Michael John Construction Ltd v (1) Richard Henry Golledge, (2) Desmond Fielding Childs, (3) Mario Carlo Carpanini, (4) Robert Matthews

JUDGMENT : His Honour Judge Peter Coulson QC TCC. 27th January 2006.

A. INTRODUCTION

1 By a claim form dated 8.12.05, the Claimant company seeks to recover from the Defendants a maximum of **£134,343.84**, together with interest, arising out of two decisions by an Adjudicator, Mr Christopher Smart, dated 6 June 2005 and 16 November 2005 respectively. Notwithstanding the relatively modest sums at stake, the bundle for the enforcement hearing comprised two lever arch files of documents, and the skeleton submissions prepared by both Counsel referred to a further two files of authorities. The enforcement hearing took place at 2 pm on Friday 20 January. Because the oral argument did not finish until 5 pm that day, I reserved this judgment.

2. I propose to deal with the issues that arise for my decision in the following way:
   a) to set out the factual background, much of which is agreed (**Section B** below);
   b) to summarise the general principles that apply to the enforcement of an Adjudicator's decision by the TCC (**Section C** below);
   c) to outline briefly the voluminous evidence before me, and to identify what material is important in accordance with those principles (**Section D** below);
   d) to analyse and set out my conclusions as to the central legal issue between the parties (**Section E** below);
   e) to consider the first decision of 6 June 2005 and to determine whether there is any reason why that decision should not be enforced against the Fourth Defendant (**Section F** below);
   f) to consider the second decision of 16 November 2005 and to determine whether there is any reason why that should not be enforced against either the First, Second and Third Defendants or alternatively the Fourth Defendant (**Sections G and H**) below;
   g) to determine the application for a stay of execution (**Section I** below);
   h) to set out my conclusions and to give judgment accordingly (**Section J** below).

3. However, before embarking on this rather extensive exercise, it is appropriate at the outset to identify, and provide my answer to, the key point in issue. In essence, the Claimant's only difficulty is that its contact was made with a Club, an unincorporated association of individuals. Who, then, were the right individuals for the Claimant to pursue in the adjudications and in these enforcement proceedings? The Claimant has one adjudication decision (6 June 2005) against the Fourth Defendant, who was, at the time of that adjudication, a Trustee of the Club, but who was not a Trustee at the time that the contract was made. The Claimant has another adjudication decision (16 November 2005) against the First, Second and Third Defendants, as the Trustees of the Club at the time that the contract was made, or alternatively against the Fourth Defendant, who actually signed the contract, as the agent of those Trustees. The Defendants say that the Adjudicator did not have the jurisdiction to reach either decision because the proper responding parties in any proceedings were not the named Defendants, but each and every Member of the Club.

4. This is, on any view, a singularly unattractive argument. However, jurisdiction arguments can often be unmeritorious, sometimes unashamedly so. That does not make them any the less right. I should say that Mr Burr, who appeared on behalf of the Defendants, made his submissions with considerable skill and candour. The result was a much more intelligible position than the one advanced by the Defendants' advisor, Mr Fitzgibbon, to the Adjudicator during the second adjudication. However, despite Mr Burr's clarity, for all the reasons given below, I have concluded that the Adjudicator did have the jurisdiction to reach both of his decisions, and that the second of those should be enforced. As I have said, the precise formulation of my judgment is dealt with in **Section J** below.

B. FACTUAL BACKGROUND

5. The Claimant is a building contractor. Pursuant to a contract dated 15 October 2003, it was engaged to construct "a bespoke sports complex including external works" at St Peter's Rugby Football Club at Roath, in Cardiff. The contract incorporated the JCT Intermediate Form. The contract sum was £678,543. The Architect named in the contract was The Design Practice.

6. The Employer was named in the contract as "St Peter's RFC" whom I shall call "the Club". It is agreed that the Club is an unincorporated association of individuals, with no separate legal identity or status. The contract was signed by the Fourth Defendant, who was then the Director of Development, and subsequently became a Trustee of the Club. As I have said, he was not a Trustee at the time that he signed the contract. It subsequently emerged that the Trustees of the Club when the contract was signed were the First, Second and Third Defendants. They were replaced as Trustees by the Fourth Defendant and a Mr Norman in late 2003/ early 2004.

7. It was at this time that the building works started. Practical completion was achieved on 23 August 2004. It appears that, at about that time, there were problems with the payments to the Claimant company, and in September 2004, the Claimant issued a statutory demand against the Fourth Defendant. The Fourth Defendant instructed O'Keefe & Co, the solicitors now acting for all four Defendants in these proceedings, to set aside the statutory demand.

8. In his affidavit of 7 October 2004, in support of that application, the Fourth Defendant's solicitor said: *"… It is admitted that the Applicant (the Fourth Defendant) entered into a contract on behalf of St Peter's RFC with Michael John Construction Ltd wherein the Applicant acted upon the authority of the Trustees of St Peter's RFC who constitute that unincorporated association …"*

The solicitor did not, at that stage, reveal that the identity of the Trustees at the time that the contract was signed was different to the identity of the Trustees in October 2004.

9. This acceptance that the Fourth Defendant was acting on behalf of the First, Second and Third Defendants, as the Trustees of the Club at the time he signed the contract, is important. The proposition is confirmed by the Defendants, in unequivocal terms, in a letter written much later, during the second adjudication. That letter, dated 7 November 2005, was written by Mr Terence Fitzgibbon, a Quantity Surveyor and construction claims advisor, who was then acting for and advising the Defendants. He said*: "The parties are specifically agreed that when Mr Matthews [the Fourth Defendant] signed the contract he acted as the agent for Messrs Childs, Colledge & Carpanini [the First, Second and Third Defendants] in their position of Trustees (see, for example, paragraph 8.1.2 of the Referral). There being no dispute about that matter, you cannot find otherwise."*

10. Returning to the chronology, it is not clear to me what happened to the bankruptcy proceedings. I have pointed out elsewhere that, in an ordinary case, such proceedings are not the best way of enforcing an adjudicator's decision: see **Harlow & Milner v Linda Teasdale** [2006] EWHC 54 (TCC). Be that as it may, by early 2005, certain interim certificates issued by the Architect had still not been paid by the Club and, pursuant to the express provisions of the JCT Form, the disputes were referred to adjudication ("the first adjudication").

The First Adjudication

11. The notice of adjudication was given on 26 April 2005. The responding parties were named as the Fourth Defendant and Mr C Norman. The notice of adjudication made plain that they were pursued because they were the Trustees, and because the Fourth Defendant had acted on behalf of himself and Mr C Norman when signing the contract. Mr Smart was appointed to act as Adjudicator on 29 April 2005. The Claimant, the Fourth Defendant and the Adjudicator signed the JCT Adjudication Agreement on 5 May 2005.

12. Throughout the first adjudication, the Fourth Defendant took no point that he was not a proper party to those proceedings. All of his arguments in the first adjudication were as to the detail of the financial claims being made by the Claimant. However, on 17 May 2005, the Fourth Defendant did make plain, for the very first time, that he had not been a Trustee at the time that the contract was signed. He made no point at all about the relevance or significance of this aspect of the chronology: he said it was ***"mere fact".***

13. It appears that the Fourth Defendant's letter was triggered by a request from the Adjudicator, who wanted to satisfy himself as to the correct status of the Fourth Defendant and Mr Norman. That the adjudicator was doing this off his own bat is apparent from Section 5 of his first decision, dated 6 June

2005. That states*: "Although this particular issue has not been raised by the responding party, I consider it necessary for me to establish for myself that there was a reasonable basis for the adjudication proceedings."*

He then explains the status of Mr Matthews and Mr Norman, before concluding that: *"… I consider that the Trustees and the Club are one and the same for the purpose of this adjudication and I have proceeded accordingly."*

14. The first decision of Mr Smart found the Fourth Defendant and Mr Norman liable for the following sums:
a) £108,771.13 by way of principal;
b) £12,738.07 by way of contractual interest;
c) £2,013.74 by way of interest due to late certification.

This amounted to £123,522.94. The Adjudicator went on to say that the Fourth Defendant and Mr Norman must pay these sums within seven days.

15. Neither the Fourth Defendant, nor Mr Norman, nor the First to Third Defendants, nor any other Member of the Club, paid the sum found due by the Adjudicator, or any part of it.

16. As a result of a subsequent application for pre-action disclosure, the Claimant learnt, for the first time, the identity of the Trustees at the time that the contract was signed. The Claimant's solicitors therefore wrote to the First to Third Defendants on 23 September 2005 seeking their confirmation that they would pay the outstanding sums found due by the adjudicator. The reply from the Defendant's solicitors was unhelpful:
"We are advised that no money is due to your client under the contract. This is because the final account has been prepared following re-assessment by an independent quantity surveyor, and this shows money is due from your client. This has been delivered to your client who has provided a receipt by way of acknowledgment for the same.
Your client's proposals for repayment are invited.
Turning to the adjudication, it is noted that you say it is not of any affect unless it is agreed that we be bound by it. We do not agree to be bound. This is for the reasoning set out above."

17. Accordingly, it is important to note that the rejection of liability on the part of the First, Second and Third Defendants was based on what the Defendant's solicitors considered to be the merits of the underlying disputes. It was not suggested the First, Second and Third Defendants were not the appropriate individuals to pay the Claimant, if the Claimant established a case on the detailed merits.

The Second Adjudication

18. As a result of this rejection of liability, the Claimant commenced an adjudication against all four Defendants ("the second adjudication") in relation to the outstanding sums claimed. Mr Smart was again appointed to act as Adjudicator on 18 October 2005. By this time the Defendants had instructed Mr Fitzgibbon. He was responsible for numerous letters written to the Adjudicator taking a number of different points as to jurisdiction, bias and the like. Those are dealt with in greater detail in **Sections G and H** below.

19. However, it is important to refer to Mr Fitzgibbon's letter of 1 November 2005. This letter, although at pains to make clear that it was not a formal reply to the notice to refer, contained a summary of the points which the Defendants took in the second adjudication. No point whatsoever was taken in that letter in respect of the quantum of the Claimant's claims, or any cross-claims that might have been available to the Club. The arguments were entirely confined to jurisdictional points relating to the liability, or otherwise, of the Defendants, and allegations of bias.

20. The Adjudicator was naturally concerned about the point being taken that the Defendants had no liability to pay the Claimant and that the only people who could be pursued by the Claimant were all the Members of the Club. As a result he sought and obtained an Opinion, dated 11.11.05, from Mr Paul Stafford of Counsel. He concluded that it was a fundamental feature of the case that the Fourth Defendant had signed the contract on behalf of the Trustees; that the rules of the Club were irrelevant as between the Defendants and the Claimant; that the First, Second and Third Defendants were the principals on whose behalf the contract was made; and that their agent was the Fourth Defendant. He

concluded that the Claimant could elect either to sue the First, Second and Third Defendants, as principals, or, alternatively, the Fourth Defendant, as agent.

21. The Adjudicator incorporated this advice into his second decision of 16 November 2005. Since there were no other points raised by the Defendants in the adjudication, other than the question of the identity of the correct party to be pursued by the Claimant, he therefore found in favour of the Claimant. The sum identified in paragraph 14 above was increased, to reflect interest, to the total sum of £129,244.34. In addition, the Adjudicator found that the Defendants were liable to pay his fees and expenses of £5,099.50, making a total of **£134,343.84**. He said that those sums had to be paid by 23 November 2005.

22. Again, no part of the sums referred to in paragraph 21 above were paid by the First, Second or Third Defendants, or the Fourth Defendant, or any other Member of the Club. Accordingly, on 8.12.05, the Claimant commenced these enforcement proceedings.

C. ENFORCEMENT/GENERAL PRINCIPLES

23. The Court of Appeal, and the Judges of the TCC, have repeatedly referred to the need to ensure that a successful party in an adjudication is not kept out of his money, unless it could be shown that the Adjudicator did not have the jurisdiction to decide the point in issue: see, by way of example only, **Macob Civil Engineering v Morrison Construction** [1999] BLR 93 and **Bouygues UK Ltd v Dahl Jensen UK Ltd** [2000] BLR 522.

24. The approach to be adopted by any court in adjudication enforcement proceedings was succinctly summarised by Sir Murray Stuart-Smith in **C & B Scene Design Ltd v Isobars Ltd** [2002] BLR 93 when he said: *"It is important that the enforcement of an Adjudicator's decision by summary judgment should not be prevented by arguments that the Adjudicator has made errors of law in reaching his decision, unless the Adjudicator has purported to decide matters that are not referred to him. He must decide as a matter of construction of the referral, and therefore as a matter of law, what the dispute is that he has to decide. If he erroneously decides that the dispute referred to him is wider than it is, then, insofar as he has exceeded his jurisdiction, his decision cannot be enforced. But in the present case there was entire agreement as to the scope of the dispute, and the Adjudicator's decision, albeit he may have made errors of law as to the relevant contractual provisions, is still binding and enforceable until the matter is corrected in the final determination."*

25. In the present case, this position was made express by the terms of the contract which the Claimant and the Club agreed. Clause 9A.7.1 provided that:
"The decision of the Adjudicator shall be binding on the parties until the dispute or difference is finally determined by arbitration or by legal proceedings …"
The provisions went on, at Clause 9A.7.2, to make plain that the parties must "comply with the decision of the Adjudicator" and Clause 9A.7.3 said that, if either party did not comply with the decision of an adjudicator, "the other party shall be entitled to take legal proceedings to secure such compliance pending any further determination …"

26. A point that often arises as part of a jurisdictional dispute in adjudication is the suggestion by the unsuccessful party that the matters referred to the Adjudicator comprised more than one dispute, and that therefore the Adjudicator did not have the jurisdiction to decide them. The courts have adopted a robust approach to this point, and have utilised what has been called a "benevolent interpretation of the notice" invariably to conclude that, whilst there may have been a number of issues in the adjudication in question, there was only one underlying dispute: see, amongst others, **David MacLean Housing Contractors Ltd v Swansea Housing Association Ltd** [2002] BLR 125 and **Chamberlain Carpentry & Joinery Limited v Alfred MacAlpine Construction** [2002] EWHC 514.

27. In **Fastrack Contractors Ltd v Morrison Construction Ltd** [2000] BLR 168, HHJ Thornton QC held that the dispute encompassed "whatever claims, heads of claim, issues, contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference." Similarly, in **Sindall Ltd v Solland** [2001] 3 TCLR 30, HHJ Lloyd QC said: *"Where a dispute is referred there is comprehended within it all its constituent elements, including sub-disputes, contentions, issues (some of*

which might have been referred separately) – in other words all the ingredients which go into the dispute referred."

28. Indeed, as far as I am aware, there is no reported case in which the decision of an Adjudicator has not been enforced because the Judge has been persuaded that the original notice to refer encompassed more than one dispute. In **Barr v Law Mining Ltd** (Outer House, Court of Session, 15.6.01) Lord MacFadyen appeared to doubt the Judge's approach in **Fastrack**, but he eventually reached a decision that was in accordance with it, and rejected the suggestion in that case that more than one dispute had been referred to the adjudicator.

29. Another way in which an unsuccessful party will seek to avoid paying the sums which might otherwise be due to the successful party in the adjudication is to seek a stay of any judgment on the grounds of the claimant's financial ill- health. The cases on this point include **Absolute Rentals v Glencor Enterprises** (unreported, 16.1.00); **Herschel Engineering Ltd v Breen Property Ltd** [2000] BLR 272; **Rainford House Ltd v Cadogan Ltd** [2001] BLR 416 and **AWG Construction Services v Rockingham Motor Speedway** [2004] EWHC 888 (TCC).

30. In **Wimbledon Construction Company 2000 Ltd v Derek Vago** [2005] BLR 374, these various authorities were considered and the following principles, relevant to an application for a stay, were identified:

"(a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.

(b) In consequence, Adjudicator's decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of his money.

*(c) In an adjudication to stay the execution of summary judgment arising out of an Adjudicator's decision the court must exercise its discretion under Order 47 with considerations (a) and (b) firmly in mind (see **AWG**).*

*(d) The probable inability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see **Herschel**).*

*(e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see **Bouygues** and **Rainford House**).*

(f) If the evidence of the claimant's present financial position suggested that it is probable that it would be unable to pay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

*(i) the claimant's financial position is the same or similar to its financial position at the time the relevant contract was made (see **Herschel**); or*

*(ii) the claimant's financial position is due, either wholly or in significant part, to the defendant's failure to pay those sums which were awarded by the Adjudicator (see **Absolute Rentals**)."*

D. THE NATURE OF THE EVIDENCE

(a) The Claimant's Statements

31. There is a statement dated 8 December 2005 from Mr Michael Murphy, the director of the Claimant company. There is also a second statement from Mr Murphy, dated 13 January 2006, in which he answers some of the many points taken against him in the Defendants' statements. They are proportionate to the sums in issue and the nature of these proceedings.

(b) The Defendant's Statements

32. There are four lengthy statements served on behalf of the Defendants. However, only one of these is from a Defendant, namely, the statement dated 6.1.06 from the Fourth Defendant, Mr Robert Matthews. There is thus no evidence at all from the First, Second or Third Defendants. It may be that this is a demonstration of the close links between the Fourth Defendant and the Club: I am told that the Club has subsequently been incorporated and that the only Member listed in the Annual Return is the Fourth Defendant. However, it is the content of the other three statements served on behalf of the Defendants that has given me some cause for concern.

(i) The Statement of Mr Varma

33. Mr Varma is from The Design Practice, the Architect named in the contract. His statement is made up of detailed arguments as to why the Adjudicator was wrong to reach the decisions he did, despite the fact that the Adjudicator based a good deal of his reasoning on the Architect's own interim certificates. Mr Varma's approach is summed up at paragraph 38 of his statement where he says: *"The Adjudicator did not accept my analysis of the sums due under the contract in either set of adjudication proceedings. I believe that the Adjudicator failed properly to take into account the agreed omission of the various sub-contract work packages and the payments made to the Claimant by Mr Matthews and Mr Norman when considering the amount properly due to the Claimant. I therefore do not accept that either the first or the second decision provides an accurate assessment of the Claimant's proper contractual entitlement."*

34. The vast majority of Mr Varma's evidence is completely irrelevant to the applications before me. As the authorities make clear, if the Adjudicator answered the right question then, even if he reached the wrong answer, he had the necessary jurisdiction to make his decision and that decision must be enforced by this court. Whilst I accept that, because of the application for a stay, the court needs to know how the figures would pan out if the Defendants are right on any continuing valuation disputes, this exercise could have been done in one or two paragraphs. Mr Varma's statement runs to 46 paragraphs. I consider that the preparation of a statement in such a form was excessive and unnecessary.

(ii) The Statement of Mr Edwards

35. Mr Edwards' evidence goes to a number of matters, including the Claimant's financial position. However, he is not an accountant. I am bound to say, again, that I consider much of it to be irrelevant. Furthermore, given that, entirely predictably, the Claimant company takes the point that any financial difficulties that it may be in were a result of the non-payment of the sums found due by the Adjudicator, it seems curious that this point has not been dealt with by Mr Edwards at all.

(iii) The Statement of Mr Fitzgibbon

36. This statement is 69 paragraphs long. It appears to be designed to set out, in detail, the correspondence which Mr Fitzgibbon, as the Defendants' then advisor, had with the Adjudicator during the second adjudication. This is a completely unnecessary exercise. All that was required was a bundle of the relevant correspondence, and the submissions of Mr Burr, to allow the court to identify what particular points were taken as to jurisdiction in the second adjudication. The interminable "action replay" of that correspondence in Mr Fitzgibbon's statement is a sad waste of effort. It is a practice expressly discouraged by paragraph 12.1.2 of the second edition of the TCC Guide. I was not surprised that, when making his detailed submissions before me, Mr Burr made no reference to this statement at all.

E. ANALYSIS OF CENTRAL LEGAL ISSUE

37. Before going on to consider the two adjudications, and the Adjudicator's jurisdiction to make his two decisions, it is convenient to set out, in summary form, my analysis of the central legal question: namely who was the appropriate party or parties against whom the adjudication proceedings should have been commenced?

38. The Club is not a separate legal entity. Only individuals can be pursued, whether in adjudication or in litigation, on its behalf. Mr Burr contends that the right individuals, who should have been the responding party in the adjudication and in these proceedings, are all the Members of the Club. In support of this contention, he relies on:

a) the fact that the Club is an unincorporated association of the Members;

b) the provisions of rule 23 of the Club's Constitution which provides:

*"**Trustees***

The Management Committee may appoint no more than four and no less than two Trustees from within its ranks or from among Life Members. Such Trustees, when duly authorised by resolution of the Management Committee, shall have power to sign and execute on behalf of the Club all deeds and documents without incurring any personal liability in respect thereof."

39. I do not accept Mr Burr's contention. In my judgment, there can be no doubt that rule 23 is concerned solely with the internal relationship between the Members and the Trustees. It is designed to ensure that the Members indemnify the Trustees for any sums that the Trustees may have to pay out; it protects the Trustees from having any outstanding personal liability, as against the other Members. However, I conclude that the Constitution, which was never shown to the Claimant prior to the contract being entered into, is irrelevant to the Club's legal relationship with third parties. I note that this is precisely the same conclusion that Paul Stafford reached in the Opinion that was provided to the Adjudicator, and which formed the basis of his decision in the second adjudication.

40. It should also be noted that, prior to the commencement of the first adjudication, the Defendants' solicitor wrote to indicate that the correct responding parties in any adjudication were the Members, or certain Members who they would nominate. The Claimant's advisers replied, asking for a list of all the Members and asking for confirmation that the Members were jointly and severely liable for any sums found due to the Claimant. No response was ever provided to these two questions. Accordingly, not least amongst the difficulties with which the Defendants were faced before me was that, on their case, the right responding party to the Claimant's claims was a list of individuals whose identities were known only to the Defendants and which, despite being requested to do so, they had never provided to the Claimant.

41. It is clear that, under rule 23, it is the Trustees of the Club who are authorised to enter into contracts on behalf of the Members of the Club. A Trustee who enters into a contract will generally be personally liable under the contract, like other contracting parties. Subject to any contractual limitations on a Trustee's liability – and here there were none – his personal liability to the other contracting party will be unlimited: see paragraph 21-05 of **Lewin on Trusts**, 17th edition, and **Marston Thompson & Evershed Plc v Benn** [1998] CLY No.4875. It is clear, therefore, that, provided that it can be shown that the Fourth Defendant was acting as the agent of the First, Second and Third Defendants at the time that the contract was made, then the First, Second and Third Defendants are liable to the Claimant as the Employers under the contract.

42. As previously noted, the contract was signed by the Fourth Defendant. He therefore made the contract with the Claimant. In such circumstances he has a prima facie personal liability. Paragraph 168 of ***Halsbury's Laws, Volume 6***, states as follows: *"Trustees, Members of the Managing Committee or other agents, contracting or purporting to contract on behalf of a Club may incur a personal liability, either by reason of the form or terms of the contract, or because in making the contract they are acting in excess of their authority. If such persons contract in their own names, they are prima facie personally liable, and may be sued without joining other Members of the Club, even though they may have been duly authorised to enter into the contract on behalf of the Members generally. If they were so authorised, the other contracting party may elect either to sue them, as having contracted personally, or to sue the Members, as the principals on whose behalf the contract was made."*

43. On this basis, therefore, the Fourth Defendant may be held personally liable to the Claimant. However, in the present case, it is right to note that, both before the first adjudication and expressly during the second adjudication, those acting on behalf of the Defendants made it clear beyond doubt that the Fourth Defendant entered into the contract on behalf of (or as the agent of) the First, Second and Third Defendants: see the evidence referred to in paragraphs 8 and 9 above. Accordingly, it seems to me that the Fourth Defendant is liable to the Claimant as the agent of the First, Second and Third Defendants. In those circumstances the Claimant has an election: see ***Halsbury's Laws, Volume 2(1)*** *and* ***London General Omnibus Co v Pope*** (1922) 38 TLR 270. Either the Claimant can pursue the First, Second and Third Defendants, as the Trustees who, as principals, entered into the contract with the Claimant; or, alternatively, the Claimant can pursue the Fourth Defendant, who entered into the contract personally and/or who acted as agent for the First, Second and Third Defendants. The Claimant has made it plain in its submissions to me that, in such circumstances, it would elect to have judgment entered against the First, Second and Third Defendants. Again, I note that these conclusions are very similar to those reached by Paul Stafford in his Opinion of 11.11.05.

F. ENFORCEMENT OF THE FIRST DECISION

44. In his first decision of 6 June 2005, the Adjudicator held that the Fourth Defendant was liable to the Claimant. For the reasons which I have set out in **Section E** above, I consider that he was right to do so. However, the Defendants say that he exceeded his jurisdiction because he found that the Fourth Defendant was liable to the Claimant on the false premise that the Fourth Defendant was a Trustee at the time that the contract was made. Since that was wrong, Mr Burr contends that the Adjudicator exceeded his jurisdiction in reaching such a conclusion.

45. It is perhaps not unfair to describe the Claimant's attitude towards the first adjudication decision as ambivalent. It seeks to have it enforced, but only as part of its alternative case, if it is not entitled to judgment against the First, Second and Third Defendants. Moreover, since the Adjudicator found in his second decision that the Fourth Defendant was liable to the Claimant as agent, then, if that second decision is enforceable, the Claimant does not need to rely on the first adjudication decision at all.

46. In those circumstances, the parties are in greater agreement as to the first adjudication decision than was at first apparent. Essentially, neither party wants it to be enforced, although, of course, the Claimant's position is based on the assumption that the first decision does not matter very much because the second decision is enforceable. The Claimant also maintains that the Adjudicator had the necessary jurisdiction to reach his decision. In view of my conclusion that the second decision can and should be enforced (**Sections G and H** below), it is appropriate for me to decline to enforce the first decision. However, I should make it plain that, in my judgment, the Adjudicator had the necessary jurisdiction to make that decision. My brief reasons for that are set out below.

47. First, he found that the Fourth Defendant was liable to the Claimant. For the reasons set out in **Section E** above, I consider that he was right to do so. Secondly, whilst it is true that he reached that conclusion on a possible misunderstanding as to the Fourth Defendant's status as a Trustee, I consider that this error (if that is what it was) did not affect the Adjudicator's jurisdiction to make a finding of liability against the Fourth Defendant. Thirdly, I note that the significance of when certain individuals became Trustees was never explained to the Adjudicator, who simply knew as "a mere fact" that the Fourth Defendant was a Trustee at the time of the adjudication, but not when the contract was made. Fourthly, I have already made the point that, at no time during the first adjudication, did the Fourth Defendant ever allege the Adjudicator did not have the necessary jurisdiction to make a finding of liability against him.

48. For all these reasons, therefore, it seems to me that the Adjudicator did have the necessary jurisdiction to reach the conclusion that he did in the first adjudication. However, because the possible misapprehension was corrected in his second decision, and because, for the reasons given in **Sections G and H** below, I consider that the second decision is also enforceable, it seems to me appropriate that I should decline to enforce the first decision of 6.6.05.

G. ENFORCEMENT OF THE SECOND DECISION – JURISDICTION

(a) Introduction

49. In the second decision, the Adjudicator found that the contract was made by the First, Second and Third Defendants, as principals, with the Fourth Defendant signing the contract as their agent. He then went on to find that the Claimant could therefore elect whether or not to pursue the First, Second and Third Defendants as principals, or the Fourth Defendant as the party who made the contract. That finding was entirely in accordance with the Opinion of Paul Stafford of 11.11.05, and also accords with my analysis in **Section E** above. The remaining question is whether or not that decision should be enforced. The Defendant's submissions really fall into two parts: jurisdiction and bias/fairness. The jurisdiction points are dealt with below. The bias/fairness points are dealt with in **Section H** below.

50. The jurisdiction points were sensibly refined by Mr Burr during the course of his submissions. Essentially, there are now three: that the notice to refer in the second adjudication comprised more than one dispute; that the dispute as to the correct identity of the employer was not a dispute 'under' the contract and therefore could not be referred to the Adjudicator under the contract; and that, because the dispute had already been decided in the first adjudication, the Adjudicator should have resigned. I deal with each point below.

(b) More Than One Dispute

51. The Defendants say that the notice to refer was invalid because it asked the Adjudicator to decide at least two disputes: the correct identity of the employer under the contract, and how much that employer owed to the Claimant. The relevant principles governing this point are set out at paragraphs 26-28 above and I have already commented that, as far as I am aware, this point has never yet been decided in favour of an unsuccessful defendant in any reported decision.

52. This judgment is not going to create any such precedent. It seems to me clear that the matter referred to the Adjudicator was one dispute: how much, if anything, did the employer owe? Since, in the second adjudication, the employer was identified as the First, Second and Third Defendants as principals and the Fourth Defendant as agent, the dispute could be defined as simply "how much, if anything, did the First to Fourth Defendants owe the Claimant?" It would be contrary to the whole purpose of adjudication if such a simple dispute could then be broken down into its component parts, to enable the Defendants to be able to say that, because the dispute incorporates more than one ***issue***, there must somehow be more than one ***dispute***. That would be contrary to all of the authorities to which I have referred at paragraphs 26-28 above. It would be untenable as a matter of commercial common-sense.

53. It seems to me clear that one dispute was being referred to the Adjudicator in the second adjudication. The only reason why it was being referred at all was because of the concern on the part of the Claimant's advisers that, in the first adjudication, the Adjudicator may have incorrectly found the Fourth Defendant liable as a Trustee at the time when the contract was made, when, as a matter of fact, there was no dispute that he was not. It was not suggested that there was more than one dispute in the first adjudication, even though the Adjudicator had to work out, not only what was due, but whether the Fourth Defendant was properly a responding party. For the same reason, I am in no doubt that the second adjudication also encompassed only one dispute, even though the Adjudicator had to consider a similar question in respect of the First to Fourth Defendants Accordingly, the first reason for challenge to the second adjudication decision must fail.

(c) 'Under'/ 'In Connection With'

54. **Ashville Investments v Elmer Contractors Ltd** [1987] 37 BLR 55 is authority for the proposition that an arbitration clause which includes the words "in connection with" should be given a wide interpretation and will cover related claims for rectification, negligent mis-statement and the like. When the Court of Appeal applied that decision in the later case of **Fillite (Runcorn) Ltd v Aqua-Lift** [1989] 45 BLR 27, they concluded that an arbitration clause which encompassed all disputes "under" the contract (but did not contain the additional words "in connection with"), embraced claims for breach of contact but, in the words of Slade LJ, was "not wide enough to include disputes that do not concern obligations created by or incorporated in that contract".

55. In the present case, the adjudication agreement was limited to disputes or differences arising ***under*** the contract. Mr Burr therefore contended that, because the dispute as to the correct identity of the Employer involved a consideration of other documents (such as the Club Constitution) this was a dispute that arose 'in connection with' but not 'under' the contract and that therefore the Adjudicator had no jurisdiction.

56. It seems to me that the Defendants have a difficulty in raising this argument in view of the fact that they signed an adjudication agreement with the Adjudicator in respect of the second adjudication. However, I do not need to decide this point on that ground, because I am in no doubt that the issue, as to the individuals who were liable (on behalf of the employer) to make proper payment to the Claimant under the contract, was part and parcel of the single dispute referred to the Adjudicator. The employer under the contract was named as the Club. The Claimant was simply seeking to be paid by the Club under the contract, through and by reference to the Trustees at the time that the contract was made. In my judgment, this was plainly a dispute concerned with the obligations owed under the contract by the employer to the contractor.

57. Ultimately, this point is really a matter of impression, as both Counsel accepted. For the reasons I have given, I conclude that the dispute as to whether or not the First to Third or alternatively Fourth

Defendants owed monies to the Claimant was a dispute under the contract. The second jurisdictional argument therefore fails.

(d) Matter Already Decided

58. The final jurisdiction point taken by the Defendants was that the Adjudicator had no jurisdiction because he had already decided the same dispute in the first adjudication and could not therefore consider the point afresh. Reliance was placed on the decision of HHJ Thornton QC in **Sherwood v Casson** [2002] TCLR 418 which concerned the overlap between a contractor's claim based on an interim application, and a subsequent claim on a final account.

59. I can deal with this point shortly. I have no doubt that the dispute was properly referred to the Adjudicator in the second adjudication, and that this was not a dispute that had been previously decided. In respect of the First, Second and Third Defendants, they had never been a party to any adjudication. Therefore, the question of any liability on their part could not have been an issue that had ever been adjudicated before. There can be no question but that their potential liability to the Claimant was a new issue, not arising in the first adjudication and therefore not a matter which the Adjudicator had already decided.

60. As to the position of the Fourth Defendant, the potential liability of the Fourth Defendant was only raised in the second adjudication because the Fourth Defendant had refused to accept liability pursuant to the first adjudication decision. If he had done, none of these arguments would have arisen. However, he refused to accept the liability imposed by the decision of 6.6.05, because of the Adjudicator's possible misunderstanding as to his position as a Trustee, and the Adjudicator's possible failure to appreciate the significance of the point that the Fourth Defendant had not been a Trustee when the contract had been made. Accordingly, the liability of the Fourth Defendant in the second adjudication involved a slightly different (or at least more precise) question, namely whether he was personally liable because he signed the contract, and/or because he was acting as the agent of the First, Second and Third Defendants. That was not a point which had been expressly decided in the first adjudication and it was therefore entirely appropriate for it to be decided in the second adjudication.

61. Accordingly, I am in no doubt that the issues that arose in the second adjudication had not arisen in the first and that, therefore, there was no basis for Mr Fitzgibbon's repeated requests to the Adjudicator to resign.

(e) The 'Double Jeopardy' Point

62. Mr Burr summarised his overall position in this way: that, having decided the liability of specific individuals in one capacity, the Adjudicator could not decide the same dispute on a different basis as to capacity. He called this 'the jurisdictional bind' that the Claimant had got itself into. For the reasons I have already given, I do not accept that this was the same dispute; indeed, as I go on to explain in **Section H** below, the Adjudicator was careful to ensure that the Defendants in the second adjudication understood that they could raise whatever points they wanted as to the amount (if anything) due to the Claimant. During the course of argument, I asked Mr Burr why the Adjudicator could not act as he did. His answer was that it exposed the Defendants to 'double jeopardy'; that if the Claimant had got it wrong first time round, 'it cannot come back for a second bite of the cherry'.

63. I do not consider that this submission has any real substance. On the facts, the disputes in the two adjudications were different. There can be no question of 'double jeopardy', particularly since the First, Second and Third Defendants were not even responding parties in the first adjudication. Moreover, it would be monstrous if the Claimant, who had not been told by the Club the true position as to the Trustees before the start of the first adjudication, was to be deprived of its contractual remedy because of that failure, over which it had no control. The Claimant had manifestly not 'got it wrong'.

(f) Conclusion as to Jurisdiction

64. For the reasons set out in paragraphs 51-63 above, I am in no doubt that the Adjudicator had the jurisdiction to reach his decision in the second adjudication.

H. BIAS/ UNFAIRNESS

(a) General Approach

65. A number of authorities were referred to me on the question of bias, including **In Re Medicaments and Related Classes of Goods (No.2)** [2001] 1 WLR 701; **Locabail v Bayfield Properties** [2000] QB 451; and **Pring & St Hill v Hafner** [2002] EWHC 1775 (TCC). However, it seems to me that the principles relating to potential bias in adjudication enforcement proceedings are best summarised in **Amec Projects Ltd v Whitefriars City Estates Ltd** [2005] 1 BLR 1, where the Court of Appeal considered that the test for bias is whether a fair-minded and informed observer, having considered all the circumstances which have a bearing on the suggestion that the decision-maker was biased, would conclude that there was a real possibility that he was biased.

66. In the present case, the principal ground for bias was that the Adjudicator had already reached a decision as to the sums owed to the Claimant and could not therefore deal fairly with the same issue, particularly as it related to the First to Third Defendants. **Amec** is also authority for the correct approach in cases where an Adjudicator has already dealt with a prior dispute. Dyson LJ held that the mere fact that the Adjudicator had already decided an issue was not such as to justify a conclusion of apparent bias. Again, the question was whether a fair minded observer would conclude that there was a real, as opposed to fanciful, possibility that the Adjudicator would approach his task with a closed mind, pre-disposed to reaching the same decision, regardless of the evidence and arguments which might be adduced.

67. Having considered carefully the correspondence in the second adjudication, and the manner in which the Adjudicator went about his task, I have reached the overwhelming conclusion that a fair-minded and informed observer could not possibly conclude that he was biased, or that there was any real possibility that he was biased. I do not consider that he approached the task with a closed mind. Indeed, on the contrary, it seems to me that he was very careful to invite submissions from the Defendants as to the underlying issues of valuation and pointed out that he was, effectively, giving the Club a second chance to deal with such matters.

68. On this important topic, I must repeat the point made above that, although the Adjudicator invited detailed submissions from the Defendants in relation to matters of valuation, they were not provided. As I have already pointed out, the response drafted by Mr Fitzgibbon of 1 November 2005, and all of the points in his correspondence both before and after that letter, were solely confined to questions relating to the correct identity of the responding parties, and/or jurisdiction and bias. Although expressly invited to do so by the Adjudicator, Mr Fitzgibbon never at any stage sought to address the detailed matters of valuation. This curious omission, which now completely undermines the Defendants' whole approach to the second adjudication decision, was never explained, whether by Mr Fitzgibbon or by anybody else.

69. For this reason, it was entirely unsurprising that the Adjudicator reached the same decision on the figures as he had reached in the first adjudication. This happened because he was not given any material in the second adjudication which could have led him to reach a different view. I am left with the overwhelming impression that Mr Fitzgibbon was so keen to make his quasi-legal points to the Adjudicator (which he did on an almost daily basis, and in great detail) that he omitted to address the valuation points altogether. In those circumstances, I regard the allegations of bias as not only wrong, but very unfair to the Adjudicator.

70. That said, a handful of specific points as to bias were taken by Mr Fitzgibbon during the adjudication, and maintained by Mr Burr in his submissions to me. I deal with them briefly below.

(b) Specific Complaints

71. Mr Fitzgibbon complained about the Adjudicator's description of the proceedings as 'the second adjudication'. This was an entirely apt label; it is the one I have used myself. It reveals no bias at all.

72. Mr Fitzgibbon complained about the Adjudicator's letter of 31 October 2005 because it identified the two sides' competing contentions and states that the Adjudicator "can understand the logic of" the Claimant's argument. Again, I consider that this criticism is unfair. The Adjudicator set out his

understanding, but then immediately said that "it is of course open to the responding parties to demonstrate to me that…an alternative argument should prevail." That was an entirely proper approach.

73. Mr Fitzgibbon's third point was that the Adjudicator was swayed by evidence in the first adjudication, and had a closed mind. For the reasons set out above, I consider that this criticism is not made out. On the contrary, any fair reading of his letters demonstrates beyond doubt that the Adjudicator gave the Defendants every opportunity to deal with the detail. They simply failed to do so.

74. Mr Fitzgibbon complained about the Adjudicator's suggestion, in his letter of 4 November 2005, that, when he signed the contract, the Fourth Defendant did not disclose that he was acting as an agent of the Club. This point seems to me to be wholly irrelevant, because the Adjudicator went on to give the Defendants an opportunity to answer this point, and they did so in detail on 7 November 2005. Further and in any event, the Adjudicator made no finding on this basis and made no corresponding criticism of the Fourth Defendant in his second decision. Accordingly, the point goes nowhere.

75. Complaint was also made of the material that was supplied to Counsel in November. I consider this to be a thoroughly bad point. The evidence makes it clear that Paul Stafford was given everything that he needed. The suggestion that Paul Stafford did not know that the contract defined the employer as the Club is incorrect; the whole basis of his Opinion was that the Club was the employer, but, for the reasons which he explains, the Defendants were liable to pay the Claimant on the Club's behalf. As regards the complaint that he was not told about the first adjudication and the jurisdiction points, it seems to me that this misses the point altogether. Counsel was not asked to give an opinion on anything other than the central legal issue which I have addressed in **Section E** above. There was therefore no need for him to be shown any material relating to the Defendants' jurisdiction arguments.

76. Finally, Mr Fitzgibbon complained that the Adjudicator reached the same decision on the detailed valuation points as he did in the first adjudication. I have already explained that this was entirely unsurprising, given the absence of any new material from Mr Fitzgibbon which could have led the Adjudicator to reach a different conclusion.

(c) Conclusion on Bias

77. For the reasons set out above, I have concluded that the Adjudicator dealt entirely properly with the matters that were raised in the second adjudication. He was not biased and he had not closed his mind. Indeed, my conclusion goes the other way: that the Defendants and/or their advisers were so obsessed with trying to trip up the Adjudicator in relation to matters of jurisdiction or bias that they lost sight of the fact that the second adjudication should actually have been all about the disputed valuations. That can be the only explanation for their failure, despite the Adjudicator's invitations, to put in further material on the detailed points raised by the Claimant as to the sums to which it claimed to be entitled.

I. THE APPLICATION FOR A STAY

78. I have set out the general principles that apply in paragraphs 29-30 above. In accordance with those principles, I have concluded that, in this case, it would not be appropriate to grant any sort of stay. There are three specific reasons for that.

79. First, it is plain from the evidence that the Claimant company is not in a significantly worse financial position now than it was at the time that the contract was made. Accordingly, in accordance with the principles set out by HHJ Lloyd QC in **Herschel**, the Defendants got the result they contracted for and cannot now use the Claimant's financial ill-health to avoid judgment.

80. The Claimant is a young company, incorporated only in September 2001. The only accounts that are available are for the period ended 30 September 2002, which is before this contract was signed. They show a profit up to 30 September 2002 of just £14,930. Accordingly, the Claimant could not be described as a hugely profitable company at the time that the contract was entered into. It was always vulnerable to cash-flow problems. That remains the case.

81. Secondly, to the extent that the Claimant's financial condition has deteriorated, I am in no doubt that this was due, at least in large part, to the Defendant's failure to make payment of the sums found due

by the Adjudicator. This is the second reason why I would exercise my discretion against granting a stay in these circumstances. As Mr Burr very fairly accepted, there was unchallenged evidence to that effect from the Defendant's accountants, Medina Lynch. In a letter dated 13 January 2006, they say this:

"I consider that the company is now trading responsibly in that it is entering into low risk contracts, which are generating a suitable level of profits to enable the company to discharge its liabilities.

I understand from Mr Murphy that the majority of the creditors of the company are sympathetic to the situation that currently exists and I also understand that monies being generated from works being undertaken are being utilised to discharge indebtedness to creditors across the board.

Mr Murphy has informed me that the company experienced a difficult trading period, from June 2004, due to the non-payment of certified certificates on the St Peter's RFC contract.

Due to the cash-flow difficulties that resulted from the non-payment of monies, it has not been possible to finalise the financial accounts for the years concerned.

Should the company be successful in its current action to recover outstanding certified monies then, based on the schedule of debtors and creditors provided, the company will be in a position to discharge its outstanding liabilities."

82. Accordingly, it seems to me clear that the Claimant's financial difficulties have been caused, at least to a significant extent, by the Defendants' failure to pay the sums due. This is unsurprising, given the relatively small profit margin that the Claimant company generated in its only published accounts (see paragraph 80 above). It is clear that, on the figures, the missing £134,000 odd would make a huge difference to the Claimant company's finances. Again, therefore, in the light of the principles set out in paragraphs 29-30 above, I would decline to exercise my discretion in favour of granting a stay.

83. Thirdly, it is not at all clear that, even if the Club chose to pursue its own claims against the Claimant, they would recover anything like the sums found due by the Adjudicator to the Claimant. In other words, I am not persuaded on the figures that there is a potential counterclaim, that is going to be pursued by the Club, which would get anywhere near to cancelling out the £134,000 odd found due by the Adjudicator.

84. On this point, I make two further observations. First, I am not persuaded that the Club seriously intends to pursue any arbitration against the Claimant. They issued an arbitration notice dated 9th August 2005, but have subsequently done nothing to pursue the Claimant further. It is therefore not possible to say when, or even if, a liability to repay any money on the part of the Claimant might crystallise. I note in passing that that arbitration notice was said to be from "the Club" which is, of course, an entirely meaningless description, given the points which the Defendants have taken over the last 6 months: even in pursuing their own claim, therefore, the Defendants have refused to do so in the names of all the Members.

85. More significantly, I was shown the valuation on which the Defendants now apparently rely, which purports to put a final value on the work carried out by the Claimant in the sum of £258,300 (see the last page of tab C of volume 2 of the bundle). This is to be contrasted with the certified sum which formed the basis of the Adjudicator's decisions, namely £275,738. Accordingly, on behalf of the Claimant, Mr Wynne-Griffiths made the reasonable point that, on the basis of these figures, only £17,000 odd would fall to be repaid to the Defendants, even if, which it of course denies, the Claimant had any such liability.

86. One final point arises from this comparison of the figures. In the first adjudication, the responding parties argued that any sums otherwise due to the Claimant should be reduced because of payments made to the Claimant by certain individuals. As I understand it, this point is relied on by the Defendants as part of their application for a stay. However, it seems to me that I could not possibly take such arguments into account, because they have already been considered, and rejected, by the Adjudicator. The Adjudicator decided, on the basis of the evidence that he had, that these sums should not be discounted against the sums otherwise due to the Claimant. It is not suggested that the Adjudicator did not have the jurisdiction to arrive at such a conclusion. Accordingly, in this application to enforce his decisions, it is not open to me to go behind the decisions which he reached,

or his reasons for them. Accordingly, I have had, and can have, no regard to these matters when considering the application for a stay.

87. In all the circumstances set out above, and in accordance with the principles set out at paragraphs 29-30 above, I decline to exercise my discretion in favour of a stay.

J. CONCLUSIONS

88. The Adjudicator had the jurisdiction to reach the decision that he reached in the second adjudication. For what it is worth, I consider that the Adjudicator, having enlisted the help of specialist Counsel, reached exactly the right answer. I have no doubt at all that the Adjudicator exhibited no bias or unfairness towards any of the Defendants. It was the fault of the Defendants, or their then advisers, that they deliberately chose not to raise any questions of valuation in the second adjudication.

89. Accordingly the Claimant is entitled to elect to enter judgment against the First, Second and Third Defendants, or the Fourth Defendant. It accepts that it cannot do both. It has elected to have judgment entered against the First, Second and Third Defendant. Accordingly there will be judgment against the First, Second and Third Defendants in the sum of **£134,343.84** (paragraph 21 above) together with interest. I would request the parties to agree the sum due by way of interest. As indicated at the hearing, I shall deal with all questions of costs on paper.

90. For the avoidance of doubt, I should confirm that, in my judgment, the Adjudicator had the necessary jurisdiction to reach the decision in the first adjudication. However, in all the circumstances that I have set out above, I consider that it would not be appropriate to enforce that decision. I therefore decline to do so.

Mr Ralph Wynne-Griffiths (instructed by Davies Prichard and Weatherill) for the Claimant
Mr Andrew Burr (instructed by Morgan Cole) for the Defendants