JUDGMENT : The Honourable Mr Justice Coulson : TCC. 17th October 2008

A. INTRODUCTION

1. This is an application by Kier Regional Limited ("Kier") to make final the interim third party debt orders granted by Akenhead J on 4th August 2008 against Cambridge Gate Properties Limited ("Cambridge") and Temple Guiting Manor Limited ("Temple"). There is also a cross-application by the defendant in these proceedings, City and General (Holborn) Limited ("Holborn") for a stay of execution of the judgment given against them, and in favour of Kier, by Jackson J (as he then was) as long ago as 6th March 2006.

2. Both applications are disputed and raise a number of issues, the most significant of which is the proper exercise of the court's discretion under CPR part 72 and RSC Order 47 in circumstances where:
   a) The judgment debt arises out of the enforcement of an adjudicator's decision;
   b) The enforcement methodology in question, namely a third party debt order, would, by its very nature, affect those who were not parties to the original construction contract;
   c) The adjudicator's decision that led to the judgment debt has always been disputed and is the subject of a major arbitration due to commence on 27 October 2008.

3. The particular issues that arise for determination on these applications are as follows:
   a) Is there a debt due and owing from Cambridge to Holborn and/or from Temple to Holborn? It is common ground that, if I concluded that there was no such debt due and owing, Kier's application must fail at that stage.
   b) If there are such debts, how should the court exercise its discretion under CPR Part 72 and, in particular, what (if anything) is the relevance of the fact that the judgment debt is based on an adjudicator's decision which is challenged, and which challenge is very shortly to be the subject of an arbitration hearing?
   c) If I conclude that no third party debt order should be made (either because there is no debt due and owing or because I decline to exercise my discretion in favour of Kier), should I go on to exercise my discretion in favour of Holborn's application for a stay of execution of the judgment of Jackson J pending the outcome of the arbitration?

4. I propose to set out in **Section B** below some parts of the relevant background. In **Section C**, I deal with whether or not there are debts due and owing from Cambridge and/or Temple to Holborn. Thereafter, at **Section D** below, I deal with what I consider to be the relevant principles guiding the exercise of my discretion before I go on, at **Section E** below, to explain how and why I have exercised my discretion in the way that I have. At **Section F** below, I deal with the separate application for a stay of execution under RSC Order 47. There is a short summary of my conclusions at **Section G.**

5. I ought at this stage to express my thanks to counsel for their considerable assistance. This was of particular value on the discretion issues, because it appears that this is the first time that a judgment creditor has sought a third party debt order to enforce a judgment which is itself based on the enforcement of an adjudicator's decision.

B. BACKGROUND

B1. Holborn, Cambridge and Temple

6. Holborn are the freehold owners of the former patent office in Southampton Buildings, London WC2 "*the property*". It appears that, when they purchased the property, it divided into four separate parts: Quality Court and 10 Furnival Street, which were to be sold; and the Library/Staples Inn, which were to be developed.

7. Holborn obtained financing from Irish Nationwide Building Society ("Irish Nationwide") to buy the property and carry out the development. Their original proposal was apparently set out in a letter of offer dated the 28th March 2000 but, for reasons which remain unexplained, that letter has not been provided to the court.

8. On 28th March 2000, Holborn entered into an agreement with Cambridge and Temple (the latter then called Inchflex Limited). The one page letter was signed by Mr Steinberg, a Director of both Holborn and Cambridge, and Mr Collins, a Director of both Holborn and Temple. It read as follows:

   "PATENTS OFFICE, SOUTHAMPTON BUILDINGS, LONDON, WC2

   We are writing to you regarding the arrangements between us in relation to the aforementioned property in joint venture with yourselves.

   The profits and losses are to be divisible as follows:-

   1) City and General (Holborn) to receive the first £1m of profit (but subject to an overall profit share of 10%.

   2) Cambridge Gate Properties to be entitled to 60% of profits (and/or losses).

   3) Inchflex to be entitled to 30% of profits or losses.

   Business Plan

   It is intended that City and General should proceed to complete shareholder acquisition, with finance substantially being provided on a normal records basis by Irish Nationwide Building Society, in return for which they will be entitled to 35% of all profits realised.

   The profit shares referred to above are after having provided for the lender.

   For the assistance of all parties, it is intended to design a scheme, negotiate and obtain planning consent, with a view to selling Quality Court and 10 Furnival Street.

   Thereafter it is intended to develop the Library and Staples Inn to provide high class offices.

   On completion of the development it is intended to let on best terms reasonably obtained on the open market and thereafter sell the completed investment to enable the disbursement of profits being increased, with the option to take place at the earliest possible date.

All parties undertake to act in good faith and to maintain strict confidentiality in relation to the terms of the Agreement at all times".

9. As indicated, all three companies, Holborn, Cambridge and Temple, have shared directors and can properly regarded as separate but related legal entities.

10. On 19th April 2000, Holborn entered into a formal joint venture agreement with Irish Nationwide. It is unnecessary to set out in detail the terms of that agreement but I should note that:
    a) Both net profits and net loss were defined by reference to the difference between "*the aggregate of the income and the sale proceeds"* as against *"the aggregate of the purchase price and the property expenditure and the pre-completion expenditure".*
    b) Clause 7(1) required the parties, as soon as practicable after completion of the development to *"use all reasonable efforts to dispose of the property ..."*
    c) Clause 9(2) required Holborn, upon the sale of the property, to have prepared completion accounts drawn up to determine the amount of net profit and/or net loss.

11. It appears that, in about 2001/2002, Holborn sold Quality Court and 10 Furnival Street. This led to a payment by Holborn to Irish Nationwide in accordance with the terms of the joint venture agreement. In addition, it appears that payments on account were also made by Holborn to both Cambridge and Temple, although the amount of those payments is unclear.

B2. The Building Contract and The Adjudication

12. Holborn engaged Kier to carry out the development of the Library/Staples Inn. It appears that the relationship between Kier and Holborn soured and, during the course of the building contract, there were a number of adjudications. Following the award to Kier of a number of extensions of time, totalling 60 weeks, by AYH, Holborn's contract administrator, Kier commenced an adjudication seeking loss and expense in consequence of the delays. The adjudicator was Mr Ellis.

13. On 28th October 2004, the adjudicator provided a written decision and concluded that Holborn owed to Kier £719,295.40 by way of loss and expense, together with sundry items for fees, interest and alike. This sum was not paid by Holborn, although Kier failed to apply for summary judgment until the 17th January 2006. The hearing of the summary judgment application took place before Jackson J on Friday 3rd March 2006 and lasted all day. In characteristic fashion, the judge was ready to give judgment the next working day, Monday 6th March 2006. He gave judgment in Kier's favour, and enforced the decision of the adjudicator.

14. It should be noted that in his judgment[1] Jackson J was at pains to point out that he saw "c*onsiderable force*" in Holborn's submission that the adjudicator erred because he had failed to take into account two expert's reports on which Holborn sought to rely in support of their argument that the 60 weeks EOT granted by AYH was erroneous. However, notwithstanding this potential error on the part of the adjudicator, the learned judge concluded that *"at worst, the adjudicator made an error of law which caused him to disregard two pieces of relevant evidence... that error would not render the adjudicator's decision invalid.*"

15. The sum due in consequence of the judgment of Jackson J has never been paid. There have been at least two further adjudications between Kier and Holborn. Adjudication 7, before Mr John Riches, led to confirmation that a sum of about £800,000 by way of loss and expense was owed by Holborn to Kier. That sum has not been paid. The most recent adjudication, number 8, in front of Mr Matt Molloy, dealt with numerous aspects of the delay claim. Although Mr Malloy looked at the reports which Mr Ellis excluded, it appears that he too found in favour of Kier. However, Mr Malloy concluded that, in view of the forthcoming arbitration, where the entirety of the final account was to be re-evaluated, he should not make any specific order for payment.

16. I was taken to some of the documents in adjudication 8, because one of the complaints put forward by Holborn is that they have been prejudiced by Kier's delays, both in seeking to enforce the original decision of Mr Ellis, and since the judgment of Jackson J in March 2006. Holborn maintain that, if Kier had taken steps to enforce the decision of Mr Ellis and/or Jackson J earlier, they would have commenced another adjudication, seeking to demonstrate that the delays were Kier's responsibility. In answer to that, Kier point to adjudication 8, to say that, although various delay points were taken by Holborn in that adjudication, at no time did they seek to make that case before Mr Molloy.

17. It should also be noted that, in the forthcoming arbitration, Kier's case on delay is apparently very different to the 60 week EOT originally granted by AYM. This is not, of itself, surprising: on a complex project, the critical path will often become apparent only at the end of the works on site. But in this case, it has this slightly curious effect: it means that the decision of Mr Ellis, and thus the judgment of Jackson J, is based on a delay analysis which neither party now suggests is reliable or accurate.

B3. Enforcement

18. Kier sought to enforce the judgment of Jackson J by way of a charging order. An interim charging order was made on 13th March 2006 and that order was made final on 10th April 2006. It is important to note that those then acting for Holborn made plain in writing that they did not object to the order being made final and that this was because "*the market value of the property is less than the amount for which Irish Nationwide Building Society*

[1] [2006] EWHC 848 (TCC), reported at [2006] BLR 315

hold to the charge". In other words, Kier were warned at the outset that their charging order was worthless because of the monies owing to Irish Nationwide which were the subject of the first charge.

19. I am told that Kier did not believe the suggestion that their charging order was worthless. It appears that Kier had themselves calculated that Holborn's indebtedness to Irish Nationwide was about £17m, whilst the property was worth around £20m. In other words, Kier believed that the charging order was sufficient security for the amount of the judgment.

20. There are three difficulties with this position. First, it was contrary to what Kier had been told by Holborn's then solicitors. Secondly, it appears to have been based entirely on Kier's own calculations, both as to the value of the property and the amount due to Irish Nationwide, for which there is no independent documentary evidence. Thirdly, it is not easy to see what had changed when, in January of this year, Kier began the process which has led, eventually, to this application for the third party debt orders.

B4. The Accounts of Holborn, Cambridge and Temple

21. It would be unnecessarily tedious to set out in detail the delays on the part of Holborn, Cambridge and Temple in filing their various accounts at Companies House; the errors and misleading nature of some of the entries within those accounts, which have already necessitated at least one round of amended accounts and may lead to a further round of amendments; and the responses of glacial speed which they have made to Kier's legitimate requests for financial information. It is necessary in **Section C** below to deal in some detail with one major 'error' in the recent accounts of all three companies.

C. ARE THERE DEBTS DUE AND OWING FROM CAMBRIDGE AND TEMPLE TO HOLBORN?

C1. Relevant Principles

22. The relevant parts of CPR 72.2 read as follows;

"72.2-(1) Upon the application of the judgment creditor, the court may make an order (a "final third party debt order") requiring a third party to pay to the judgment creditor-

(a) The amount of any debt due or accruing due to the judgment debtor from the third party; or

(b) So much of that debt as is sufficient to satisfy the judgment debt and the judgment creditor's costs of the application.

(2) The court will not make an order under paragraph 1 without first making an order ("interim third party debt order") as provided by rule 72.4(2).

23. CPR 72.4 deals with the making of an interim third party debt order. CPR 72.6 sets out the obligations of third parties served with an interim order; pursuant to CPR 72.6(4) "any third party other than a bank or building society served with an interim third party debt order must notify the court and the judgment creditor in writing within 7 days of being served with the order if he claims... not to owe any money to the judgment debtor".

24. CPR 72.8 is headed 'Further consideration of the application' and provides:

"72.8-(1) If the judgment debtor or the third party objects to the court making a third party debt order, he must file and serve written evidence stating the grounds for his objections.

(2) If the judgment debtor or the third party knows or believes that a person other than the judgment debtor has any claim to the monies specified in the interim order, he must file and serve written evidence stating his knowledge of that matter.

(3) If-

(a) the third party has given notice under rule 72.6 that he does not owe any money to the judgment debtor....; and

(b) The judgment creditor wishes to dispute this,

(c) The judgement creditor must file and serve written evidence setting out the grounds on which he disputes the third party's case....

(4) At the hearing the court may-

(a) make a final third party debt order;

(b) discharge the interim third party debt order and dismiss the application;

(c) decide any issues in dispute between the parties, or between any of the parties and any other person who has a claim to the money specified in the interim order; or

(d) direct a trial of any such issues, and if necessary give directions."

25. The fundamental requirement, before any final third party debt order can be made, is that the relationship of creditor and debtor must exist between the judgment debtor and the third party respectively. There must be money due to the judgment debtor from the third party. In particular:

a) There must be a present debt. *"If they [the debts] may hereafter arise, it is possible also they may not hereafter arise, and it would require explicit words to include such future possible debts"*: see Fry LJ in ***Webb v Stenton*** (1883) 11 QBD 518 at 529.

b) Thus, under a building contract, money in the hands of the employer cannot be attached until a certificate is issued by the architect, because it is only then that the employer is liable to pay the contractor: see ***Dunlop and Rankin Limited v Hendall Steel Structures*** [1957] 1WLR 1102.

c) A judgment creditor cannot, by means of a third party debt order, stand in a better position as regards the third party than did the judgment debtor: see ***Re General Horticultural Co ex parte Whitehouse*** [1886] 32 Ch. D 512.

C2. The Accounts

26. Kier rely on the accounts of Holborn, Cambridge and Temple, to demonstrate that Cambridge and Temple owe large sums of money to Holborn. In particular:
    a) Holborn's most recently filed accounts for the year ended 31.3.07, record Cambridge as a debtor, and the debt said to be due is £4,719,463. The debt is said to arise *"from joint venture profits and losses and payments on account"*. Holborn made a bad debt provision in respect of most of this figure.
    b) Those same accounts also record Temple as a debtor, and the debt said to be due is £2,359,731. Again the debt is said to arise *"from joint venture profits and losses and payments on account"*. A bad debt provision was also made in relation to £1.5million of this sum.
    c) Cambridge's most recently filed accounts, for the same period record an amount falling due to Holborn within one year of £4,720,105.
    d) Temple have filed only abbreviated accounts for the year ended 31 March 2007, which show debts falling due within one year of almost £3.5million, of which the lion's share is the sum said to be owed to Holborn.

27. Although Holborn's accounts deal separately with contingent liabilities, the debts to which I have referred in the preceding paragraph are not categorised as contingent liabilities. Accordingly, on the face of the accounts, it would seem that significant debts are due and owing from Cambridge and Temple to Holborn. However, all three companies maintain that these sums, although recorded as debts in the accounts, are in fact only contingent liabilities and that no debt will be due to Holborn from Cambridge and/or Temple until the final account in respect of the development of the property (and therefore the imminent arbitration), have been resolved. They maintain that, until that happens, it is simply not known whether or not Cambridge and Temple will owe any money to Holborn by way of shared losses under the agreement of 28 March 2000.

28. Of course, such an argument inevitably means that Holborn, Cambridge and Temple must submit that their own accounts are wrong. Despite my misgivings, expressed at the hearing on 11th September 2008, I acceded to the parties' request to be allowed to adduce expert accounting evidence, which necessitated an adjournment of these applications until the start of term. That evidence has now been obtained and, just as I had indicated was inevitable, the experts are broadly agreed that, to the extent that these sums are not debts, but contingent liabilities, they have not been properly described or qualified in the accounts.

29. I regard these potential misdescriptions as extremely serious. They call into question the reliability of all of these sets of company accounts. It is quite unacceptable for the court to have to listen to one director after another say that, although the accounts say x, they really should have said y. The so-called mistakes are not just in one line or one figure. Why have a separate category for contingent liabilities and not put these figures into that category? Why make bad debt provisions for these sums when they are apparently not even regarded as debts? Why did the accounts say that these large sums fell due within one year when they did not?

30. Unhappily, no answers to these questions were provided. In those circumstances I do not accept that Mr Steinberg, Mr Brock and Mr Collins, each of whom gave evidence before me, were unaware of the inaccuracies in the accounts. In addition, I do not accept Mr Morgan's submission that the accounts are of no evidential value at all on the issue as to the existence – or otherwise – of debts due and owing. They are clearly an important part of the factual background.

31. That said, it would be quite wrong in principle for me to find that a debt existed solely on the basis of (disputed) entries in the accounts; if, in truth, no such debts existed, then the fact that the accounts suggest otherwise is insufficient to meet the ***Webb v Stenton*** test. It is therefore necessary to analyse the arrangements between the three parties to see whether or not there are, in fact, debts due and owing from Cambridge and Temple to Holborn.

C3. The Joint Venture Agreement

32. The joint venture agreement is set out at paragraph 8 above. It is short and written in relatively informal language. However, as a matter of simple construction, it seems to me that the three parties were agreeing that the profit and/or loss would not be payable until at least the costs of the building works were ascertained, and possibly not until after the sale of the development. There are a number of reasons for this.

33. First, as a matter of ordinary common sense, it is impossible to say whether or not a property developer has made a profit or a loss on a project until he can ascertain, with confidence, how much the development itself has cost. Thus any profit-sharing (or loss-sharing) could not logically take place until after that event has occurred.

34. Secondly, I consider that the paragraph that starts "*on completion...*" appears to recognise that the profit and/or loss will not be ascertained for some time, and possibly not until the development has been sold. It is certainly contrary to a suggestion that the share of any losses to be paid by either Cambridge or Temple fell due on some sort of rolling programme, to be ascertained and paid annually.

35. Accordingly, as a matter of construction of the joint venture agreement, I conclude that the parties did not agree that any shares of the profit or loss due from or to Cambridge and Temple would be payable on a rolling or annual basis. If that is right then, given the fact that the final account with Kier has not yet been finalised, so that the cost of the development is not yet known, it is not right to say that either Cambridge or Temple currently owe any debt to Holborn. I note, for what it is worth, that such a conclusion is also consistent with the more formal Joint Venture Agreement reached with Irish Nationwide.

36. Of course, on the basis of that conclusion, I would be bound to find that there is no debt due owing from either Cambridge or Temple to Holborn, and that therefore no final third party debt order should be made. Indeed, on that basis, the interim third party debt orders would have to be revoked.

C4. The Alleged Oral Agreement

37. On behalf of Kier, Ms Stonefrost recognised that it was not possible to identify an express term of the written joint venture agreement of 28th March 2000, to the effect that there was to be a rolling profit/loss account, with debts falling due from Cambridge or Temple to Holborn annually, prior to the settlement of the final account between Kier and Holborn. For that reason, in reliance upon the entries in the accounts to which I have already referred (with their clear statement of debts due and owing), she submitted that the joint venture agreement was not an entire agreement, and that there was or must have been an oral agreement as well as to when the profits and losses fell to be paid.

38. It was her submission that the joint venture agreement was partly written and partly oral and that the latter comprised an agreement that:

"Cambridge Gate Properties Limited and Temple Guiting Manor Limited agree that their respective shares of the losses incurred by City and General (Holborn) Limited during the twelve month period to 31st March of each year are due and payable to City and General (Holborn) Limited no later than 30th March of the following year".

39. Accordingly, Ms Stonefrost submitted that, because (on her case) the agreement was partly written and partly oral, subsequent conduct could be examined in order to determine the full terms of the contract: see ***Kellogg Brown and Root Inc v Concordia Maritime AG*** [2006] EWHC 3358 (Comm). Whilst Ms Stonefrost accepted that subsequent conduct of the parties could not be looked at in order to construe a written contract (see ***James Miller and Partners Limited v Whitworth Street Estates (Manchester) Limited*** [1970] AC 583), she maintained that it was appropriate for the court to look at the way in which the parties acted for the purpose of ascertaining what terms were agreed but not written down. In this regard, she also relied on ***Maggs v Marsh*** [2006] BLR 395.

40. The authority on which Ms Stonefrost placed the greatest reliance was the employment case of ***Mears v Safecar Security Limited*** [1983] QB 54, which dealt with implying terms into a contract of employment which was silent as to sick pay. However, I ultimately derived little assistance from this case because, as Stephenson LJ made clear at page 78A-C, the court was not there dealing with the ordinary run of commercial contracts, but was instead implying a term on the basis of the provisions of the **Employment Protection (Consolidation) Act, 1978** and considering whether sick pay was a 'legal incident' of a contract of employment.

41. I do accept Ms Stonefrost's basic proposition that, where a contract is partly oral and partly in writing, the court may have regard to subsequent conduct to ascertain what the oral agreement might have been. In the present case, the difficulty with that argument does not arise from the principle, but from the facts. Mr Steinberg was adamant in cross-examination that there was no oral agreement. There was no other documentary evidence that even hinted at the existence of an oral agreement. There was also no evidence that the detailed (one might even say convoluted) term for which Kier contend, set out at paragraph 38 above, was ever discussed between the three parties, let alone agreed.

42. Essentially, this debt issue boils down to a very short point. The only evidence that suggests a debt comes from the accounts, which show a debt that Holborn, Cambridge and Temple say was, in fact, no such thing. Kier maintain, as they have to, that this was not a mistake in the accounts, and that it reflected an oral agreement, but there is simply no evidence on which I could find any such agreement. There is nothing to suggest that the terms of the joint venture agreement were not fully recorded in the letter of 28 March 2008. Accordingly, the evidence of subsequent conduct – if that is what it is – is irrelevant and inadmissible.

C5. Summary

43. For all these reasons, although I find that the accounts of Holborn, Cambridge and Temple are wholly unreliable, I must also find that, on the balance of the evidence, there was no oral agreement that the debts arsing out of the profit /loss share would be ascertained and payable on a rolling or annual basis. I conclude, again on the balance of the evidence, that any share of the profit or loss between the three parties would not be payable at least until the conclusion of the arbitration, due to start on 27th October, which will ascertain the sum due to Kier, if any, under the final account. In those circumstances there is no debt due and, accordingly, it is quite inappropriate for me to make any final third party debt order. The interim third party debt orders must be discharged.

D. DISCRETION/PRINCIPLES

D1. Introduction

44. It follows from the preceding section of this judgment that it is unnecessary for me to exercise my discretion under CPR Part 72, given that I have concluded that there was no debt due and owing from the third parties to the judgment debtor. But in deference to the detailed arguments as to discretion that I have heard, and in the hope that it might be of some small assistance to those who find themselves in a similar position to the parties in the present case, I set out below my conclusions on the issues of discretion that were argued before me. Accordingly, for this purpose, I shall assume that, contrary to my primary view, there was a debt due and owing from Cambridge and/or Temple to Holborn. The question then becomes: should I exercise my discretion in favour of making a final third party debt order?

45. General guidance as to the exercise of the court's discretion can be found in ***Roberts Petroleum Ltd v Bernard Kenny Ltd*** [1983] 1 WLR 301. Of particular relevance to the present case are the following principles:

a) The burden of showing cause why an interim order shall not be made final is on the judgment debtor;

b) In exercising its discretion, the court must take into account all the relevant circumstances whether they arose before or after the interim order.

D2. The Enforcement of an Adjudicator's Decision

46. The underlying policy behind the **Housing Grants Construction and Regeneration Act 1996** may perhaps be inelegantly summarised in this way: save in exceptional circumstances, the adjudicator's decision is to be enforced by the courts. That principle has been underlined by the TCC and the Court of Appeal in numerous cases over the past decade. It is perhaps most clearly set out in paragraph 85 of the judgment of Chadwick LJ in ***Carillion Construction Limited v Devonport Royal Dockyard Limited*** [2005] EWCA Civ 1358, where he said:

"The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question which was referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the court will interfere with the decision of the adjudicator. The court should give no encouragement to the approach adopted by DML in the present case; which …may, indeed, aptly be described as "simply scrambling around to find some argument, however tenuous, to resist payment".

47. This approach has meant that the courts have enforced the decision of an adjudicator even when it contained an obvious error (see ***Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*** [2000] BLR 49 (1st instance); [2000] BLR 522 (Court of Appeal). In addition, it has lead the courts to take a relatively sceptical view of applications to stay judgments which themselves seek to enforce the decisions of an adjudicator: see ***Herschel Engineering Limited v Breen Property Limited*** [2000] BLR 272 and ***Wimbledon Construction Company 2000 Limited v Derek Vago*** [2005] EWHC 1086 (TCC); [2005] BLR 374.

48. Once a judgment enforcing an adjudicator's decision has been obtained, then such a judgment is generally treated for enforcement purposes in the same way as any other judgment of the court. In ***Harlow and Milner Limited v Linda Teasdale (No 2)*** [2006] EWHC 535 (TCC) and ***(No 3)*** [2006] EWHC 1708 (TCC), the TCC made both a final charging order and an order for sale. Amongst the factors taken into account by the court in enforcing the adjudicator's decision in this way was the fact that the defendant admitted that some sums were due to the claimant in any event, and that, in view of the terms of the contract that the defendant had agreed, the court was sceptical as to the realistic merits of her case that the adjudicator had been wrong on other matters. It was also important that the arbitration between the parties, in which the adjudicator's decision was to be challenged, had not long been commenced, and the hearing was not due for some months.

49. A concern that a party might simply ignore the judgment debt for as long as possible, in the hope that "*something may turn up",* can be discerned in the judgments of the court in ***Harlow v Milner.*** In the judgment making the order for sale, it was put in this way;

"Standing back from the authorities for a moment, it is worth considering what the effect would be if I acceded to the defendant's request not to make the order for sale because of the on-going arbitration. It would mean that any unsuccessful party in adjudication would know that, if they refused to pay up for long enough, and started there own arbitration, they could effectively render the adjudicator's decision of no effect. It would be condoning, in clear terms, a judgment debtor's persistent default and its complete refusal to comply with the earlier judgments of the court. For those reasons, it is a position which I am simply unable to adopt".

50. Perhaps unsurprisingly, given that I was the judge in ***Harlow & Milner,*** and that Holborn were seeking to rely on the imminent arbitration in a similar way to Mrs Teasdale, Mr Constable, on behalf of Kier, urged me to adopt precisely the same approach in the present case.

D3. The Position of a Third Party

51. Of course, one of the principal differences between ***Harlow & Milner*** and the present case is that here the particular enforcement mechanism under review (third party debt orders), involves parties who were not parties to the construction contract, and who might therefore be said not to have signed up to the 'pay now, arbitrate later' philosophy behind the 1996 Act. Notwithstanding the shared directors here, it seems to me that that argument has some force. Moreover it is, I think, worth comparing the position of the third parties in the present case with the position of third parties generally under CPR Part 72.

52. As the notes at paragraph 72.8.1 of the White Book make plain, the exercise of the courts discretion under CPR 72.8 is usually straightforward because "*the third parties are not prejudiced by the making of an order... the third party owes the money anyway and is merely directed to pay it to the judgment creditor instead of the judgment debtor and to the same extent receives discharge of his obligations."* Moreover the notes go on to make plain that, in cases where it has been concluded that the making of a final order would be inequitable, that conclusion has usually resulted from a concern that the making of a third party debt order would lead to the preference of one creditor over another. In those more straightforward cases, therefore, the exercise of the court's discretion will be principally influenced by the position of the other creditors: see, for example, ***D Wilson (Birmingham) Limited v Metropolitan Property Developments Limited*** [1975] 2All ER 814.

53. The present case is very different. I am told, and have no reason to challenge, that if final third party debt orders were made in the present case, Cambridge and Temple would be forced into insolvent liquidation. They would therefore suffer clear prejudice if a third party debt order was made. In such circumstances, so it seems to me, it becomes a highly relevant factor that the third party debt order is being sought to enforce a judgment (which

itself is enforcing a decision which is of "*temporary finality*"), against third parties. In other words, it seems to me idle to suggest that, as a matter of principle, when exercising its discretion, the court should not take into account the fact that the underlying decision (and therefore the judgment) is the subject of legitimate (and in this case imminent) challenge.

54. On behalf of Holborn, Mr McMullan urged me to say that, because third parties are not parties to the construction contract and should not therefore be taken to have agreed to the particular rules and restrictions relating to adjudication, the making of third party debt orders to enforce an adjudicator's decision should *never* be permitted or, alternatively, should only be permitted in exceptional circumstances. I do not think that it is appropriate or helpful to make such general pronouncements. It seems to me that, depending on the facts of the particular case, there will be times when the making of a third party debt order will be an appropriate way by which a judgment creditor, having successfully enforced an adjudicator's decision, could seek to enforce the judgment debt. The question will always be whether, in all the circumstances of that case, such a result would be just and equitable.

D4. The Imminence of the Arbitration

55. As noted above, one of the considerations in ***Harlow v Milner*** which led me to exercise my discretion against the defendant was that the arbitration in which the adjudicator's decision was challenged, had not long been commenced and was still many months from a hearing. I also had doubts as to the underlying merits of the defendant's position in that arbitration. It seems to me that, in the round, neither of those considerations apply here. As I have said, the arbitration in the present case is due to commence on 27th October 2008. Moreover, whilst it is apparent that the hearing will take many weeks, and the delivery of the award many months thereafter, that does not seem to me to be a consideration that should operate against Holborn. The fact remains that, for whatever reason, the challenge to the original decision of Mr Ellis is now imminent.

E. DISCRETION/ANALYSIS

56. Broadly speaking, there are four factors upon which Holborn, Cambridge and Temple rely when urging me to exercise my discretion against making final third party debt orders. They are:

a) The prejudice that such orders will cause to the third parties;

b) The imminence of the arbitration (and the issues in that arbitration as they now stand);

c) The delay on the part of Kier; and

d) The fact that the original adjudicator's decision was based on what Jackson J himself thought might well be an error.

57. I have concluded that, on balance, even if I had found that debts were due and owing from Cambridge and Temple to Holborn, I ought not to exercise my discretion in favour of Kier in making final third party debt orders. I make clear that, in reaching that conclusion, I attach particular significance to the first two of the four matters outlined above. I attach little significance to the third and fourth matters. My reasons for this conclusion are outlined below.

58. First, I consider that there would be clear prejudice to the third parties if I made final third party debt orders in this case. The two third parties, Cambridge and Temple, would go into insolvent liquidation. I am not prepared to see that happen in circumstances where the judgment debt, to which the third party debt orders would be attached, is itself based upon a disputed adjudicator's decision. It seems to me that it would be inequitable, on these facts, for me to force these companies into insolvent liquidation when, in a few months time, the judgment debt may be revealed to be no such thing.

59. There is a related point on prejudice. Both Mr Morgan and Mr McMullan asked rhetorically: if the money was paid by Cambridge and Temple to Kier, (because the directors paid up on their behalf) by what mechanism could it be recovered if the arbitration goes against Kier? No mechanism was identified. It may be that an arrangement could be devised to meet the difficulty, but none was suggested by Kier. I therefore conclude that it would be prejudicial to the third parties to make orders which might permanently deprive them of sums that may not even be due.

60. In short, I consider that, in all the circumstances of this case, it would be inequitable for me to cause prejudice to third parties, whilst ignoring what might fairly be called the elephant in the room: the fact that the judgment of Jackson J was itself based on an adjudicator's decision which could only ever be temporarily binding, which is already 4 years old, and which has been the subject of a detailed challenge, with the detail of that challenge just about to be considered and determined. This is one of those rare occasions when the mantra '*pay now, arbitrate later*' does not, without more, meet the justice of the situation.

61. That analysis, of course, ties in with the second point, namely the imminence of the arbitration. It seems to me that, when exercising my discretion under CPR Part 72, the fact that the arbitration is imminent, and that in that arbitration the whole basis of Mr Ellis's decision will be reviewed, must be a factor to be taken into account in favour of Holborn in the exercise of the court's discretion. I consider that it would be fundamentally unjust, at this late stage, to pretend that the judgment debt was inviolable, and that there were no imminent proceedings in which that debt might be overturned.

62. It is also important to note, on this aspect of the case, that neither party in the arbitration is now contending for the delay analysis on which Mr Ellis's calculation of loss and expense was based. In addition, his actual method of calculation (by reference to the figures for preliminaries set out in the contract, as apposed to actual expenditure) is also not now relied upon by Kier. It does not, I think, detract from the principle stated by Jackson J in ***Interserve***

Industrial Services Ltd v Cleveland Bridge (UK) Ltd [2006] EWHC 741 (TCC) (to the effect that the court must consider the position at the end of each adjudication, without regard to what might happen in the future), to conclude that, on the facts of the present case, it is relevant that the arbitration which is about to start will be based on a very different analysis of delay and loss and expense to that which formed the basis of Mr Ellis's decision in 2004.

63. I now turn to deal with those matters which I do not consider to be of any great significance. First, I do not believe that any delay by Kier, of itself, is an important factor that should lead me to exercise my discretion in favour of Holborn, Cambridge and Temple. Of course, the fact that there has been delay, so that the arbitration is now imminent, has already counted against them. But I do not think that they should be doubly penalised as a result of the delays between Mr Ellis's decision and today's date. In any event, at least some of that delay has arisen because of the failure of the part of Holborn, Cambridge and Temple to provide answers to the legitimate requests for information raised by Kier and their solicitors.

64. Furthermore, I consider that delay could only be a significant factor in the exercise of my discretion if that delay, of itself, had caused prejudice to Holborn, Cambridge and Temple. No such prejudice has been identified. There is the vaguest of suggestions, in paragraph 30 of Mr Morris's statement that, if Kier had sought to enforce the decision earlier, Holborn would have commenced a separate adjudication seeking to challenge the factual/delay basis of Mr Ellis's decision. That point is not developed in his statement and no other details are provided. In any event, I consider that this proposition is contrary to the evidence as to the later adjudications (paragraphs 15 and 16 above). I find that it was quite open to Holborn to take such points in front of Mr Riches, and in particular, Mr Molloy. They chose not to do so, and they cannot now claim that they would have done things differently if the decision of Mr Ellis had been the subject of an earlier application for a third party debt order.

65. Finally on the issue of delay, I have puzzled as to why this application is being made so close to the commencement of the arbitration, a factor which Kier must have realised would, on any view, weaken its prospects of success. I do not accept the suggestion that it is all part of Kier's plan to distract Holborn from the arbitration, since it has doubtless caused Kier equal distraction. I have concluded that the timing of the application may well have been linked to the arbitrator's second refusal to grant Kier security for costs. At first sight, this looks a surprising decision, given that Kier are the respondent and Holborn, the claimants, are impecunious. But I am told that Kier have refused to agree that any stay of proceedings, if security is not provided, would have to encompass both Holborn's claim and Kier's counterclaim. Thus, in accordance with ***BJ Crabtree (Insulation) Ltd v GPT Communication Systems*** (1990) 59 BLR 93, the arbitrator declined to order security. That analysis would suggest that Kier's present position was, at least in part, of their own making.

66. I am also not persuaded that the failure on the part of Mr Ellis to take into account the two expert's reports is relevant to the exercise of my discretion. The fact remains that this criticism was carefully considered by Jackson J. In his application of the principles of adjudication enforcement to the facts of this case, he concluded that the adjudicator's potential error did not affect the enforceability of his decision. He gave judgment in favour of Kier as a result, and that is the judgment that the third party debt order is seeking to enforce. I cannot regard that judgment as in some way tainted, or of lesser force and status, than a judgment in which no such criticism of the adjudicator had been raised. There is no such thing as a two-tier system of judgments on adjudication enforcement, with some being of greater status than others, depending on the marks out of 10 that the judge awarded the adjudicator on his original decision.

67. Accordingly, I make plain that, had I found there to be a debt due and owing from Cambridge and/or Temple to Holborn, I would have refused to exercise my discretion in favour of making final third party debt orders. The two principal grounds for that conclusion would have been the prejudice to the third parties if such an order was made and the imminence of the arbitration (and a consideration of the issues involved in that arbitration). Neither the delays nor the original nature of the adjudicator's decision would have been of any real significance in the exercise of my discretion.

F. THE STAY OF EXECUTION

68. This is an unusual application under RSC order 47 for a stay of execution. As previously noted, and as summarised in ***Wimbledon v Vago***, most of the cases under RSC Order 47 Rule 1 are concerned with the judgment debtor's allegation that, if the money is paid, the judgment creditor may not be in a position to pay it back as and when the final accounting process is completed. That point does not arise here.

69. Of the four points urged on me to exercise my discretion against making the final third party debt orders (paragraphs 56-66 above), the matters at paragraph 56b), c) and d) all apply again. However, as I have indicated, I am not persuaded that points c) and d), namely the delay and the possible question mark over the original decision of Mr Ellis, are matters of any great significance in the proper exercise of my discretion. That leaves the imminence of the arbitration and the issues to be resolved within it. Is that a reason on its own to justify making the stay sought by Holborn?

70. I have concluded that, on the particular facts of this case, I ought to grant the stay sought on that ground. Standing back from the detail for a moment, it must be remembered that this is a case where there were, broadly speaking, two ways in which the judgment of Jackson J could have been enforced by Kier against Holborn. One was by way of a charging order, and the other was by way of a third party debt order. There is already a final charging order in place, and, for the reasons set out above, I have refused to make a third party debt order.

Accordingly, it is difficult to see how Kier's present position could be improved by the taking of yet further steps to enforce the judgment of Jackson J.

71. Furthermore, I have been concerned, and have expressed that concern on more than one occasion, that these hard-fought enforcement proceedings are distracting both parties from the major task of preparing for an eight week arbitration. I would be most anxious to do whatever I could to ensure that the parties focused on that arbitration from now on. Given that Kier already have a final charging order in their favour, it seems to me appropriate to restrain Kier from taking any further enforcement proceedings, at least until the arbitration has been concluded.

G. CONCLUSION

72. For the reasons set out in **Section C** above, I have concluded that there is no debt due or owing from either Cambridge or Temple to Holborn. Even if I had concluded that there was a debt, I am firmly of the view, for the reasons set out in **Sections D and E** above, that I ought to exercise my discretion against making final third party debt orders. In the unusual circumstances of this case, I am also persuaded that I should grant the stay sought by Holborn, for the reasons set out briefly in **Section F** above. I would ask the parties to agree the precise terms of the order consequent upon this judgment.

Ms Hilary Stonefrost and Mr Adam Constable (1st and 2nd October), instructed by Messrs Taylor Wessing , for the Claimant / Applicant
Mr Nicholas Baatz QC (11th September and 1st October), Mr Nicholas Peacock (1st and 2nd October) and Mr Manus McMullan (2nd October only), instructed by Messrs Clyde and Co, for the Defendant/ Respondent
Mr Richard Morgan, instructed by Messrs Kidd Rapinet, for the Third Parties