaining £13,500 will be due for payment after completion of the base-built works on ground floor..

2. Variations

AKL's variation list from 20,11,2007 (items 1 to 45) was checked by Deerglen (checked version handed over to AKL). Deerglen accepts a total amount of £56,936.05 for the listed variations with an amount of £30,571.15 due for payment. Both sums are reduced by £10,571.15 for works that were caused by AKL and had to be carried out by others and were paid by Deerglen. Deerglen will pay £20,000 on 30/11/2007.

The remaining amount of £26,364.90 will be paid on 30/11/2007 according to rendered works.

Maintenance

AKL will assign a local company for maintenance works and clearing minor defects..."

The variation list referred to contained variations both to the Base build and CPA works.

10. Differences arose between the parties as to whether Air Design had finished the works, what was due to it and as to whether there were any remaining defects. Air Design instructed a claims consultant, Knowles, who wrote to Deerglen on 27 March 2008 asserting that there was one contract albeit subject to the Supplementary Agreement and claiming a total of £341,992 which related to the sum of £177,646.28 declared to be due in the later agreement and the remainder for what Air Design asserted was the true value of variations. Deerglen's Solicitors' response of 1 April 2008 was:

"...It is agreed that there was a contract between our respective clients in respect of mechanical installations at the Liberty Wharf Phase 3 office building and that this contract was subject to the supplementary agreement dated 29 November 2007.

The purpose of that later agreement was perfectly clear..."

The issue taken was that the Supplementary Agreement was effectively a settlement of the money claims between the parties and set an agreed agenda for finishing of and putting right the work. That was challenged by Knowles shortly thereafter.

11. Air Design served on Deerglen a Notice of Intention to refer a dispute to adjudication on 7 July 2008 referring to there being one contract dated 16 April 2007 varied by the Supplementary Agreement of 29 November 2007 and to carrying out "varied and additional work". The RICS nominated Mr Harvey Mason as adjudicator. There is no challenge to the way in which he was appointed.
12. The Referral to adjudication, dated 10 July 2008, materially said as follows:
"1.1 Deerglen ... contracted with Air Design ... by an Agreement dated 16 April 2007 for AKL to carry out mechanical services installations at Deerglen's site known as Liberty Wharf Phase 3.
1.2 The agreement referred to in Paragraph 1.1 stated that 'the contractual basis is JCT Intermediate', ...
1.3 AKL carried out the work contracted for, including varied and additional work.

- 1.4 Prior to AKL's completion, at a meeting on 29 November 2007, the parties reached agreement to vary the payment arrangements to the remainder of the contract. ...
- 1.6 The IC Sub/D/C form of contract at Section 8 provides for Adjudication ...
- 2.1 The Contract was concluded by the Agreement dated 16 April 2007 ...
- 3.1 By a Supplementary Agreement dated 29 November 2007 [there is then a summary of that Agreement] ...
- 3.3 Deerglen failed to make further payments either as agreed or at all and consequently repudiated the Agreement, in any event.
- 3.4 AKL have subsequently sought payment for both the sums listed in the Supplementary Agreement and by reason of AKL's Variation Account, but have been paid no further moneys."
13. At the end of the Referral, Air Design listed "matters to be decided by the Adjudicator":
- "1. The Adjudicator is asked to decide if the Agreement dated 29 November 2007 did not extend to the valuation of the final account and/or the variation account but was solely an agreement that the sum was to be paid as interim payment.
 2. The Adjudicator is asked to decide that AKL's variation account be valued at £309,277.71 or such other sum as the Adjudicator shall decide.
 3. The Adjudicator is asked to decide that AKL be paid a further £468,704.09 as balance of their account or such other sum as the Adjudicator shall decide.
 4. The Adjudicator is asked to decide that AKL be paid interest for late payment ...
 5. The Adjudicator is asked to decide that AKL have currently no further obligations with regard to defects and/or incomplete work.
 6. The Adjudicator is asked to decide that Deerglen's contra charges are both unjustified and unsubstantiated ..."
14. Over the following three weeks, the parties exchanged submissions on the jurisdictional issues with which this Court has to grapple. In effect Deerglen took the point that there were four contracts between the parties. It sought to argue that disputes relating to at least three if not four separate contracts were being sought to be referred to adjudication and that since there was no adjudication clause in what was said to be separate contracts relating to the CPA Works Arrangement and the BMS Arrangement (and possibly the Supplementary Agreement), the Adjudicator had no jurisdiction over disputes which arose out of those contracts.
15. Air Design's response to this was to say that the Adjudicator did have jurisdiction essentially arguing that the CPA and BMS Arrangements were simply variation agreements and that the Supplementary Agreement was simply varying terms and timings of payments.
16. In their three sets of submissions dealing with this jurisdictional point, Deerglen prefaced their submissions as follows:
- "These submissions and the Responding Party's continued participation in this adjudication are served without prejudice to the Responding Party's contention that the Notice and Referral are deficient and/or that the Adjudicator in any event had no jurisdiction as is set out below. For the avoidance of doubt, the Responding Party reserves the right to expand on these arguments in any enforcement proceedings in due course should the necessity arise, and/or to take any or all points on jurisdiction which are available to it."*
- At various points in the various submissions Deerglen asked the Adjudicator to do various things, for instance:
- "(a) Therefore the Adjudicator should enquire into his jurisdiction and determine that he does not have any." (Para 8 Submissions on Jurisdiction)*
 - (b) ... As the letter [12 September 2007 relating to the BMS Arrangement] of itself contains all the necessary ingredients to form a binding contract the Adjudicator is invited to find that this is what in fact occurred." (Para 21 ibid)*
 - (c) Accordingly, the Notice and the Referral are deficient and the Adjudicator should decline to reach any determination on the matters AKL has sought to refer. (Paragraph 31 ibid)*
 - (d) It is accordingly indisputable that this reference is flawed and that the Adjudicator should decline to make any decision or determination in this matter. (Paragraph 58n ibid)*
 - (e) Therefore, as the Adjudicator finds that there was in fact more than one contract (which Deerglen is clear that he must) the reference can go no further and the Adjudicator must decline to continue to act. (Paragraph 2 Reply Submissions)*
 - (f) This argument [relating to the Supplementary Agreement] cannot be sustained and should again be rejected by the Adjudicator." (Paragraph 15 ibid).*
17. By letter dated 4 August 2008 (before his Decision), the Adjudicator responded to these various submissions as follows:
- "The purpose of this letter is to set out my views on the claim by the Responding Party that I do not have jurisdiction to continue with this adjudication based on the case advanced through the Referral Notice ...*
- In summary, it is the case for Deerglen that the dispute that has been referred to me is not a dispute under one contract, but under three if not four contracts ... There is no dispute that I have jurisdiction to deal with the dispute that arises under the Basebuild Contract ...*

The CPA Works and the BMS System can be considered together. The question is whether these Works constituted separate contracts as contended for by Deerglen or variations to the Basebuild Contract as contended for by Air Design. It must follow that should I agree with the submissions on behalf of Deerglen then I do not have jurisdiction to deal with anything other than a dispute arising under the Basebuild Contract in this adjudication ...

This situation is clearly one that would have benefited from better paperwork being put in place. I have difficulty in accepting the statement of Mr Frenzel with regard to the way that applications were submitted by Air Design and paid by Deerglen. It is not at all difficult to see why applications might have been made in the way that they were but as part of a simple contract. This is particularly true of a project such as this where certain costs need to be passed on outside of the immediate contractual arrangement and Mr Frenzel makes reference to this in Paragraph 12 of his statement.

I find nothing in the submission before me to support the contention of Deerglen that they entered into three separate Works Contracts and I agree with the submissions of Air Design that the Works were all instructed and carried out as part of a single contract for the reasons they have set out. ...

I do not consider this [the Supplementary Agreement] to be anything more than an agreement to vary the payment terms under the Contract on the achievement of certain milestones.

As the representatives of the parties will be aware, I do not have power to decide my own jurisdiction. I can only investigate any challenges to it and report my non-binding view. It follows from the foregoing that I do not agree with the challenge to my jurisdiction on behalf of Deerglen and, as a consequence, I am able to and should continue with the adjudication as referred on behalf of Air Design."

18. The adjudication then proceeded and the Adjudicator issued his Decision in accordance with an extended timetable agreed by the parties on 17 September 2006. At Paragraph 11 of that Decision he set out, verbatim, his response to the jurisdictional challenge of 4 August 2008. Although reasons were not specifically requested, the Adjudicator proceeded to give reasons for his decision on the merits of the various claims and contra charges. He found that the Supplementary Agreement "did not extend to the valuation of the final account and/or the variation account". He effectively decided that that Agreement simply dealt with further interim payments. He proceeded to consider all disputed items on the variation account including those relating to the CPA and BMS Arrangements in effect as arising under one contract. He considered the contra charges relating to defects and snags. Although he substantially reduced Air Design's claims, he found that Deerglen should pay Air Design £139,964 exclusive of VAT and that interest should be paid in the sum of £5,487.58 and daily after his Decision at the rate of £39.20 per day. He ordered Air Design to pay part of his fees and Deerglen to pay the sum of £14,504.12 inclusive of VAT.

These proceedings

19. On 23 October 2008, Deerglen having not paid the sum decided by the Adjudicator to be due, Air Design issued proceedings in the Technology and Construction Court seeking to enforce by way of summary judgment that Decision. Witness statements were exchanged.

The Adjudicator's Finding on Jurisdiction

20. The first point taken by Air Design is that the parties gave the Adjudicator jurisdiction to decide the issue of jurisdiction. If that was the case, Air Design would have a good point. However it is a point which cannot succeed for the following reasons:
- (a) It is abundantly clear that in their submissions to the Adjudicator the clearest possible reservation on jurisdiction was made by Deerglen at the beginning of their written submissions (see above).
 - (b) One needs to read the contents of those submissions in the light of that very clear reservation. Requests in those submissions to the Adjudicator to "find" or "determine" this or that are clearly subject to the reservation. In any event Paragraph 8 of the first set of submissions makes it clear that all that Deerglen were asking the Adjudicator to do was to "enquire into his jurisdiction and determine that he does not have any" jurisdiction.
 - (c) I am satisfied that the Adjudicator did not and did not purport to reach a decision as such on jurisdiction. As set out above, he makes it clear that he believed that he did "not have the power to decide [his] own jurisdiction". All he did was to "investigate any challenges to" his jurisdiction and "report [his] non-binding view". The fact that he repeated verbatim the contents of his letter of 4 August 2008 in his formal decision does not in logic affect this view.

One, two, three or four contracts

21. In the light of my decision on this topic, it is, perhaps, unnecessary for me to decide how many contracts there were. However, lest it be relevant, I set out my views:
- (a) The Basebuild Contract was one which incorporated the standard JCT Intermediate Form of sub-contract. That contains provisions for the ordering of variations.
 - (b) In context, the BMS Arrangement was clearly agreed to be part of the Basebuild Contract. Its reference to the "existing Contract" must have referred to the Basebuild Contract. The CPA Arrangement was not the subject of a "formal contract" since the signed Letter of Intent clearly envisaged that there would be a formal contract to be implemented. Thus on its face the BMS Arrangement was clearly intended to be dealt with as if it was part of the Basebuild Contract. The fact that it refers to work in the CPA part of the Project is neither here nor there. It was still all mechanical services work.

- (c) The Supplementary Agreement of 29 November 2007 at the very least was simply determining or varying existing or previous contract arrangements relating to payment or payments, variations and maintenance. It was an agreement in writing which varied either one or a number of pre-existing agreements.
- (d) The CPA Arrangement is a signed Letter of Intent which envisages that, following its issue, if no formal contract was implemented, Air Design would be entitled to the "net costs reasonably and necessarily incurred by" it in respect of such work as was done. It envisaged a formal contract but what it did, simply, was to identify that it was Deerglen's "intention to instruct" Air Design to carry out various elements of the proposed CPA Work. In fact, it was the case that instructions had already been given before this Letter of Intent was sent out. One then has to ask upon what basis instructions to carry out such work were being given. The pre-existing Basebuild Contract contained provisions for instructions requiring variations to be carried out. The CPA Work was clearly a variation to the Basebuild Contract Works. Properly classified, it is probably the case that the instructions calling for the CPA Work issued in connection with this Letter of Intent would be classified as instructions issued under the Basebuild Contract. The quotation giving rise to the instruction made it clear that Air Design's "contract conditions are based upon the original base build contract" and that is a clear reference back to the Basebuild Contract. The fact that a formal contract relating to the CPA Work was envisaged does not take the matter very much further. If a formal, separate and separable contract had been signed by the parties (and none was available for consideration at the time of this Letter of Intent), it is at most possible that it would have been negotiated as an entirely separate contract, that is, one that was considered as entirely separate from the Basebuild Contract; commonsense would suggest that the greater possibility is that it would like the BMS Arrangement have been tied back to the Basebuild Contract.
22. However, there are two further factors which effectively override considerations as to whether or not there were one, two, three or four contracts between the parties which establish that the Adjudicator was acting within his proper jurisdiction:
- (a) The substantive decision-making process upon which the Adjudicator had to embark in relation to the disputed claim put before him necessarily involved a consideration of whether there was more than one contract. It was thus within his jurisdiction to decide in effect that there was one contract, albeit one that may have been varied by agreement.
- (b) It was thus a part of his jurisdiction to decide whether or not and if so to what extent the Basebuild Contract had been varied by the CPA and BMS Arrangements and indeed whether there were yet further variations ordered to the Basebuild Contract. There may be cases, and this is clearly one, where substance and jurisdiction overlap so that it is within the Adjudicator's jurisdiction to decide as matters within his or her substantive jurisdiction whether there have been in effect variations to the contract pursuant to which he or she has properly been appointed Adjudicator. It cannot then in those circumstances be a valid challenge to his or her jurisdiction that upon analysis he or she may be wrong as a matter of fact or law in determining that such variations were made to the originating contract as opposed to a series of later legally unconnected contracts.
- (c) The Supplementary Agreement is one which recognises in a way which has contractual effect that the parties were treating their contractual relationship as being in one "main contract". The total of the three sums agreed originally to be due with regard to the Basebuild, CPA and BMS Works are said to be a "contract sum"; the variations are being treated as a single variation list to be addressed; maintenance and defects liability obligations are being treated as arising in effect as a unified obligation. It is this one "main contract" which is effectively being varied. Thus, whatever the arrangement or arrangements contractually were before, as from the Supplementary Agreement the parties clearly agreed to treat their contractual relationship as stemming from one contract.
23. I have therefore formed the view that the Adjudicator did have jurisdiction to rule on all the matters which he did decide in his Decision. Whether he was right or wrong to find or make the assumption that there was effectively one contract which was varied and whether he was wrong as a matter of fact or law in any other part of his decision is immaterial. Any such errors do not mean that he does not have jurisdiction. Even if I was wrong about that conclusion, then my analysis that effectively the CPA and BMS Arrangements and the Supplementary Agreement were simply variations of the Basebuild Contract would apply.
24. Additionally, the adjudication clause is drawn widely and relates to "a dispute or difference [arising] under this Sub-Contract". In the *Fiona Trust* case [2007] UKHL 40, the House of Lords adopted a pragmatic and commercial approach to construing arbitration clauses. Lord Hoffmann said at Paragraph 13:
- "In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."*
- Whilst it could be argued that, if there were entirely separate contracts between the same parties which had obviously different dispute resolution clauses, there should be separate dispute resolution processes, in the current case all the disputes could properly be said to have arisen under the Basebuild Contract and the commercial parties could properly be said to have intended to have agreed to the adjudicator appointed under that contract to have jurisdiction to determine the value of sums due under that contract and any variations to that contract.

Stay of execution

25. Deerglen have serious concerns that AKL will not be able to repay any sum paid by Deerglen pursuant to the Decision of the Adjudicator. Deerglen points to the accounts of Air Design which show shareholders' funds as £48,870, £75,099, £20,555 and £831 for the years ending 31 January 2004, 2005, 2006 and 2007 respectively. The accounts for the year ending 31 January 2008 are not available. Being a relatively small company, Air Design has not filed profit and loss accounts but only abbreviated balance sheets. It is said that this reduction in shareholders' funds or net assets infers a probability that Air Design will be unable to repay the judgment sum if and when it is established that all or part of it should not have been paid over.
26. In *Wimbledon Construction Co 2000 v Derek Vago* [2005] BLR 374, HHJ Coulson QC (as he then was) properly summarised the law in relation to stays of execution in adjudication proceedings at Paragraph 26:
- "(a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.
- (b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.
- (c) In an application to stay the execution of summary judgment arising out of an Adjudicator's decision, the Court must exercise its discretion under Order 47 with considerations (a) and (b) firmly in mind ...
- (d) The probable inability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see *Herschell*).
- (e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see *Bouygues* and *Rainford House*).
- (f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:
- (i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see *Herschell*); or
- (ii) The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see *Absolute Rentals*)."
27. There is no suggestion that, as such, Air Design is, currently insolvent. Indeed, the accounts for the year ending 31 January 2007 will obviously not have taken into account the fact that in the following accounting period over £1.3m was paid to Air Design by Deerglen; that is without taking into account any other projects which Air Design was working on (if any). It is not appropriate for the Court to speculate what the next set of accounts will or may show. As the onus is on the Defendant to establish insolvency, I am satisfied that it has not proved that Air Design is insolvent.
28. In the ordinary course of events, a company which only had net assets of £831 would probably be unable to repay any relatively sizeable award which it obtained in its favour. However, one must determine following in particular Sub-Paragraph (f)(i) in the judgment set out above whether Air Design's financial position is the same or similar to its financial position at the time that the relevant contract was made. As the contract was made in April 2007, even if one assumed that its net assets were still no more than about £800, it would be in no worse financial position now than it was then. The fact that Deerglen had no access to the accounts for the year ending 31 January 2007 in April 2007 does not alter this view: the accounts show what the financial position was at the relevant time. The available accounts for the year ending 31 January 2005 which show only £20,555 as the net assets are not in relative terms much better than the accounts for the later year. In those circumstances, I decline to impose a stay of execution.

Decision

29. There will be judgment for Air Design for the sums claimed together with interest at the rates claimed. There will be no stay of execution.

Alexander Hickey (instructed by Gullands) for the Claimant
Gaynor Chambers (instructed by Speechley Bircham) for the Defendant