JUDGMENT : His Honour Judge Toulmin CMG Q.C. TCC. 31st July 2006

1. This is an application to enforce the decision by Mr. Hawkswell acting as an Adjudicator, dated 18th May 2006, that the defendants, MSD (Darlington) Limited (MSD) should pay ALE. Heavylift Limited (ALE), the sum of £93,699.08, plus VAT of £14,718.20, making a total of £108,417.28, by the 25th May 2006. The sum (exclusive of VAT) is made up as to £80,000 in respect of the hire of a crane and operators, together with interest, ALE's costs, and the Adjudicator's fees.

2 The claim arises out a hire by MSD of a crane and operators from ALE in connection with construction work carried out by MSD on the erection of four bridge arches on the Wembley Stadium site at Wembley, Middlesex, in August/September 2005. The Notice of Adjudication is dated 3rd April 2006. The Referral Notice is dated 7th April 2006.

3 The lengthy response to the Referral Notice is dated 13th April 2006. ALE's reply to the response is dated 26th April 2006. This was followed by what is described as a Reply to the Rejoinder.

4 There is an extraordinary amount of unnecessary duplication in the documents before me. This should be taken into account on any assessment of costs.

5 The defendants challenge the enforceability of the Adjudicator's award on a number of grounds.

6 First, they say that there were effectively two contracts, the second of which was not in writing (or was a substantial oral variation of the first contract) so that the Housing Grants Construction and Regeneration Act 1996 (The Act) does not apply.

7 Secondly, it is argued that the Adjudicator based his decision on an incorrect identification and analysis of the contractual relationship between the parties which went to the root of his jurisdiction.

8 Thirdly, it is argued that the defendant was entitled to set off sums due to it because the obligation to pay had not crystallised and neither had the obligation to issue a withholding notice.

9 Fourthly, it is claimed that, as a matter of natural justice, it was unfair of the Adjudicator to decline to consider MSD's cross-claim.

10 Fifthly, it is argued that summary judgment should not be granted because MSD has a realistic prospect of success in arguing that there is a serious dispute on the nature of the contractual relations and in relation to the necessity of MSD serving a withholding notice.

11 Sixthly, if MSD fails in its argument so far, it argues that I should grant a stay because ALE is balance sheet insolvent and may be unable to repay any money which is paid to it.

12 I shall deal with the factual position relating to a stay when I am considering my conclusions.

13 The claimants respond by arguing that the Adjudicator considered the contract which both parties in their statements of case invited him to consider, and that MSD is estopped, or has waived its right to contend now, that the Adjudicator should have considered a different contract.

14 Secondly, the Adjudicator's award was based not only on his identification of the relationship of the parties but the parties own identification of their relationship as they put it before him.

15 Thirdly, the Adjudicator was, on the facts, right to exclude MSD's set-off or counterclaim but even if he was wrong in so doing, the error was within his jurisdiction.

16 Fourthly, even if unfairness is an appropriate test in these circumstances, the Adjudicator was not acting unfairly in excluding MSD's set-off or counterclaim.

17 Fifthly, there are no grounds for ordering a stay under RSC Order 47 rule 1. ALE. does not have a "precarious financial position". Also there has been no substantial adverse change in ALE's financial position since the date of the contract (August 2005) such as would provide grounds for ordering a stay.

The Facts

18 The facts are largely set out in the referral notice and are as follows. On the 17th March 2005 MSD was engaged by Cleveland Bridge (UK) Limited as a subcontractor to perform various works at Wembley Stadium. The works included building a bridge adjacent to the main site of the stadium. After initial discussions, Mr. Sands, a Director of ALE, wrote to MSD on the 15th August 2005 offering to supply a Gottwald forklift crane and two operators on the basis of three separate options as to the working patterns. The options were to cost respectively £75,000, £80,000 and £85,000.

19 The letter enclosed ALE's conditions for the hiring of plant. The conditions included the following provisions relating to dispute resolution.

35 Dispute Resolution

"35*(b) The Scheme for Construction Contracts contained in the Scheme for Construction Contracts (England and Wales) Regulations 1998 (The Scheme) or any amendment or re-enactment thereof for the time being in force shall apply to the contract. The person (if any) specified in the contract to act as Adjudicator may be named in the offer. The specified nominating body to select Adjudicators shall be the Construction Plant Hire Association acting by its President or Chief Executive for the time being. In paragraph 21 of the scheme" this paragraph "shall be deleted and 'paragraph 20' substituted.*

"**35**(c) The owner and the hirer shall comply forthwith with any decision of the Adjudicator and shall submit to summary judgment and enforcement ... in respect of such decisions in each case without any defence, set-off, counterclaim, abatement or deduction ..."

20 There was clearly some further discussion between the parties and on the 16th August 2005, Mr. Stephens, Managing Director of MSD, wrote to Mr. Sands at ALE as follows:

"We are pleased to inform you that we confirm our order for the hire of your Gottwald AK912 crane in line with your quotation ALE-HL-254/rev1 and as agreed in our meeting dated 15th August 2005 with yourself, Mr. I Cottam, Mr. M. Johnson and the undersigned.

"Please note the error in your quotation under the heading of Option 2. The rail possession starts from midnight Saturday 10th September to 0500 hours Monday 12th September 2005."

21 The letter was accompanied by a purchase order, 3934/IDC/600, dated 16th August 2005: *"As quote 'ref ALE-HL-254/rev1 and our letter 16.08.05."*

22 Endorsed on the purchase order is "£80k"

23 On 30th September 2005 ALE. submitted its Invoice 495 to MSD for hire of the crane and operators in the sum of £80,000, plus VAT. The invoice referred to order 3934/IDC/600 and said explicitly that payment was due 30 days after invoice. By then it appears that difficulties may have occurred in carrying out the contract. MSD claims that it has a set-off or counterclaim.

24 If the Act and the Scheme apply the following provisions are relevant. Section 111 of the Act provides that:

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

(2) To be effective such a notice must specify

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

(b) if there is more than one ground, each ground and the amount attributable to it, and must be given not later than the proscribed period before the final date for payment.

(3) The parties are free to agree what the prescribed period is to be. In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts."

25 Under clause 10 of the Scheme:

"(10) Any notice of intention to withhold payment mentioned in section 111 of the Act shall be given not later than the prescribed period, which is to say not later than seven days before the final date for payment determined in accordance with the Construction Contract or where no such provision is made in the contract in accordance with paragraph 8 above."

26 Under paragraph 8 of the Scheme the final date for payment is 17 days from the date that payment becomes due. ALE. claims that the final date for payment was the 16th November 2005 and that the final date for service of a withholding notice was seven days earlier, i.e. the 9th November 2005.

27 On 16th November 2005 ALE, through its then solicitors, applied to MSD for payment. The letter threatened that if the sum claimed was not received by ALE. by the 23rd November 2005 legal proceedings would be commenced without further notice.

28 On 17th November 2005 Merritt and Co wrote to ALE. on behalf of MSD. The letter acknowledged that MSD placed an order for the hire of the crane in accordance with the terms of the letter of the 15th August 2005. The letter went on to explain that there had been problems in working in accordance with the contract because of the limited opportunity for working during the hours specified in the contract. As a result MSD claimed that it suffered loss and damage which it estimated could reach £65,000 to £70,000.

29 The letter went on to say that Mr. Sands of ALE. admitted that his company was in breach of its contractual obligations. I note that the letter makes no suggestion that there were two separate contracts.

30 A further letter from Merritt & Co, dated 15th December 2005, increased MSD's claim against ALE. to £385,000.

31 The Notice of Adjudication, dated 3rd April 2006, referred to ALE's invoice, claimed that payment was due on the 30th October 2005, that no withholding notice had been issued on or before the 9th November 2005 and that no payment had been made. It contended therefore that a dispute had arisen.

32 The Referral Notice, dated 7th April 2006, set matters out in greater detail. In paragraph three it set out that: *"The contract was made on or about the 16th August 2005 and was in the form of the following documents."*

33 The Referral Notice then referred to ALE's letter, dated 15th August 2005, attaching standard conditions, and MSD's letter and purchase order dated 16th August 2005. It then referred to specific terms of the contract.

34 In paragraph 17 under the heading "Redress Sought" it says:

"In conclusion ALE. seeks that the Adjudicator makes the following decision (which will be binding between the parties) to have the effect set out in section 108(3) and/or paragraph 23 of the Scheme.

17.1 That MSD do pay forthwith to ALE the sum of £94,000 as per ALE's invoice i.e 495, dated 30th September 2005 ..."

35 Paragraph 23 of the Scheme follows section 108 of the Act and provides that (a) the Adjudicator may if he thinks fit order any of the parties to comply peremptorily with his decision and (b) his decision is binding on the parties who are required to comply with it until the dispute is finally determined by legal proceedings, by arbitration or by agreement between the parties.

36 MSD's response to the Referral was dated 13th April 2006. It made the point which has not been pursued here (correctly) that since this was a contract for plant hire it was outside the Act.

37 In relation to paragraph three of the Referral Notice, it claimed that the contract incorporated oral agreements "as referred to in MSD's letter to ALE. dated 16th August 2005". It made no reference to any subsequent variation or to a subsequent oral agreement.

38 The response admitted that ALE. submitted an invoice following completion of the works and that, under the contract, payment was due 30 days from the date of the invoice and that therefore the sum claimed by ALE. became due on the 30th October 2005. It then went on to make various factual submissions.

39 At paragraph 1.11.1 it dealt with withholding notices. MSD argued that no notice of withholding was required because no notice was due. The submission went on to refer to various terms in ALE's conditions for hiring plant and claimed that ALE. was in breach of contract.

40 The essence of MSD's response to the redress sought is set out in paragraph 16.2: *"MSD denies that the sum of £94,000 is payable under the invoice dated 30th September 2005 as a result of the adjudication. First because as set out above MSD believes that adjudication under the Scheme or Act should not apply to the contract. Second, the sum is not due and in the alternative (which is strenuously denied) if any sums were due then there is a valid counterclaim in excess of the amount in the invoice."*

41 ALE served its Reply on the 26th April 2006. It noted correctly that there was judicial authority for the proposition that hiring a crane with a driver or operator on site constitutes a construction operation within the terms of section 105 of the Act. It sought to distinguish cases in relation to withholding notices which MSD said were in its favour. It argued that the letter dated 17th November 2005 did not constitute a section 111 notice since it was out of time. It also claimed that the notice did not comply with the terms of section 111(2) of the Act.

42 On the 2nd May 2006 MSD provided a short response to ALE's Reply. On the 10th May 2006 the Adjudicator requested the parties to make submissions on ALE's letter, dated 15th August 2005. This they did on the 15th May 2006.

43 The Adjudicator's decision was dated 18th May 2006. He began by referring to the contract incorporating the CPA Model Conditions of hire, agreed on or about 16th August 2005. He set out clause 35(b) of the Scheme and recited the notice of adjudication and the appointment of the Adjudicator.

44 In paragraph 19 he found that the letter from Merritt & Company was outside the requirements of section 111 and as he put it: *"Accordingly on that basis I find that the purported notice in the form of the letter from Merritt & Company of the 17th November 2005 is ineffective as a withholding notice. Notwithstanding that, I have considered the letter of the 17th November 2005 and I do not consider that it meets the requirements of section 111."*

45 In relation to the carrying out of the work under the contract he found in paragraph two that: *"ALE. carried out the work albeit over periods different from those envisaged in options 1 and 2. From the submissions and evidence provided by the parties I find that ALE. are entitled to the sum claimed of £80,000, plus VAT. As I have said, for the reasons given, I have not considered MSD's counterclaim."*

46 On the 19th May 2006 ALE's solicitors wrote to Merritt & Co to demand payment.

47 On the 6th June 2006 ALE served these proceedings to enforce the award, together with the application for summary judgment.

The Law

48 It is well established that the purpose of the Act is to provide a speedy mechanism for settling disputes in construction contracts on a provisional basis. Section 108 (3) of the 1996 Act provides:

"108

(3) The contract shall provide that the decision of the Adjudicator is binding until the dispute is finally determined by legal proceedings ... or by agreement."

49 This provision is also replicated in the Scheme. In principle the Act and the Scheme require the decisions of Adjudicators to be enforced pending the final determination of disputes by litigation, arbitration, or agreement -- see Dyson J in ***Macob Civil Engineering Limited v Morrison Construction Limited*** [1999] BLR 92 at 97. This incidentally is what the parties agreed to in paragraph 35 of ALE's standard conditions.

50 It is also clear from the jurisprudence, developed by this court and the Court of Appeal, that there are only very limited grounds for refusing to enforce immediately an Adjudicator's award setting out what is due to a party to a contract in relation to the particular dispute which has been referred to the Adjudicator. See ***Bouygues (UK) Limited v Dahl-Jensen*** [2000] VLR 135 and succeeding cases.

51 At paragraph 14 of his judgment in ***Bouygues,*** Buxton LJ noted that the Adjudicator: *"Had answered directly the questions put to him."*

52 He cited the dictum of Knox J in ***C & B v Isobars*** *[2002] BLR 93* at 98: *"If he answered the right question in the*

wrong way his decision will be binding. If he answered the wrong question it would be a nullity."

53 In ***Carillion Construction v Devonport Royal Dockyard*** [2006] BLR 15 at 35 Chadwick LJ gave a timely warning:

"85. The objective which underlines 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 referred to him or the manner in which he has gone about his task is obviously unfair. It should only be in rare circumstances that the courts will interfere with the decision of an Adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case ... which may indeed be aptly described as 'simply scrabbling around to find some argument to resist payment'."

54 I come now to deal with the law in relation to the issues raised by MSD. They relate to (a) jurisdiction to decide a contract which it is alleged was either a written contract, which was varied substantially by oral agreement, or was a written contract substituted by an oral agreement; (b) adjudication and set-off; (c) principles of natural justice; and (d) principles relating to a stay.

55 The first and crucial question in relation to jurisdiction is to consider the dispute which was referred to the Adjudicator and whether or not the parties conferred jurisdiction upon him. MSD argues that the Adjudicator had no jurisdiction to hear the dispute and cites ***Grovedeck v Capital Demolition*** [2001] BLR 181 and ***RJT Consulting Engineering v DM Engineering*** [2002] 1 WLR 2344. ALE. argues that no objection was taken before the Adjudicator that he had no jurisdiction because either the contract had been varied to such an extent that it was no longer a written contract or that there were two contracts, the second of which was an oral contract. Therefore the parties can be taken to have conferred jurisdiction on the Adjudicator. MSD is now prevented from pursuing successfully its claim, either by estoppel, or waiver.

56 In these circumstances ALE. argue that ***Grovedeck***, decided by His Honour Judge Bowsher Q.C., and ***RJT Consulting***, decided by the Court of Appeal, have little or no relevance. I note that in ***Grovedeck*** the point on jurisdiction was taken before the Adjudicator (see paragraph 17 of the judgment) that the Adjudicator had no jurisdiction because the contracts to which the referral notice referred were not in writing.

57 Section 107 of the Act sets out the relevant provisions relating to jurisdiction:

"Section 107

(1) The provisions of this Part only apply where the construction contract is in writing and any other agreement between the parties as to any matter is effective for the purpose of this Part only if in writing ...

(2) There is an agreement in writing

(a) if the agreement is made in writing (whether or not it is signed by the parties)

(b) if the agreement is made by exchange of communications in writing

(c) if the agreement is evidenced in writing ...."

58 Then (5): *"An exchange of written submissions in adjudication proceedings or in arbitral or legal proceedings in which the existence of an agreement otherwise in writing is alleged by one party against another and not denied by the other party in its response constitutes as between those parties an agreement in writing to the effect alleged."*

59 In Grovedeck at paragraph 29 His Honour Judge Bowsher Q.C. interpreted section 107(5) to refer to proceedings in arbitral and legal proceedings which occurred before the adjudication proceedings. He further concluded that the reference to adjudication proceedings was not to the current adjudication proceedings but to preceding adjudication proceedings. As he put it: *"There was no intention by Parliament to provide that submissions made by a party to an un-authorised adjudication should give to the supposed Adjudicator a jurisdiction which he did not have when appointed."*

60 In ***RJT Consulting Engineers v DM Engineering*** [2002] 1WLR 2344 the Court of Appeal did not approve ***Grovedeck.*** At page 2352, paragraph 16, Ward LJ, said as follows: *"Subsection (5) is a specific provision. Where there has been an exchange of written submissions in the adjudication proceedings in which the existence of an agreement, otherwise than in writing, is alleged by one party and not denied by the other, then that exchange constitutes 'an agreement in writing' to the effect alleged."*

61 The last four words are important. The exchange constitutes an agreement in writing which does more than evidence the existence of the agreement. It also evidences the effect of the agreement alleged and that must mean such terms which it may be material to allege for the purposes of that particular adjudication.

62 At paragraph 19 Ward LJ concludes:

"19. On the point of construction of section 107 what has to be evidenced in writing is literally the agreement which means all of it. A record of the agreement also suggests a complete agreement, not a partial one. The only exception to the generality of that construction is the instance falling within subsection 5, where the material or relevant parts alleged and not denied in the written submissions in the adjudication proceedings are sufficient."

63 ALE. argues correctly that not only by the route of estoppel or waiver but by direct application of the legislation the adjudicator had jurisdiction to decide the issue which was referred to him.

64 The next challenge in this case relates to the refusal of the Adjudicator to consider MSD's set off or counterclaim described as a *"cross-claim"*. The following principles relating to set-off are distilled from previous decisions, including, in particular, Jackson J's formulation in ***Interserve Industrial Services v Cleveland Bridge UK Limited*** [2006] EWHC (TCC) 741 (Interserve).

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65 1. As a matter of common law, where a claimant and a defendant have a liability to each other, the general principle is that the defence of set-off arises. This applies, in the absence of clear words to the contrary, to building contracts as to other contracts. (See ***Modem Engineering v Gilbert Ash*** [1974] AC 689, 718, per Lord Diplock).

66 2. The purpose of section 108 of the 1996 Act provides for the rapid resolution of disputes in the construction industry on a provisional basis and is an exception to the general rule set out above.

67 3. Section 111 of the 1996 Act, dealing with the intention to withhold payment, provides a comprehensive code governing the right to set off against payments contractually due (see HH Judge Hicks Q.C. in ***VHE Construction plc v RBSTV Trust Company Limited*** [2002] BLR 187).

68 4. This general principle may be subject to certain very limited circumstances where it may be possible to set-off liquidated damages for delay against an Adjudicator's award. (See ***Balfour Beatty Construction v Serco*** [2004] EWHC (TCC) 3336 at Part vi of the judgment).

69 5. A distinction can be made between claims where there is no immediate contractual right to payment, e.g. where the work has not been certified as completed and due for payment, and where the work has been so certified. In the former case it may be open to argue before the Adjudicator that the sum claimed should be reduced, e.g. because the work has not been completed. (See ***Rupert Morgan Building Services Limited v Jervis*** [2004] 1WLR 1867).

70 6. The intention of Parliament is that the decision of the Adjudicator is to be given effect in a way which is consistent with providing a quick and effective remedy on an interim basis and without consideration of arguments as to other provisions in the contract. (See ***Ferson Contractors v Levolux AT Limited*** [2003] BLR 118 and His Honour Judge Gillyland Q.C. in ***Gleeson Group plc v Devonshire Green Holdings Limited*** (Salford District Registry 19th March 2004).)

71 In ***Rupert Morgan Building Services Limited v Jervis***, Jacob LJ brought out an important distinction between a contract where an architect had issued an interim certificate under the contract which triggered a liability to pay a sum and a contract in respect of which there was a demand for payment but where there was no calculation of the sum due and owing or mechanism under the contract which gave rise to an obligation to pay.

72 He concluded that in the former case the party wishing to withhold payment must give notice in due time, under section 111 of the Act, or under the scheme. In the latter case the rendering of a bill did not make any sums due so no withholding notice was required.

73 I shall apply the principles set out above to the facts of this case in my conclusions.

74 The next point that is taken by MSD is that it would be unjust or unfair to decline to consider MSD's counterclaim. It is difficult to see how a court can describe as "*unfair*" that which Parliament has enacted and that to which (if MSD does not succeed on the first issue) MSD has agreed. For completeness I refer to the formulation of natural justice in the context of adjudication by Dyson LJ in ***Amec Capital Projects Limited v Whitefriars*** [2005] BLR 1 at 6: *"The common law rules of natural justice and procedural fairness are two-fold. First, the person affected has the right to prior notice and effective opportunity to make representations before a decision is made. Secondly, the person affected has the right to an un-biased tribunal."*

75 I now consider the law in relation to MSD's application for a stay. CPR 40.11 sets out the provision that a party must comply with the judgment within fourteen days unless:

"(c) The court has stayed the proceedings or judgment."

76 Schedule 1 of the CPR re-enacts the former RSC order 47. It provides:
"Where a judgment is given or order made for the payment of money and the court is satisfied
(a) that there are special circumstances which render it inexpedient to enforce the judgment or order or
(b) that the applicant is unable from any cause to pay the money
then ... the court may by order stay the execution of the judgment, or order ... either absolutely or for such period and subject to such conditions as the court thinks fit."

77 In ***Herschell Engineering Limited v Breen Property Limited*** (judgment 28th July 2000) His Honour Judge Humphrey Lloyd Q.C. set out his analysis of the legislation and the circumstances when a stay might be granted. He noted that the Adjudicator's award was provisional and that the essence of the decision was that it was merely that at the present time, and on the basis of the material then available, a sum of money appeared to the Adjudicator to be due.

78 In analysing the power to grant a stay, he emphasised (paragraph 12) that a stay should only be granted in circumstances where it would not be just that payment should be made (such as a real likelihood that any payment would not be recouped from the claimant). The learned Judge concluded that in the circumstances of that case it would not be just to order a stay. He concluded that the date on which the claimant might be called upon to repay the money was uncertain and it was not possible to predict the financial health of the claimant on that date.

79 Secondly, it was not incumbent on the claimant to establish that it would have the money to pay now or at a later stage. It was for the applicant for a stay, i.e. the defendant, to make out its case.

80 In considering the question of whether it would be just to grant a stay, His Honour Judge Lloyd Q.C., at paragraph 16 of his judgment, made reference to the question of uncertainty of time for repayment. This touches on an important consideration relating to the justice of granting a stay where an Adjudicator has declined to take into account a set-off or counterclaim.

81 It is possible to have such claims determined speedily, independently of the present Adjudication, either in a separate adjudication, or before the courts. In the present case, which is not complicated, it would have been open to MSD to start such proceedings at the latest very soon after the Adjudicator's decision on the 18th May 2006. Had it done so, by now, if the proceedings had been started in this court, the first CMC would have taken place and there would have been a time-table to trial. The court would have been able to predict a date at which the question of the solvency of the claimant would have crystallised. Equally the court would have at this stage been able to make an assessment of the defendant's prospects of success. In the absence of such proceedings, either by way of court proceedings, or adjudication, it is impossible to predict when the issue of the claimant's solvency will crystallise.

82 Paragraph 19 of His Honour Judge Lloyd's Q.C's judgment is relied upon by the claimants:

"In my view, on an application for a stay, where a party has entered into a contract with a company whose financial status is or may be uncertain and finds itself liable to pay money to that company under an Adjudicator's decision, the question may properly be posed: is this not an inevitable consequence of the commercial activities of the applicant that it finds itself in the position it is in? It has, as it were, contracted for the result. That is not normally a ground for avoiding the consequences of a debt created by the contractual mechanism (which is how in the absence of express terms adjudication operates -- see section 114 of the Act). It is very easy (and prudent and relatively inexpensive) to carry out a search or to obtain credit references against a company whose financial status and standing is unknown. Not to do so inevitably places a person at a significant disadvantage.

"It has only itself to blame if the company selected by it proves not to have been substantial (as opposed to a material deterioration since the date of the contract)."

83 In concluding that this was not an appropriate case for granting a stay I understand His Honour Judge Lloyd Q.C. to have been taking into account all the circumstances of the case and not simply relying on the consideration set out in paragraph 19 of his judgment, cited above, although he clearly regarded that as a very important consideration.

84 In ***Wimbledon Construction v Vago*** [2005] BLR 374 His Honour Judge Caulson Q.C. set out the principles to be applied where a claimant, as in this case, may appear to be in an uncertain position financially, but is not in insolvent liquidation or in administrative receivership. He includes in his considerations the consideration that the claimant's financial position is the same, or similar, to its financial position at the time the relevant contract was made. I respectfully agree with him that the financial considerations which should be taken into account are those set out in his judgment, but in my view they do not absolve the court from considering all the circumstances as set out in Order 47 RSC in the course of exercising its discretion whether or not to order a stay of execution absolutely or for such period and on such conditions as the court thinks fit.

Conclusions

85 I now consider the various submissions in the context of the law and the facts and make my findings. It is clear from the Notice of Adjudication and the Referral Notice that the Adjudicator was being asked to adjudicate on a written agreement between the parties which conformed with section 107 of the Act. It is equally clear to me from MSD's response that MSD agreed that the Adjudicator was being asked to adjudicate on a dispute arising out of precisely the same contract. This contract was based on ALE's standard terms and conditions. Paragraph 35 of the standard terms and conditions apply. In short in carrying out the adjudication, the Adjudicator was deciding the issue which the parties had referred to him.

86 Paragraph 35 of the standard terms and conditions was binding on the parties and on the Adjudicator. The provisions relating to withholding set out in section 111 of the Act, and clause 10 of the Regulations, apply.

87 There has been no challenge in this hearing to the Adjudicator's ruling that the notice of set-off or counterclaim was out of time. It clearly was out of time under the provisions of the Act and the Regulations.

88 If I had to disagree with His Honour Judge Bowsher Q.C's interpretation of section 107 (5) of the Act in Grovedeck I would do so, but I simply need to follow Ward LJ's proposition in paragraph 19 of his judgment that where the material relevant parts of a contract alleged in the written submissions in the adjudication are not denied, that is sufficient. That applies both to submissions relating to an alleged written agreement as well as submissions relating to an alleged oral agreement. If I have to take this route I conclude that applying the Statute the Adjudicator had jurisdiction. The simple answer is that as a matter of contract where the jurisdiction of the Adjudicator is not challenged on a particular ground, a challenge of jurisdiction on that ground has been waived, and the parties have agreed to proceed with the adjudication despite the possibility of that challenge.

89 In relation to the Adjudicator's decision not to investigate the counterclaim, or set-off, this is put on the basis that this was not a real set-off or counterclaim but even if it was it should have been investigated.

90 In this case the Adjudicator found on the issue referred to him that the work had been completed. In these circumstances he was right to make the award which he did and to treat the claim made by MSD for alleged losses as a counterclaim. It was out of time. He was right to exclude consideration of this from his decision.

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91 I also find that the Adjudicator was not in breach of the common law rules of natural justice. Provisions under the written contract under which the adjudication was held were explicit in relation to withholding. MSD was simply out of time. It appears that they were advised by solicitors. There was no breach of natural justice in relation either to notice of the dispute or bias.

92 I should add that MSD should have known that it was out of time when Merritt & Co wrote its letter, dated 17th November 2005, and if it had chosen to do so it could then have started its own adjudication proceedings (or court proceedings). Had it started proceedings in this court in November 2005 it is probable that the whole of the dispute would have been determined by now.

93 Further I find that MSD has no realistic prospect of success in arguing in relation to this adjudication that there is a serious dispute in the nature of the contractual relations and in relation to the necessity of MSD serving a withholding notice which should go to trial.

94 In relation to other proceedings it may be open to MSD to deploy other arguments in relation to the formation of the contract but in these proceedings no assistance will be gained from a full hearing with witnesses. The position is equally clear in relation to the service of a withholding notice.

95 In relation to the application for a stay MSD append the documents to Helen Baxter's statement. MSD claims that as at the 31st March 2005 ALE. was balance sheet insolvent. It is concerned that if monies are ordered to be paid to ALE on this application they will be swallowed up. If the dispute is finally determined in its favour ALE may not have the resources to pay the money back. MSD notes that ALE's accountants have been prepared to sign off the accounts only because of support by the parent company.

96 In open correspondence MSD have offered to pay the monies in dispute to a third party or to ALE upon a suitable parent company guarantee. This approach has been formally rejected by ALE's solicitors in their letter dated 23rd June 2006.

97 I find that ALE's accounts are in a state that would give cause for some serious degree of concern although ALE. does not appear to be in a financially more difficult state than it was in August 2005. Since MSD has not commenced court proceedings it is not possible to predict when, if it was successful, judgment would be given and ALE. would be bound to repay the money. I do not know whether at that stage the parent company would continue to support ALE. if it became liable to repay the money.

98 In reaching my conclusion on a stay I have to take into account all the circumstances of the case bearing in mind that adjudication is intended to be a quick means of arriving at a temporary result in a construction dispute and that in consequence Adjudicators' decisions are intended to be enforced summarily and the successful party should not generally be kept out of its money.

99 While the inability of the claimant to repay the judgment sum at trial or after an arbitration may constitute a special circumstance I must also take into account the fact that the claimant's financial circumstances are the same, or similar, to the time when the contract was made. This on its own would be a very persuasive factor for the reasons given by His Honour Judge Lloyd Q.C. in Herschell.

100 I must also take into account the fact that MSD has not commenced any form of proceedings to recover sums to which it claims to be entitled although it could have done so. It is therefore impossible to predict the date on which, if MSD is successful in those proceedings, ALE would be liable to repay the money and the financial circumstances in which it will be placed at that date.

101 Taking all the circumstances set out in Order 47 RSC into account, including the circumstances set out by His Honour Judge Coulson Q.C. in Wimbledon Construction v Vago, and all the surrounding circumstances, I am not persuaded that this is an appropriate case in which to order a stay. I therefore give judgment for ALE. in the sum claimed, namely £108,417.28, together with any additional interest due since the issue of proceedings.

102 MR. TOWNEND: My Lord, my learned friend and I were able to discuss interest before and 68 days have passed since the issue of proceeding and we agreed the figure of £1,354.98.

103 JUDGE TOULMIN: £1,354.98.

104 MR. TOWNEND: I think that brings our total to £109,772.26.

105 JUDGE TOULMIN: Yes, I agree. I therefore give judgment, including interest to date, in the sum of £109,772.26.

106 MR. TOWNEND: My Lord, I would seek payment within fourteen days.

107 MR. QUINEY: My Lord, I would ask for payment in 21 days. It is a large sum of money. My client company is a small to medium size business and finding the money within 21 days would be more convenient.

108 MR. TOWNEND: My Lord, this matter has been going on for an extraordinary long time. It would be surprising indeed if the defendant has not in place some means to pay this, either into court, or to ourselves. I therefore maintain my application.

109 JUDGE TOULMIN: Yes. Payment 4 pm on the 16th August 2006.

110 MR. TOWNEND: My Lord, I would also apply for my costs to be summarily assessed.

111 JUDGE TOULMIN: Nobody has provided any documents in relation to summary assessment of costs. I have already indicated concern over the way in which the bundles were done which seems to me to indicate that there

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were substantial additional costs, particularly in copying, which I do not think can be justified. As I say, nobody has made any application. I am not going to deal with the matter now unless Mr. Quiney persuades me otherwise when this matter has not been properly put before me in advance.

112 MR. TOWNEND: My Lord, I do apologise for that.

113 JUDGE TOULMIN: No apology is necessary.

114 MR. TOWNEND: I had understood that a revised costs schedule was lodged at court on Friday.

115 JUDGE TOULMIN: It has not reached me.

116 MR. QUINEY: My Lord, do I take that to mean that you would like the assessment of costs to go off to a detailed assessment?

117 JUDGE TOULMIN: The costs will have to go to a detailed assessment in those circumstances.

118 MR. QUINEY: My Lord, if that is the way you are considering it I have no submissions for you.

119 JUDGE TOULMIN: I thought you would not have.

120 MR. TOWNEND: I accept your Lordship's order.

121 JUDGE TOULMIN: Please could the claimants draw up the order. You will probably do it today, will you not? I will say by 4 pm on the 1st August. If you want me to approve it, it will have to be by 4 o'clock this afternoon.

122 MR. QUINEY: My Lord, given the points you have made before regarding the formal handing down and perfection of the judgment, I have no further submissions to make.

123 MR. TOWNEND: Nor do I. We are very grateful, your Honour.

Mr. Townend (instructed by Jeffrey Green Russell) for the Claimant.
Mr. B. Quiney (instructed by Merritt & Co) for the Defendant.