JUDGMENT : JUDGE PETER COULSON QC : TCC. 11th October 2006

1. The Defendant, The Essential Box Company, engaged the Claimant, Gray & Sons Builders (Bedford) Limited, to demolish and rebuild Unit 6, Norse Road Industrial Estate, in Bedford. By a decision dated the 26 April 2006 the Adjudicator, Mr Ian Salisbury, concluded that the Defendant had wrongfully repudiated that contract. In a second adjudication the same Adjudicator decided that the sum of £101,988.87p plus interest was due from the Defendant to the Claimant. The sum was not paid and the Claimant commenced enforcement proceedings. The total sum claimed today, the day of the Claimant's summary judgment application, is £115,436.04p.

2. These enforcement proceedings were commenced on the 12 September 2006. In accordance with the special procedure formalised by the TCC to deal with adjudication enforcement applications (see paragraph 9.2 and Appendix F of the second edition of the TCC Guide) I gave directions that required the Defendant to acknowledge service by the 18 September, and to put in any evidence in opposition to the application by the 28 September 2006.

3. In the event, the Defendant's solicitors, who had earlier indicated that they intended to contest the enforcement application, wrote two lengthy letters of the 14 and 19 September which took a variety of what might fairly be called technical points. Although there was an acknowledgement of service on the 18 September, the Defendant failed to put in any evidence in opposition to the application, but they did not indicate that the claim was accepted. It therefore appeared to the Court that, despite the Defendant's failure to comply with the order, the application to enforce was resisted for the jurisdictional reasons which had been indicated during the adjudication itself.

4. It is unnecessary for me to set out at any length the proper approach that the Court must follow in any application to enforce the jurisdiction of an adjudicator. However, since it becomes relevant at a later stage in this judgment, I should perhaps refer to the judgment of Chadwick LJ in the Court of Appeal in ***Carillion Construction Limited v Devonport Royal Dockyard Limited*** [2005] EWCA Civ 1358. This is an important statement of principle and at paragraphs 85 to 87 he says this:

> *"85. 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 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 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 (contrary to DML's outline submissions, to which we have referred in paragraph 66 of this judgment) may, indeed, aptly be described as 'simply scrabbling around to find some argument, however tenuous, to resist payment'. "*
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> *86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels 'excess of jurisdiction' or 'breach of natural justice'. It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case...The need to have the 'right' answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions...*
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> *87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense – as, we suspect, the costs incurred in the present case will demonstrate only too clearly."*

5. The Defendant was possibly mindful of this clear warning because, on the morning of the 10 October (yesterday), the Claimant and the Court received a brief skeleton argument from the Defendant's Counsel, Mr Kulkarni. That indicated that "for present purposes the Defendant does not oppose the Claimant's application." It went on to say that a point arose on the costs of the hearing today, although in fact, following argument, it is clear that there are three separate disputes relating to costs. The Claimant is, however, entitled to judgment in the sum of £115,436.04p and I give judgment accordingly. This sum must be paid within 14 days with interest accruing at £34.93p per day until judgment.

6. As I indicated, there are three points on costs with which I have to deal. The first, which is a point of some general importance, is the right basis for the assessment of costs in a case where a Defendant has resisted the enforcement of an adjudication decision up until the date of the enforcement hearing itself. The second point concerns the specific arguments raised by the Defendant in relation to the costs of today and, so it is said, the Claimant's unreasonable failure to accept an earlier offer made by the Defendant. The third point, of course, is the summary assessment of the bill in the present case. I deal with each of those three issues below.

Issue 1: Basis of Assessment of Costs.

7. The Claimant seeks an assessment of its costs on an indemnity basis pursuant to CPR 44.4(1)(b). It contends that the Defendant should have paid up on the adjudicator's decision and that the Defendant had no defence to the

claim to enforce that decision. Thus it is said, as a matter of discretion, I should order that the costs be assessed on an indemnity basis. The Defendant, on the other hand, submits that the Court should not assess the costs on the indemnity basis because it operates on a cyclical business basis and that, at this time of the year, it experiences major cash flow difficulties. Thus, it is argued, the offer that the Defendant made to pay the sums outstanding as a result of the decision at the end of January 2007 was reasonable in all the circumstances.

8. The principles to be followed in cases where there is a claim for indemnity costs was set out by May LJ in ***Reid Minty v Taylor*** [2002] 1WLR 2800. He said:

> "28... If costs are awarded on an indemnity basis, in many cases there will be some implicit expression of disapproval of the way in which the litigation has been conducted, But I do not think that this will necessarily be so in every case. What is, however, relevant to the present appeal is that litigation can readily be conducted in a way which is unreasonable and which justifies an award of costs on an indemnity basis, where the conduct could not properly be regarded as lacking moral probity or deserving moral condemnation."

9. In ***Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd*** [2005] EWHC 2174 (TCC), 2006 BLR 45, I concluded that the Claimants should have realised about two months before the trial was due to start that their claim was bound to fail. I ordered that the Claimants should pay costs on an indemnity basis from that date onwards. I said: *"I do not believe that unnecessary or unreasonable pursuit of litigation must involve an ulterior purpose in order to trigger the court's discretion to order indemnity costs. I consider that to maintain a claim that you know, or ought to know, is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs."*

10. It is clear to me that, in the present case, the Defendants knew or ought to have known that they had no defence to the claim to enforce the Adjudicator's decision. There was a suggestion, both within the correspondence and during submissions, that, because the Defendant had commenced arbitration proceedings, the Claimant could not and should not be allowed to enforce the second adjudication and/or that the Adjudicator had no jurisdiction to consider that second adjudication. To the extent that it is relevant, I reject that submission completely. The decision of Dyson J. (as he then was) in ***Herschel Engineering Ltd v Breen Property Ltd*** [2000] BLR 272 dealt comprehensively with the argument that an enforcement application was somehow illegitimate if there were concurrent arbitration or legal proceedings. The short point is that it does not matter in an adjudication enforcement application whether there are concurrent litigation or arbitration proceedings: the successful party is entitled to enforce that decision, whatever the state of other concurrent proceedings may be. Any other result would frustrate the principal purpose of the 1996 Act.

11. In my judgment it was unreasonable for the Defendant to continue to give the impression throughout that this application was resisted, thereby letting the Claimant incur costs and, I may say, obliging the Court to make arrangements for a contested hearing, only to arrive at the position the day before the hearing that they would not, after all, be contesting the application. It seems to me that that is the sort of conduct which, in the round, would ordinarily attract an order for indemnity costs. There is not, and has never been, any defence to these proceedings.

12. I should add that it is not uncommon for this Court to list an application for adjudication enforcement, only to be told shortly before that hearing that the application is not in fact contested. In such circumstances I consider that *prima facie* an order for indemnity costs will be appropriate. That this is the correct approach seems to me to be confirmed by the clear terms of the warning given by Chadwick LJ in ***Devonport***, set out above. Defendants who avoid paying up in accordance with an Adjudicator's decision until the last moment or beyond are, so it seems to me, seeking to frustrate the adjudication provisions within the Housing Grants Construction and Regeneration Act 1996, or, if it is appropriate, the adjudication scheme that might have taken its place in any given construction contract. In those circumstances, for the reasons that I have given, it seems to me that, as a matter of principle, indemnity costs are appropriate.

13. Coming back to the specifics of the present case I should say that in my judgment Mr Kulkarni's submissions as to cash flow, although attractively put, are ultimately irrelevant. These sums have been due to the Claimant since interim applications were made in April of this year. They were sums due pursuant to a contract freely entered into by the Defendant. It is wholly immaterial that the Defendant now has a cash flow difficulty. These sums should have been paid months ago. Moreover, the Claimant, as a contractor, also doubtless regards cash flow as being extremely important. Lord Denning MR in ***Dawnays v Minter*** [1971] 1 WLR 1205 described it as the lifeblood of the enterprise of any builder. The Housing Grants Construction and Regeneration Act 1996 was designed to preserve that cash flow. In all those circumstances it seems to me that the right order is that in the present case the costs should be assessed on an indemnity basis.

Issue 2: The Costs of Today.

14. The second and related point is the Defendant's submission that the Claimant should be deprived of their costs by reason of the offer made by the Defendant on the 21 September and, indeed, the counter offer made by the Claimant on the 27 September. Neither offer nor counter offer were accepted by the other side. They both involved the proposed payment of what is now the judgment sum by instalments and/or late. They reflect what seems to me to be an entirely proper attempt to compromise this dispute. Ultimately, however, as Mr Stansfield correctly puts it, the Claimant has done better by getting a judgment today in the full amount, which is due to be

paid in two weeks' time. Thus it seems to me that the offers are again irrelevant to any suggestion that the Claimant should be deprived of part of its costs.

15. Mr Kulkarni submitted that the Defendant's offer at the 21 September was reasonable and should have been accepted by the Claimant. As I have indicated, the key feature of this offer was that the judgment sum would become payable not later than the 31 January 2007. As the Claimant's solicitors rightly pointed out at the time, this meant that any enforcement proceedings based on this agreement could not be commenced until the 1 February 2007. Since these sums have been outstanding for so long in any event, and were the subject of an Adjudicator's decision from the summer, it seems to me that it was plainly not unreasonable for the Claimant to have decided to reject that offer.

16. Therefore, I decline to deprive the Claimant of any part of its costs which are to be assessed on an indemnity basis. There is no ground for saying that the Claimant should or could have done something different which would have put it in the same position that it is in this morning. I therefore turn to the assessment itself.

Issue 3: The Assessment Itself.

17. The Claimant seeks £12,400.85p in respect of costs. The question for me is whether these costs have been reasonably incurred or are reasonable in amount, with any doubt to be resolved in favour of the Claimant because of my decision to order the assessment on an indemnity basis. To my surprise the points taken by the Defendant's solicitors were set out in a written schedule, six pages long, containing 25 items of objection in total, which was not handed to the Claimant or to the Court until the course of the argument. Plainly that was not Mr Kulkarni's fault, but it has meant that the points made in the schedule have been dealt with in relatively brief terms by the Claimant.

18. It also seems clear that the schedule was prepared on the assumption that the costs would be assessed on a standard basis. It is therefore not immediately apparent what points would survive my ruling that the costs should be assessed on an indemnity basis. However, Mr Kulkarni very helpfully identified certain items which he said would apply whichever assessment basis the Court applied. It seems to me that, save for the points identified below, the points made in the schedule fall away on the basis that the costs are assessed on an indemnity basis. I deal with the significant points that remain.

a) **No need for work to be done by a partner.**
The point is taken that Mr Eyre, the relevant partner in the Claimant's solicitors, was too involved in this application and that more of the work should have been done by a junior solicitor. I reject that submission. It seems to me clear that Mr Eyre was properly involved in the application, but that he did not do nearly as much of the work as the junior solicitor. Again, that is what I would expect. I accept the submission that it was reasonable for the Claimant to have a partner involved. I therefore reject this objection.

b) **Partner's rate of £310 per hour is too high.**
The next point is that Mr Eyre's rate of £310 per hour was too high. Mr Stansfield counters that by pointing out that the published TeCSA rate for a partner is identified as being £250 - £330 per hour and, what is more, that is by reference to a schedule that dates from October 2003, and is thus about three years old. It seems to me that the band of £250 - £330 per hour is still of some relevance because rates have not gone up significantly since October 2003, but even if we take that band, Mr Eyre's rate of £310 is well within it. I therefore reject the submission that the rate of £310 per hour was too high.

c) **Duplication.**
The point was made, by reference to items 9 and 10 on the schedule, that there was unnecessary duplication in relation to the preparing of documents for the application. Mr Stansfield says that in view of the TCC's special procedure in relation to the enforcement of adjudication decisions, it is important for the Court and for the parties that the documents are put in order properly at the outset so that there is then no subsequent delay. I accept that submission. It is a feature of the TCC enforcement procedure that speed is of the essence, just as it is under the 1996 Act. Therefore, I accept that careful work is necessary to prepare the Court documents. It seems to me that items 9 and 10 do not demonstrate any duplication.

d) **Much of the work is routine.**
It is suggested that much of the work done by the Claimant's solicitors was routine. That may be right, but I am bound to say that I share Mr Stansfield's puzzlement as to how it is that, simply because something is said to be routine, there should be no charge for it. If the charge is for work done in accordance with normal practice and the work is required by the application, then it seems to me that it is payable. I therefore reject, to the extent that it is relied upon, an objection based on the work being routine.

e) **Consideration of letters received.**
Mr Stansfield accepts that this item should come out of the bill. The item is worth £62.

f) **Waiting time at Court.**
Again Mr Stansfield accepts that this should come out of the bill. That is in the sum of £240.

g) **Bundles.**
This is item 20 in the schedule. There is an objection to the time spent on preparing the bundle for today's hearing. As the recipient and the principal beneficiary of the bundle, I have to say that there is nothing that increases the work of a judge more in an application of this kind than the absence of a proper hearing

bundle. I reject the suggestion that the assistant solicitor was not entitled to spend 2 hours and 54 minutes preparing the bundle for the application this morning. Of course, at the time that that bundle was prepared it was not known that the application would effectively be conceded.

h) **Counsel's fees.**
There is an objection to the extent of Mr Stansfield's fees. He deals with that by pointing to the fact that, in accordance with my order, he had to prepare a skeleton argument by Monday, which effectively meant his being briefed towards the end of last week, and preparing the skeleton at that time. It seems to me that that is entirely right. It may well be that it was the preparation and presentation of his skeleton that was one of the factors in the Defendant's decision not to contest the application. It therefore seems to me, particularly given that Mr Stansfield will also have been present at Court for a large part of this morning, that it would be quite wrong to make any reduction in relation to his fees.

i) **Attendance by solicitors.**
The point is made by the Defendant that it is unreasonable for both the partner and the assistant solicitor representing the Claimant to be in attendance today. I think that that opposition is probably right. It seems to me that, with the benefit of Mr Stansfield's attendance, it was unnecessary for both solicitors to be here. Therefore, there should be a reduction to reflect that point, and I make a reduction of £240 to reflect Ms Roberts' attendance.

j) **Taxi fares.**
This is an item which Mr Stansfield concedes in the sum of £16.

19. Having made those deductions, therefore, the correct figure for costs is the sum of **£11,842.85p**. I find that that sum was reasonably incurred and it should form the basis of the Court's order. I should add that, even if the assessment had been on a standard basis, there was nothing in any of the other items in the schedule put forward by the Defendant's solicitor which would have led me to conclude that the claims made by the Claimant were too high, or that there were any doubts which would justify a further reduction. In other words, it seems to me that the figure of **£11,842.85p** is justified even on the standard basis of assessment.

20. Accordingly:
a) I give judgment for the Claimant in the sum of £115,436.04p.
b) I order that that sum be paid by 25 October 2006.
c) I order that until that sum is paid interest will continue to accrue on the judgment sum at the rate of £34.93 per day.
d) I order that the Claimant's costs are assessed in the sum of £11,842.85p and I order that those costs also be paid by the Defendant to the Claimant. I will hear Counsel as to when those costs should be paid.

Mr Piers Stansfield (instructed by Glovers, W1) for the Claimant
Mr Yash Kulkarni (instructed by Piper Smith Watton, SW1) for the Defendant