Neutral Citation Number: [2006] EWHC 1708 (TCC)

Case No: HT-06-142

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 07/07/2006

Before :

HIS HONOUR JUDGE PETER COULSON, Q.C.,

- -

Between :

	HARLOW & MILNER LTD	**Claimant**
	- and -	
	MRS LINDA TEASDALE	**Defendant**

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Ms Elizabeth Repper (instructed by **Cobbetts**) for the **Claimant**

Colin Teasdale (McKenzie Friend for the **Defendant**

Hearing dates: 07/07/06

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JUDGMENT **(No 3)**

HIS HONOUR JUDGE COULSON, Q.C.:

Introduction

1.
This is an application by Harlow & Milner Ltd ("the Claimant"), for an order for sale pursuant to CPR 73.10. It comes at the end of a long road which they have been obliged to take in order to enforce an adjudicator's decision in their favour dated as long ago as the 19th May 2005. The particular point in issue this morning illustrates the clear but sometimes harsh consequences of the system of construction adjudication introduced by the **Housing Grants Construction & Regeneration Act 1996**.

2.
Over 20 years ago the Defendant bought three terraced properties in Armley, Leeds, for £10,000 each, as part of a proposed pension plan with her husband. The properties were affected by asbestos contamination. With the help of grants from Leeds City Council ("the Council") the Defendant intended to refurbish the properties, keep two and sell the third. On the 27th May 2004 the Defendant entered into a contract with the Claimant in respect of those refurbishment works. The contract sum was £264,877.16. The grant monies promised by the Council were, I am told, £230,000, although there was no reference to this separate arrangement in the building contract.

3.
Problems arose during the carrying out of the works at the properties. Against claims for interim payments amounting to over £90,000, the Council paid directly to the Claimant just over £11,000. There were no interim certificates. No other sums were paid by the Defendant. Indeed, it is not clear how, if the Council was not going to pay the interim claims made by the Claimant, the Defendant could have made any substantial payments herself. This risk, of a shortfall between what the Claimant wanted and what the Council were prepared to pay, was, apparently, the Defendant's contractual responsibility, but it does not appear that this was appreciated by the Defendant at the time that the contract was entered into.

4.
Inevitably, as a result of the non-payment of its interim applications, the Claimant suspended work. The Claimant took its claims to adjudication. The adjudicator awarded the Claimant the vast bulk of the monies sought. This cannot have come as a huge surprise to the parties, given that the solicitors then instructed by the Defendant wrote to the adjudicator setting out reasons why any payment should be less than the amount sought by the Claimant, but not apparently disputing that sums were due and owing. Following abortive bankruptcy proceedings, the Claimant sought to enforce the adjudicator's decision in this Court. I gave judgment on that application on the 16th January 2006. That application was not opposed by the Defendant, who did not attend.

5.
The Defendant did not pay the judgment sum and I made an interim charging order. On the 15th March I made a final charging order, following a hearing when the Defendant was again not represented, but for which her (new) solicitors had written to the Court setting out her position. The Defendant sought to appeal that order, or alternatively, to stay it. That application was dismissed by the Court of Appeal on Monday the 3rd July.

6.
Accordingly, in the light of the Defendant's on-going refusal, or inability, to meet the judgment sum, the Claimant now seeks an order for sale arising out of the final charging order. The amount now due is put at £108,356.10 with interest accruing at £22.90 per day. The Defendant is today represented by

Mr Colin Teasdale, her husband, who also acted on her behalf before the Court of Appeal. The Claimant is represented, as it was on the last occasion before me, by Ms Elizabeth Repper of Counsel.

7.
The issues that have arisen seem to me to fall into four categories:

a)
Whether or not I have the jurisdiction to make the selling order sought;

b)
If I do have the necessary jurisdiction, whether the Defendant is entitled to make any submissions at all on this application;

c)
Whether I should exercise my discretion in favour of the Claimant's application;

d)
Whether there should be a stay of any order of sale.

I deal with each point below:

Jurisdiction

8.
The application is made under CPR rule 73.10. The relevant parts of that read as follows:

"(1) Subject to the provisions of any enactment, the court may, upon a claim by a person who has obtained a charging order over an interest in property, order the sale of the property to enforce the charging order.

(2) A claim for an order for sale under this rule should be made to the court which made the charging order, unless that court does not have jurisdiction to make an order for sale.

(A claim under this rule is a proceeding for the enforcement of a charge, and section 23(c) of the County Courts Act 1984 provides the extent of the county court's jurisdiction to hear and determine such proceedings)."

It would, therefore, seem to follow that, because this Court made the interim and final charging orders, this Court also has the jurisdiction to make an order for sale.

9.
However, as Ms Repper properly pointed out to me, the relevant practice direction, at paragraph 4.2, provides that a claim in the High Court for an order for sale of land to enforce a charging order must be started in Chancery Chambers at the Royal Courts of Justice, or a Chancery District Registry. There would, therefore, appear to be a conflict between the rule, which gives this Court power to make the order sought, and the practice direction, which suggests that the power resides only in the Chancery Division.

10.
In my judgment there can be no doubt that this Court has the jurisdiction to make the order sought by the Claimant. Rule 73.10(2) admits of no other interpretation. This Court made the charging order; this Court, therefore, has the jurisdiction to make the order for sale. To the extent that there is a conflict between the rule and the practice direction, the Court Of Appeal has repeatedly made it plain

that, in such circumstances, it is the rule that must apply. The practice directions have been described as “at best a weak aid to the interpretation of the rules themselves” (see May LJ in **Godwin v Swindon Borough Council**[2004] 4 All ER 641) which should “yield to the CPR where there is a clear conflict between them” (see Auld LJ in **R (Mount Cook Land Ltd) v Westminster City Council** [2003] ECWA Civ 1346).

11.
To the extent that it is relevant, I also accept Ms Repper’s submission that it would contrary to the overriding objective in CPR 1.1 to decline to deal with the application for an order for sale, when that is the obvious consequence of the earlier orders made by this Court and the Defendant’s on-going failure to pay the judgment sum.

12.
In addition, and for completeness, I note that paragraph 17.2.3 of the second edition of the TCC Guide provides as follows:

“Where orders are required or sought to support enforcement of a TCC judgment or order, a judge of the TCC is the appropriate judge for that purpose. If available, the judge who gave the relevant judgment, or made the relevant order is the appropriate judge to whom all applications should be addressed.”

I adopt that approach. For all these reasons, therefore, I conclude that I have the necessary jurisdiction to make the order sought.

The Defendant’s Procedural Position

13.
Ms Repper submits that the Defendant is in procedural difficulties in respect of this application because

a)
She has failed to acknowledge service, contrary to CPR rule 8.3(1)(a);

b)
She can, therefore, only take part in this hearing with the permission of the Court;

c)
She has not filed any evidence in accordance with CPR 8.5(3).

14.
Ms Repper is right on all these points. Notwithstanding that, as I made clear in argument, I concluded that I should grant the Defendant permission to take a full part in this hearing and, through her husband, make all the points that she wished to in respect of this application. To that end, therefore, I should say that I have read the two Lever Arch files of documents that the Defendant has provided to the Court, and I have considered the submissions that have been made on her behalf. The real issue is whether that material and those submissions should lead me to exercise my discretion against making the order for sale.

Discretion

15.
The particular issues as to discretion seem to me to be these:

a)
Question 1: Does the fact that there is an on-going arbitration between these parties mean that, in the exercise of my discretion, no order for sale should be made?

b)
Question 2: Should I exercise my discretion against making the order for sale to preserve the evidence necessary for the proper disposition of the arbitration?

c)
Question 3: Are there any other facts relevant to the exercise of my discretion under RSC 73.10?

16.
As to question 1, the answer is, in my judgment, no different to the position as it was on the 15th March, when the fact of an on-going arbitration was being relied on by the Defendant's then solicitors to resist the application that the charging order be made final. I pointed out that this was a wholly insufficient ground on which to oppose the application. I referred to the various decisions by the Court of Appeal under the 1996 Act, including **Macob Civil Engineering v Morrison Construction** [1999] BLR 93 and **Bouygues (UK) v Dahl-Jensen (UK)** [2000] BLR 522. Both of these cases are authority for the proposition that the decisions of adjudicators must be peremptorily enforced. At paragraph 6 of my judgment on the 15th March, I said:

"The Defendant is not entitled to ignore the judgment of this court and to delay her payment to the Claimant in the hope that 'something may turn up'. Her solicitor's suggestion that the Charging Order should in some way be suspended, until the result of the arbitration is known, would wholly undermine the adjudication process. If it were right, it would mean that any party who was on the receiving end of an adjudicator's decision could, if they wanted to avoid the result, commence arbitration proceedings against the successful party, and then argue that the adjudicator's decision should abide the eventual outcome of that arbitration. It was precisely to avoid such delaying tactics that the statutory adjudication process was created in the first place. "

17.
That was the main reason for my decision to make the charging order final. It was against that Judgment that the Defendant's application to appeal was refused at the beginning of this week. It seems to me that that principle is equally applicable to the present claim for an order for sale.

18.
I should add that there are a number of authorities which make it clear that a party who is ordered to make a payment, pursuant to an adjudicator's decision, cannot seek to avoid making such payment by setting off other claims that it has or might have: see, for example, the two decisions of His Honour Judge Gilliland (sitting as the TCC judge in Salford) in **MJ Gleeson Group plc v Devonshire Green Holding Ltd** (19th March 2004) and **David McLean Contractors Ltd v The Albany Building Ltd** (10th November 2005). More recently, in **Interserve Industrial Services Ltd v Cleveland Bridge (UK) Ltd** [2006] EWHC 741, Jackson J. held that Cleveland Bridge could not set off, against an adjudication decision that it had lost, its actual or anticipated recovery in another, later adjudication between the same parties. He said, at paragraph 43 of his judgment:

"Where the parties to a construction contract engage in successive adjudications, each focused upon the parties' current rights and remedies, in my view the correct approach is as follows. At the end of each adjudication, absent special circumstances, the losing party must comply with the adjudicator's decision. He cannot withhold payment on the ground of his anticipated recovery in a future

adjudication based upon different issues. I reach this conclusion both from the express terms of the Act, and also from the line of authority referred to earlier in this judgment."

19.
I respectfully agree with that conclusion. I note that it was recently followed by His Honour Judge Toulmin CMG QC in **Hillview Industrial Developments (UK) Ltd v Botes Building Ltd**[2006] EWHC 1365 (TCC). I also note that all these decisions went against parties who were in the same position as (or a stronger position than) the Defendant in the present case. She simply has a claim in the relatively early stages of arbitration. If, for example, a party who has a claim that accrued after the adjudicator's decision cannot set that off against the decision that went against him (**Gleeson**, cited with approval in **Interserve**), then a fortiori a party who simply has the hope of an arbitrator's award somewhere down the line cannot be entitled to set off that hope against the sum due pursuant to a binding adjudicator's decision.

20.
Standing back from the authorities for a moment, it is worth considering what the effect would be if I acceded to the Defendant's request not to make the order for sale because of the on-going arbitration. It would mean that any unsuccessful party in adjudication would know that, if they refused to pay up for long enough, and started their own arbitration, they could eventually render the adjudicator's decision of no effect. It would be condoning, in clear terms, a judgment debtor's persistent default, and its complete refusal to comply with the earlier judgment of the Court. For those reasons, it is a position which I am simply unable to adopt.

21.
As to the present arbitration itself, I note that the parties have completed the pleadings stage. Experts' reports will shortly be exchanged. No hearing date has been fixed, but a date in November this year has been mooted as a possibility. The issues between the parties will not, therefore, be the subject of an arbitrator's award until the end of this year or early next at the earliest. There may, of course, then be a further appeal to this Court. Final resolution of the issues between the parties is, therefore, still some way off.

22.
There are no particular features of the parties' respective cases in the arbitration which would lead me to conclude that I should not exercise my discretion in favour of the Claimant on its application today. The Defendant says that she is confident of winning in the arbitration and I understand that, but there is no admission by the Claimant or preliminary finding by the arbitrator that could provide independent support for the Defendant's assertion. Indeed, it is right to note that, on the face of the pleadings, the Defendant appears to accept that a sum of just over £30,000-odd is due to the Claimant in any event. That is, therefore, a point in favour of the Claimant, because it means that, according to the arbitration pleadings, the parties are agreed that the Claimant is entitled to a substantial sum.

23.
As to question 2 (preserving the evidence), I note the following:

a)
The properties are not the Defendant's home. They are investment properties.

b)
The properties are the subject of the disputed construction works. The precise condition, state of the works and the defects alleged are the subject of three detailed reports which, I am told, have already

been prepared on behalf of the Defendant. Those reports can only have been prepared as a result of a detailed inspection of the buildings. I understand that the Claimant's experts are undertaking a similar investigative/inspection exercise in the coming week.

c)
The order sought envisages that the properties would not be handed over to the Claimant until the 4th August, over a month from now. Accordingly, any further detailed inspections, including any inspection considered necessary by the arbitrator himself, and any videos or CDs of the interior or exterior of the properties, could be carried out and completed during the forthcoming month.

24.
Accordingly, it seems to me that the order sought allows the Defendant to preserve all the evidence within the properties for inspection, and the making of any additional permanent record of their present state and condition, during the next month. The terms of the order sought do not, therefore, cause any irredeemable injustice to the Defendant in respect of the preservation of the evidence.

25.
That leaves question 3 on discretion, namely whether there are any other matters which should lead me to exercise my discretion against making the order sought.

26.
I have been carefully through the notes at paragraph 73.10.1 of the White Book. For obvious reasons, those notes appear to differentiate between orders for sale of a defendant's home (which are exceptional) and orders for sale for what are described as second homes or investment properties (which are more common). It seems to me that, because:

a)
This is not the matrimonial home, but three investment properties;

b)
The Defendant is in contumelious default because she has refused to pay a judgment sum for reasons which do not, in law, justify such non-payment;

c)
The financial reality appears be that the judgment debt will not be paid without a sale;

d)
The value of the property is said to be £130,000, so that the amount of the increasing judgment debt is approaching the value of the property;

the available evidence leads me again to conclude that the right exercise of my discretion is in favour of granting the order for sale sought. There is a further factor, referred to at paragraphs 28/29 below, which also leads to that conclusion.

Stay

27.
The final issue is whether or not there should be a stay of the order for sale. Ms Repper argued strongly that there should not be; that such a stay would frustrate the whole point of the adjudication and enforcement process. For the reasons previously set out, I accept that submission.

28.

In addition, I consider that there is another, separate reason why the sale may well be the best course in all the circumstances. Based on all that I know about this case, it seems to me to be unrealistic to believe that the Defendant could ever be in a position to employ another contractor to carry out the remainder of the works, so that the necessary Clean Air Certificates could be issued by the Council, and the remainder of the grant monies (however much that is) could then be released. The original contractual scheme was flawed because it appeared to impose upon the Defendant a liability for any shortfall between what the Claimant wanted, and what the Council would pay. Any remedial scheme will suffer from the same defects and be exacerbated by the problems that have been suffered so far.

29.
The remaining works at the properties could have been carried out over the last 14 months. They have not been, and I can only conclude that that is because, for perfectly understandable reasons, the Defendant is simply unable to finance the letting of another contract to another contractor. It seems to me that the position will be no different after the arbitration, whether the Defendant wins or loses that arbitration. She would still have to face the same financial difficulties in completing the works as she does now. Accordingly, I conclude that it is, in the round, in the Defendant's best interests for the properties to be sold. The order for sale should not, therefore, be stayed.

30.
I considered whether or not the sale money should be paid into Court to abide the award in the arbitration, thus achieving a stay of execution in a different way, but, in accordance with the guidelines set out in **Wimbledon Construction v Vago** [2005] BLR, 374, no such order would be justified. There is no evidence that the Claimant would not be able to pay back any sums which the arbitrator might award to the Defendant. I am told that the Claimant currently has a balance sheet surplus of £750,000 and Mr Milner, who is in Court today, is the third generation to run the company.

31.
Accordingly, for all those reasons, I do not consider that any sort of stay in this case is appropriate.

The Terms of the Order Sought

32.
The Claimant seeks an order that includes the following terms:

"1. The remainder of this order will not take effect if the Defendant does by 4 p.m. on the 21st July 2006 pay to the Claimant the judgment debt of £108,356.10 together with interest on the judgment debt at a rate of £22.90 per day from the date of this order until payment is received by the Claimant together with costs…

2. The property shall be sold without further reference to the Court at a price of £130,000 unless that figure is changed by further order of the Court…

5. The Defendant must deliver possession of the property to the Claimant on or before the 4th August 2006.

6. The Claimant shall first apply the proceeds of the sale of the property;

6.1 To pay the costs and expenses of effecting the sale; and

6.2 To discharge any charges or other securities over the property which have priority over the charging order.

7. The Claimant shall then

7.1 Retain the amount due to him as stated in paragraph 1; and

7.2 Pay the remaining proceedings of sale to the Defendant.

8. Any party may apply to the Court to vary any terms of this order, or for further directions about the sale of the application of the proceedings of sale or otherwise."

33.
For the reasons which I have already explained, it seems to me that the terms of the order sought provide sufficient time for the Defendant to arrange for any further inspections or records to be made of the properties for the purposes of the arbitration. Of course, the order also seeks, quite properly, the payment of the judgment sum without the need to sell the properties. It seems to me that, for all the reasons set out above, I should make an order in the terms sought.

34.
There is one potential exception. That is the reference to the figure of £130,000. It seems to me that that figure should be in the order that I make today, since that is the only evidence as to a realistic sale price with which I have been provided. However, it seems to me that the Defendant ought to be entitled to obtain advice and to make any further representations to the Claimant, and if appropriate, the Court, that she might want as to the sale price. If, prior to the 4th August, there is a dispute between the parties as to the right sale price, then, it seems to me, that is a matter which ought to be referred back to the Court and, if appropriate, the figure of £130,000 included in the order that I make today can then be varied.

35.
Finally, I should say that whilst I have considerable sympathy for the Defendant, and much admiration for her husband's clear presentation today of the difficulties in which they now both find themselves, I have concluded, from the information available to me, that these difficulties stem, not from the adjudication, but from the way in which the contractual arrangements were set up in the first place. The absence of any contractual nexus between the ultimate payer (Leeds City Council) and the ultimate payee (the Claimant), with the Defendant stuck between them, meant that what happened was always a very real possibility. It was, as I put to Mr Teasdale in argument, an accident waiting to happen.