IN THE HIGH COURT OF JUSTICE Claim No.HT-06-204

QUEEN'S BENCH DIVISION

TECHNOLOGY AND CONSTRUCTION COURT

[2006] EWHC 2857 (TCC)

Royal Courts of Justice

3rd November 2006

Before:

HIS HONOUR JUDGE PETER COULSON QC

B E T W E E N :

HART INVESTMENTS LTD. Claimant

- and -

FIDLER & Anor. Defendants

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MR. A. BUTLER (instructed by Hunt & Hunt, Romford) appeared on behalf of the Claimant.

MR. B. QUINEY (instructed by Arif Anwar, Liquidator) appeared on behalf of the Second Defendant.

Hearing Dates: 27th October, 3rd November 06

J U D G M E N T

(As approved by the Judge)

JUDGE PETER COULSON QC:

INTRODUCTION :

1 In November 2002 the Claimant ("Hart") engaged the Second Defendant in the main action ("Larchpark") to carry out extensive building works at a property known as Queen's Lodge, 53-55 Queen's Avenue, Muswell Hill in North London. The First Defendant ("Fidler") provided engineering services in respect of the works, although there is an important issue as to which of the parties he was actually working for at the relevant time. On 5th February 2004 a large part of the flank wall of the property collapsed.

2 The collapse has directly and indirectly given rise to three separate sets of proceedings which have now been transferred to this court and have been assigned to me. They are:

(a) An action originally commenced in the Romford County Court and later transferred to Central London County Court in which Hart alleged trespass on the part of Larchpark in wrongfully remaining at the property until February 2005. In those proceedings Larchpark counterclaim the sum of £145,192.52 arising out of an adjudicator's decision in their favour dated 18th April 2005;

(b) An action, again started in the Romford County Court and transferred to Central London County Court, in which Hart seek a restraining order against Fidler in respect of his house, as a result of his potential liability to Hart and a threat to dissipate his assets;

(c) The main action, issued in the TCC on 13th July 2006, in which Hart claims damages estimated to amount to at least £700,000 against both Fidler and Larchpark arising out of the collapse itself.

3 In the main action Hart obtained judgment in default against Larchpark on 31st July 2006. Larchpark seek to set aside that judgment. That is the first application before me now. In addition, Larchpark seek summary judgment on their counterclaim. Essentially, that second application amounts to an application to enforce the adjudicator's decision of 18th April 2005. Both applications are resisted by Hart.

4 There was a wide variety of issues canvassed before me on these two applications and the bundles for the hearing were not all that they might have been. I am therefore particularly grateful to both counsel for the clarity of their written and oral submissions.

APPLICATION 1: SETTING ASIDE THE JUDGMENT IN THE MAIN ACTION :

1.1 The Facts:

5 On Thursday, 13th July 2006 Hart issued a claim form in the main action in the TCC. The following day, Friday, 14th July, their solicitors sent a fax to the liquidator of Larchpark purporting to serve a claim form and particulars of claim in the main action. The response pack was said to be coming in the post. It is agreed that this fax was received by the liquidator before 4 pm on Friday, 14th July. At the same time, Hart's solicitors faxed a second letter to the liquidator seeking his consent to transfer the two sets of proceedings in the county court, including all outstanding interlocutory applications, to the TCC.

6 The claim form, particulars of claim and response pack were also served by post on Friday, 14th July. They were actually received by the liquidator on Monday, 17th July. Larchpark's acknowledgement of service was sent by fax to the court on 1st August 2006, which was a Tuesday. The defence was served on 13th August. It was only after the defence had been served that the liquidator discovered that judgment in default had been entered against Larchpark on 31st July 2006. The default was specified as the failure to file an acknowledgement of service within 14 days of the date of service which, according to Hart's certificate of service, was said to have occurred on 14th July 2006.

1.2 The Relevant Provisions Of The CPR:

7 It seems to me that the following provisions within the CPR are relevant to this application:

(a) Service by Post:

CPR 6PD3.1(1) provides that if service by fax is to be validly effected, a party or his legal representative "must previously have expressly indicated in writing to the party serving… that he is willing to accept service by electronic means." Paragraph 3.1(2) goes on to say:

> "The following shall be taken as sufficient written indication for the purposes for para.3.1(1) –
>
> "(a) a fax number set out on the writing paper of the legal representative of the party who is to be served; or
>
> (b) a fax number, email address or electronic identification set out on the statement of case or a response to a claim filed with the court."

(b) Service of Response Pack:

CPR 7.8(1) provides that where particulars of claim are served on a defendant:

> "they must be accompanied by –
>
> (a) a form for defending the claim;
>
> (b) a form for admitting the claim; and
>
> (c) a form for acknowledgement of service."

These are the documents which are commonly referred to as 'the response pack'.

(c) Service by Post:

CPR 6.7 provides that, where documents are served by post, the date on which service is deemed to have occurred is "the second day after it was posted." According to the notes in Volume 1 of Civil Procedure at para.6.7.2, there is conflicting Court of Appeal authority as to whether "day" includes or excludes Saturday or Sunday. That is a point with which I deal in greater detail below.

(d) Acknowledgement of Service:

CPR 10.3(1) provides that an acknowledgement of service must be filed 14 days after service of the claim form.

(e) Entering Judgment in Default:

Judgment in default may be entered if an acknowledgement of service has not been filed by the end of the 14 day period referred to above (CPR 12.3(1)(b)). This is an administrative exercise carried out in this court by the TCC Registry, which relies entirely upon a valid certificate of service and the accuracy of the date of service entered on that certificate (CPR 12PD4.1(1)). CPR 13.2(a) provides that a default judgment must be set aside if the relevant period for the filing of an acknowledgement of service had not, in fact, expired when the acknowledgment was filed.

(f) Setting aside a Default Judgment:

A judgment obtained in default may be set aside in two circumstances, one mandatory and one discretionary. CPR 13.2 provides that a default judgment must be set aside if the acknowledgement of service was filed within the period of 14 days from the service of the claim form. CPR 13.3.1(a) provides that a

default judgment may be set aside as a matter of discretion if the defendant has a real prospect of successfully defending the claim. The test is analogous to that under CPR Part 24. The question is whether the defence raises "an unwinnable case where a continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides": see ***Harris v. Bolt Burden*** [2000] L.T.L. February 2nd 2000, cited by Potter L.J. in ***Partco Group Ltd. & Anor. v. Wragg & Anor***. [2002] 2 Ll.Rep, 343 (Court of Appeal). Further, CPR 13.3.1(b) provides that a default judgment may also be set aside as a matter of discretion if there is "some other good reason" for doing so.

8 Accordingly, it seems to me that I must first determine whether the judgment entered in default was invalid or irregular and therefore must be set aside pursuant to CPR 13.2(a). That in turn depends on when I conclude that service was properly effected. If the default judgment is not irregular and not a nullity I must then go on to decide whether, in the exercise of my discretion, I should set aside the default judgment anyway, either because Larchpark have a real prospect of successfully defending the claim, or because there is some other good reason for doing so.

1.3 When Was Service Properly Effected?

9 On behalf of Hart, Mr Butler maintains that service by fax was properly effected on Friday, 14th July, and that, therefore, certainly by Monday, 31st July, the 14 days for the acknowledgement of service had expired and the claimant was entitled to judgment in default. Mr. Quiney on behalf of Larchpark maintains that service by fax was invalid and that therefore valid service in this case was by post. He maintains that the deemed date of service by post was Tuesday, 18th July, and that accordingly the filing of the acknowledgement of service on Tuesday, 1st August was within the required 14 days. Mr. Butler accepts that if, which he disputes, service was not validly effected until Tuesday, 18th July, the acknowledgement of service was filed in time. However, he submits that if service was by post, then the deemed date of service was Sunday, 16th July, which meant that the acknowledgement of service was still filed too late.

10 Mr. Quiney maintains that service by fax was not proper service because, contrary to CPR 6PD3.1 Larchpark's liquidator had not "previously … expressly indicated in writing" to Hart that he was "willing to accept service by electronic means". He relied on the decision of the Court of Appeal in ***Molins Plc v. G.D. SpA*** [2000] 1 WLR, 1741, where at paras.24 and 25 of his judgment Aldous L.J. said:

> "24 … The Civil Procedure Rules 1998 permitted for the first time service of proceedings by fax. Paragraph 3.1(1) sets out the requirements for service by fax upon a party such as the claimant. That must be read together with para.3.1(3)(a) which lays down when a fax number can be

taken as a sufficient written indication for the purposes of para.3.1(1). Thus a party such as the claimant must have indicated in writing that he is willing to accept service by fax and the fax number to be used. If a fax number is provided in writing expressly for the purpose of accepting service then that is deemed to be sufficient written indication of a willingness to accept service by fax.

25 In the present case the intention of the defendant to issue proceedings was concealed from the claimant. The claimant had no reason to indicate that it would or would not accept service by fax. Nor did it provide its fax number expressly for the purpose of accepting service. The suggestion that the inclusion of a fax number in a heading or on writing paper amounts to an indication in writing of willingness to accept service of legal documents by fax is contrary to the clear meaning of the Practice Direction and common sense. If inclusion of a fax number on writing paper were to be sufficient then the Practice Direction would have said so without more ado. Further, the meaning of para.3.1(1) is confirmed by 3.1(3), which expressly provides that a fax number on writing paper of a legal representative of a party to be served is sufficient. If that were to be the case for the party itself, then there would be no need to make such a specific provision in the case of a legal representative."

11 Hart maintain that Mr. Proctor, the man in the liquidator's legal department who was dealing with the claim on behalf of the liquidator, was Larchpark's legal representative and that the inclusion of a fax number on the liquidator's notepaper was a sufficient indication of a willingness to be served by fax in accordance with CPR 6PD3.2(a). In the alternative, Hart say that the liquidator's use of a fax number on a document sent to Central London County Court indicating that the previous solicitors had come off the record and had effectively been replaced by the liquidator was sufficient notice under CPR 6PD3.2(b).

12 I reject both of Hart's submissions on this point. As to para.3.2(a) of the Practice Direction, it seems to me that Mr. Proctor was working for the liquidator who had effectively stepped into the shoes of Larchpark. Although he was in the liquidator's legal department, Mr. Proctor did not hold himself out to be Larchpark's legal representative, nor is he described as such in any document emanating from the liquidator, Hart's solicitors or the various courts in which these actions have been managed. In my judgment, the reference to "legal representative" in 6PD3.2(a) is a reference to a person who is retained by a client to give it legal advice and to represent it in the proceedings in question. Mr. Proctor was not in such a position. He was part of the liquidator's organisation, and therefore, prima facie, part of the client. He was not, and has not represented himself to be, the client's legal representative. As to para.3.2(b) of 6PD, the provision is specific. The indication must be given in a statement of case or a response to a claim filed with the court. It is not suggested that an

indication of willingness to accept service by fax was included in any such document in this case. The highest that Mr. Butler could put it was the reference to the liquidator's fax number on the formal document announcing the coming off the record of Larchpark's previous solicitors. I consider that document is actually against him because, on any fair reading of it, it is clear that the address that is specified in that letter by the liquidator for service purposes is the postal address, not the fax number.

13 More widely, I am also bound to note that Hart's solicitors use notepaper with a fax number but with an express disclaimer at the bottom that service by fax is not accepted. Thus, it seems to me that they are seeking to stretch the envelope of 6PD3.1(2) in a particular way against a liquidator, not another firm of solicitors, when, doubtless for good reason, they would not allow others to serve documents by fax on them. For all those reasons and in accordance with the principles set out by Aldous L.J. in ***Molins***, it seems to me that there was no acceptance by Larchpark of a willingness to accept service by fax.

14 For those reasons I have concluded that Mr. Quiney is right and that the purported service by fax in this case was invalid. As a result of that conclusion it is unnecessary for me to consider in any detail Mr. Quiney's second point, to the effect that the failure to include the service pack in the fax of 14th July meant that, even if there was a prior indication of willingness to accept service by fax pursuant to 6PD3.1.1, service by fax was still not effective, at least until the response pack was served. However, I should indicate that, in my judgment, the absence of the service pack did not invalidate service as such: see the Court of Appeal decision in ***Hannigan v. Hannigan*** [2000] 2FCR, 650, and the decision of Christopher Clarke J. in ***Asia Pacific UK Ltd. & Ors. v. Hanjin Shipping Co. Ltd. & Ors***. [2005] EWHC 2443 (Comm).

15 Further, neither of those cases indicate that the failure to serve a response pack delays effective service until the service of the pack itself, and I do not believe that it would be right for me to express a concluded view on that issue. But it does seem to me that the failure by a claimant to serve a response pack on a defendant such as the liquidator in the present case, who is not represented by solicitors, would be a matter which the court would be bound to take into account when considering whether or not to set aside the judgment as a matter of discretion under CPR 13.3. That omission must be of particular significance where, as here, the judgment was entered because of an alleged failure to send back part of that same response pack (i.e. the acknowledgement of service) within 14 days. Accordingly, I consider that I am bound to take this omission into account in exercising my discretion in Larchpark's favour pursuant to CPR 13.3.1(b).

16 As a result of my conclusion that service by fax was ineffective the parties are agreed that effective service was achieved by post. There is then an important

further dispute as to when the relevant date for service by post should be deemed to have occurred. Hart maintains that in accordance with CPR 6.7, because the documents were posted on Friday, 14th July, the effective date for service was deemed to be the second day after those documents were posted, namely Sunday, 16th July. Larchpark say that the second day after it was posted has to be calculated by excluding the Saturday and Sunday, so that effective service must be deemed to have occurred on Tuesday, 18th July. This would then mean that their acknowledgement of service was filed in time. The parties are agreed, quite correctly in my view, that the date on which the documents were actually received in the post is irrelevant for the purposes of CPR 6.7.

17 As previously indicated, the notes in Volume 1 of Civil Procedure at para.6.7.2 indicate that the correct way to calculate the two day period is not free from doubt. The paragraph refers to the decision of the Court of Appeal in ***Godwin v. Swindon Borough Council*** [2001] EWCA Civ. 1478. There was a range of issues in that case. However, as part of their reasoning, the Court of Appeal calculated the two days without including Saturday and Sunday. The notes make clear that in another case in 2002, namely ***Anderton v. Clwyd*** [2002] EWCA Civ. 933, the Court of Appeal concluded that the calculation of the two days should not disregard the weekends and that the reference to 'day' in CPR 6.7 meant a calendar day. After the hearing of these applications last Friday, I was helpfully provided with copies of both these cases. I am bound to say that they are quite impossible to reconcile. Indeed, in ***Anderton*** Mummery L.J. made it clear that the Court of Appeal had considered the remarks in ***Godwin*** to the effect that the two days excluded Saturday and Sunday and expressly disagreed with that conclusion (see para.42 of his judgment). He also noted that the result in ***Anderton*** could be called "surprising".

18 Having considered these two judgments carefully, it seems to me that I am bound by the decision of the Court of Appeal in ***Anderton***. I cannot follow ***Godwin*** on this point, no matter how much I might want to, because it seems to me that I am bound by what Mummery L.J. said about ***Godwin*** in his detailed judgment in ***Anderton***. Thus, whilst I also consider it to be a surprising result, I am obliged to find in the present case that the deemed date for service of the claim form was Sunday, 16th July. Accordingly, the acknowledgement of service was filed more than 14 days after the effective date for service and was therefore out of time.

1.4 Other Points On The Regularity Of The Default Judgment:

19 Mr. Quiney complains that, even if service was deemed to have been validly effected on Sunday, 16th July, the default judgment was still irregular because

(a) the certificate of service relied on said that the date of service was 14th July, which was the wrong date;

(b) the request for a default judgment was made on 28th July, which was too early, even if the date of service had been 14th July, which it was not. A proper request could not have been made until Monday, 31st July at the earliest.

20 Of course, these are unashamedly technical points, but then, as demonstrated by the drafting of CPR 6.7 (the amendment of which Mummery L.J. said in ***Anderton*** should be considered) and the existence of two conflicting decisions of the Court of Appeal, this area of practice and procedure regrettably abounds with such points. Indeed, it might be said that it is the technical (and not the logical or sensible) result of the CPR that a claim form can be deemed to have been validly served by post on a Sunday, before the document had been or could have been received. Against that background, I have concluded that for a judgment in default to be valid, it must be based on a correct certificate of service and a valid request for a default judgment. In this case the certificate of case contained the wrong date and the request for the default judgment was plainly premature and thus invalid when it was filed. I have therefore decided that the default judgment was obtained by irregular means and should be set aside. Perhaps equally importantly, I have concluded that, even if I am wrong about that and the default judgment was still valid, I should take these same matters into account in the exercise of my discretion under CPR 13.3.1(b) (see para.22 below).

21 By way of a separate submission Mr. Quiney argued that on the basis of the decision in ***Lazard Brothers & Co. v. Bank Industrielle de Moscow*** [1932] 1 KB, 617 (CA), the mere fact of Larchpark's liquidation was, on its own, sufficient to justify setting aside judgment. I reject that submission. It seems to me that Mr. Butler was right to point out that the ***Lazard Brothers*** case concerned a company that had been dissolved, so that judgment had been entered against a non-existent entity. It seems entirely logical that such a judgment should be set aside as of right. But Larchpark have not been dissolved; they are simply in liquidation. The principle is thus of no application.

1.5 The Exercise of Discretion:

22 If I was wrong in my conclusion as to the ineffective service by fax and/or wrong that the judgment in default was irregular and/or invalid, I would, in any event, exercise my discretion in Larchpark's favour and set aside the default judgment pursuant to CPR 13.3.1(a) and (b). As to 13.3.1(b), I make plain that in my view the matters set out above in paras.15 (service by fax) and 17-20 (service by post and the background to the default judgment) constitute "any other good reason" for setting aside the default judgment. In particular:

(a) There was clear confusion over whether or not service had been or could be validly accepted by fax. The liquidator should be treated by the court with the same concern for justice and fairness as a litigant in person. Given the admitted absence of a response pack until the start of the following week, it would, I think,

be unjust in the circumstances to allow the default judgment to stand when that judgment rests entirely upon the failure to return timeously one part of that self-same response pack.

(b) Although a matter of much less significance, it seems to me that the fact that the Court of Appeal have been unable to agree whether or not Saturdays and Sundays are to be included or excluded from the calculation of the deemed service period is not to be ignored, given that, although this court is bound by the "surprising" result in the later of the two relevant decisions, in accordance with the earlier decision, the judgment in default would have been invalid.

(c) If the default judgment was regular/valid, it should still be set aside as a result of what I consider to be Hart's solicitors' unreasonable conduct in filing an incorrect certificate of service and a request for a default judgment which was, on any view, premature. This unnecessarily aggressive conduct is, in my judgment, made worse by the fact that it was directed against a liquidator acting in person, not another firm of solicitors.

(d) In all the circumstances set out above, I consider that it would be contrary to the overriding principle (CPR 1.1) if I did not set aside the default judgment pursuant to CPR 13.3.1(b).

23 Larchpark, of course, have another important submission by reference to CPR 13.3.1. This argument relies on CPR 13.3.1(a), to the effect that Larchpark have a real prospect of successfully defending this claim on the basis that the collapse occurred, not because of their bad workmanship, but because of the design of the works themselves. They maintain that they had no responsibility for the design of the structural elements of the work, for which the first defendant, Mr. Fidler, was liable. On the face of it, that seems to me to be a point with a realistic prospect of success, and should also lead me to exercise my discretion in favour of setting aside the default judgment.

24 Mr. Butler raises two points on behalf of Hart to counter that submission. The first is to argue that, on the face of Larchpark's defence, it appears to be admitted that Mr. Fidler was employed by Larchpark, so that Larchpark are effectively admitting responsibility for any design errors that he may have made. I do not accept that this is a fair reading of Larchpark's defence. I find that they clearly distinguish there between their role as contractors and the designer performed by Mr. Fidler. Indeed, if it was Hart's case that Mr. Fidler was an employee of Larchpark, there would have been no room or need for Hart's separate claim against Mr. Fidler at all. The alleged distinction between Larchpark and Mr. Fidler is inherent in Hart's own case and it is emphasised, as one might expect, in Larchpark's defence. It seems to me that it is a point which naturally gives rise to a realistic prospect that one or other of these defendants will be found not liable for the collapse at the trial.

25 Mr. Butler's second submission on CPR 13.3.1(a) had rather more force. By reference to the decision in ***Regency Rolls v. Carnell*** (2000) EWCA 379 he says that the court should not exercise its discretion in setting aside the default judgment because of the delay in the making of the application to set aside. In ***Regency Rolls*** the defendant waited 30 days before making the application, and the Court of Appeal held that this was too long a delay to permit the application to be entertained. In the present case, Larchpark waited 59 days before making the application, which was, as Mr. Butler submitted, too long for the court now to exercise its discretion in their favour.

26 It seems to me that Larchpark's delay in the making of the application to set aside is very much at the outer edge of what could possibly be acceptable. However, I must be bear in mind two important matters:

(a) Larchpark do not have solicitors to advise them. They are, through the liquidator, essentially acting as a litigant in person, albeit one with some legal expertise;

(b) At the time that it was entered, the judgment in default was only one procedural aspect of this case. There was also the transfer to this court of the two actions from Central London County Court, and the outstanding applications for summary judgment and security for costs in those two actions. These interlocutory matters (including the judgment in default) were all going to be canvassed, and were indeed canvassed, at the directions hearing before me on 9th October 2006. In view of all that interlocutory activity and the delays created by the transfers to this court, it seems to me that Larchpark cannot be blamed for the entirety of the delay in issuing the application.

27 Thus, whilst I consider that there was some delay in the making of the application to set aside, I conclude that any such delay should not ultimately affect the exercise of my discretion in Larchpark's favour pursuant to CPR 13.3.1(a).

1.6 Conclusions On Setting Aside:

28 For these reasons, therefore, I conclude that the judgment in default is a nullity and/or irregular and I should set it aside pursuant to CPR 13.2. That is a mandatory requirement. In the alternative, I consider that the facts and matters set out at paras.15, 17-20 and 22 above constitute any other good reason pursuant to CPR 13.3 and justify the exercise of my discretion in favour of Larchpark in setting aside the judgment pursuant to CPR 13.3(b).

29 In addition, and for entirely separate reasons, as set out in para.23 above, I have concluded that I should exercise my discretion in favour of setting aside the default judgment pursuant to CPR 13.3.1(a). I consider that Larchpark's defence

has a reasonable prospect of success and that this is inherent in the make-up of Hart's claim. Depending on the findings of fact at trial, it is a realistic prospect that one or other of these defendants will not be liable in law for the collapse. Whilst there was a delay in the making of the application to set aside, I consider that, in all the circumstances that I have articulated, this delay should not lead me to decline to exercise my discretion in favour of Larchpark pursuant to CPR 30.3.1(a). The default judgment will therefore be set aside.

APPLICATION 2: THE ENFORCEMENT OF THE ADJUDICATOR'S DECISION :

2.1 The Facts:

30 On 1st November 2002 Chinmans, acting on behalf of Hart, sent Larchpark a letter of intent. That letter contained the following provisions:

> "We write as agent on behalf of the client, Hart Investments Limited, to advise you that it is their intention to enter into a contract with you for the structural works required to be carried out at Queen's Lodge, 53-55 Queen's Avenue, Muswell Hill, London N.10. The contract to be entered into will be the JCT intermediate form of building contract 1998 edition, incorporating amendments 1-4 inclusive …
>
> Upon receipt of your acceptance of the terms set out in this letter, Larchpark Limited are authorised to proceed with all activities to comply with the requirements of the overall programme together with any necessary placement of orders for materials, goods and services subject to the client's liability for costs arising from such activities being limited to a maximum of £20,000 or such other increased sum as is subsequently confirmed in writing by ourselves pending issue of the contract documentation. Also let us have, as a matter of expedition, your detailed method statement for the works and any statutory pre-commencement submissions that you are required to make.
>
> The terms and conditions of the proposed contract shall govern retrospectively the work carried out by you and any monies paid to you in respect of the work performed pursuant to this authorisation shall form part of the amounts due under the contract.
>
> This letter of intent will automatically terminate on 2nd December 2002 unless it is renewed by or on behalf of the client or when the building contract is duly executed by both parties. The client reserves the right to terminate the letter of intent by written notice at any time before it expires. If, for any reason, the building contract is not entered into or this letter of intent is terminated or terminates and is not renewed then the

following terms will apply to the whole of the works carried out by Larchpark Limited.

1. The client will reimburse the reasonable costs together with VAT properly and reasonably incurred in connection with the work done and orders placed under the authority of this letter subject to all such costs being verified by and recommended for payment by ourselves and subject to liability being limited to the amounts stated above or subsequently increased.

2. No compensation will be due in respect of the termination of this instruction. In particular, you will have no claim for breach or loss of contract, loss of profit or loss of expectation.

3. Larchpark Limited will promptly vacate the site with as little disruption as possible removing all plant and waste materials and leaving the site clean and tidy …"

31 On 6th December 2002 there was a further letter from Chinmans which indicated that it was written on behalf of an entirely separate client, Belsize Park Hotel Limited. The letter was written "further to the letter of intent issued 1st November". It said that it was designed:

"… to extend the period of validity of the letter of intent by two weeks through to 16th December by which time it is hoped the contract agreement itself will have been signed.

The terms of the letter of intent are as previously stated except that the client's limited liability under the said authorisation is removed now that works have commenced and costs and expenditure will henceforth be determined in accordance with the terms of the contract.

Would you sign a copy of this variation to the letter of intent and return same to us as acknowledgement as your concurrence with its content."

This second letter was subsequently signed on behalf of Larchpark.

32 Despite the optimism of the letter of 6th December, there never was a signed building contract agreed by the parties. I have no evidence before me as to how or why it was that no such contract was concluded. However, despite the absence of a building contract, Larchpark carried out work at the property, both before and after the collapse, at the request of Hart and/or their professional consultants, Chinmans. When Larchpark originally pursued Hart in respect of the unpaid sums for work done after the collapse, they did so in two separate adjudications which suggested that there was a JCT contract in existence. Such a

suggestion was plainly wrong. This may explain why the first adjudication decision was not enforced, and that in the second adjudication the same adjudicator resigned when he received counsel's advice to the effect that there was no such contract.

33 By way of a third notice of intention to refer Larchpark tried again, this time by reference to the letter of intent set out in para.30 above and the Scheme for Construction Contracts ("the Scheme") introduced under the Housing Grants (Construction and Regeneration) Act 1996 ("the 1996 Act"). The same adjudicator was again appointed. The referral notice was not served in accordance with the Scheme, being provided eight days (rather than seven) after the notice of intention to refer. Hart promptly took the point that this meant that the adjudicator had no jurisdiction to deal with the dispute. However, Larchpark carried on and during the adjudication Hart took a second jurisdiction point to the effect that, because of the nature and the contents of the letter of intent, it could not be said that all the terms of the contract were in writing. They argued that, by reference to s.107 of the 1996 Act and the Court of Appeal decision in ***RJT Consulting Engineers Ltd. v. DM Engineering (Northern Ireland) Ltd.*** [2002] 1 WLR, 2344, the adjudicator had no jurisdiction.

34 The adjudicator took counsel's advice again and concluded that, although the only contract in existence was contained in the three default paragraphs in the letter of intent (referred to at para.30 above), this was sufficient to constitute a contract in writing. He dismissed the suggestion that Larchpark were responsible for the collapse on the basis of what he called a lack of "proof". He awarded Larchpark the sums they sought of £145,192.52, including interest and fees. His decision was dated 18th April 2005. It is that decision which Larchpark now, rather belatedly, seeks to enforce. That application is opposed by Hart for the two reasons noted in para.33 above.

2.2 The Relevant Principles Of Law:

(a) Enforcement Generally:

35 The courts have made it clear that, unless there has been a breach of natural justice or the adjudicator has decided something which he did not have the jurisdiction to decide, they will enforce the adjudicator's decision regardless of the alleged errors of law or fact which the adjudicator may have made: see, purely by way of example, ***Macob v. Morrison*** [1999] BLR 93, ***Bouygues UK Ltd. v. Dahl-Jensen UK Ltd***. [2000] BLR 522 (Court of Appeal), and ***C & B Scene Concept Design Ltd. v. Isobars*** [2002] BLR 93 (Court of Appeal).

36 In the most recent statement by the Court of Appeal on this topic in ***Carillion Construction Ltd. v. Devonport Royal Dockyard Ltd***. [2006] 1 BLR 15, Chadwick L.J. said at para.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 para.66 of this judgment, may indeed aptly be described as 'simply scrabbling around to find some argument, however tenuous, to resist payment'."

(b) Contracts in Writing:

37 Section 107 of the 1996 Act deals with the necessity for contracts to be in writing if the adjudication provisions are to be implied. The relevant provisions are as follows:

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

The expressions "agreement", "agree" and "agreed" shall be construed accordingly.

(2) There is an agreement in writing –

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

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

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

It is the provision at 107(2)(c) that is relevant to the present dispute.

38 The leading case on this topic is the decision of the Court of Appeal in ***RJT***. In that case the Court of Appeal held that for an agreement to be in writing in accordance with s.107(2)(c) of the 1996 Act the whole contract had to be evidenced in writing, not merely a part of it. Ward L.J. said:

"13. Section 107(2) gives three categories where the agreement is to be treated in writing. The first is where the agreement, whether or not it is

> signed by the parties is made in writing. That must mean where the agreement is contained in a written document which stands as a record of the agreement and all that was contained in the agreement. The second category, the exchange of communications in writing, likewise is capable of containing all that needs to be known about the agreement. One is therefore led to believe by what used to be known as the ejusdem generis rule that the third category will be to the same effect, namely that the evidence in writing is evidence of the whole agreement.
>
> 14. Sub-section (3) is consistent with that view. Where the parties agree by reference to terms which are in writing the legislature is envisaging that all of the material terms are in writing and that the oral agreement refers to that written record …
>
> 16. … The written record of the agreement is the foundation from which a dispute may spring, but the least the adjudicator has to be certain about is the terms of the agreement which is giving rise to the dispute …
>
> 19. On the point of construction of s.107 what has to be evidenced in writing is, literally, the agreement which means all of it, not part of it. A record of the agreement also suggests a complete agreement not a partial one. An exception to the generality of that construction is the instance falling within sub-section (5) where the material or relevant parts alleged and not denied in the written submissions in the adjudication proceedings are sufficient."

39 Because Auld L.J. referred in his short judgment in that case to "the material terms of the agreement", it is sometimes suggested that it is only those material terms that must be in writing and not all the terms of the contract. That is an incorrect reading of ***RJT***. Jackson J. pointed out in ***Trustees of the Stratfield Saye Estate v. AHL Construction*** [2004] All ER (D) 77 that Auld L.J.'s remarks were not part of the ratio of the decision in *RJT*. He said at para.46 of his judgment in that case:

> "In my view, it is not possible to regard the reasoning of Auld L.J. as some kind of gloss upon, or amplification of, the reasoning of the majority. The reasoning of Auld L.J., attractive though it is, does not form part of the ratio of ***RJT***."

(c) The Timing of the Referral Notice:

40 The relevant parts of s.108 of the 1996 Act provide as follows:

"(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose dispute includes any difference.

(2) The contract shall –

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within seven days of such notice;

(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred …"

41 The provisions concerning the referral notice are expanded in the Scheme which contains the relevant adjudication provisions for this case. Paragraph 7(1) provides as follows:

"Where an adjudicator has been selected in accordance with paras.2, 5 or 6, the referring party shall, not later than seven days from the date of the notice of adjudication, refer the dispute in writing (the 'Referral Notice') to the adjudicator."

42 There are no reported cases on the consequences of a referral notice being provided outside the stipulated period of "not later than seven days". There is, however, a line of authorities dealing with an adjudicator's failure to provide a decision within 28 days in accordance with s.108(2)(c) of the 1996 Act, and para.19(1) of the Scheme.

43 In ***Barnes & Elliott Ltd. v. Taylor Woodrow Holdings*** [2004] BLR, 111, His Honour Judge Lloyd QC held that a decision reached on day 28, but not communicated until day 29, was a valid decision. His reasoning was based upon the express terms of the contract with which he was dealing, which do not apply here. Moreover, the judge stressed that s.108 "only confers authority to make a decision within the 28 day period".

44 In contrast, in ***Simons Construction Ltd. v. Aardvark Developments Ltd***. [2004] BLR, 117, His Honour Judge Seymour QC held that a decision that was reached over a week beyond the 28 day period was binding because the adjudication agreement had not been terminated by the time the late decision was provided. Indeed, the judge went so far as to say that, subject to the termination of the

agreement, an adjudicator retained his jurisdiction "until the giving of a fresh referral notice".

45 However, in ***Ritchie Brothers Plc v. David Phillip Commercials Ltd***. [2005] BLR, 384 the Inner House of the Court of Session decided by a majority that His Honour Judge Seymour QC had been wrong to reach the conclusion that he did in ***Simons*** and that the 28 day limit meant what it said. Accordingly, they held that a decision that was not provided until a day after the expiry of the 28 days was a nullity, despite the fact that the delay in the provision of the decision had been just that one day.

46 As to the requirement that an adjudicator must produce his decision within 28 days (unless an extension is agreed by the parties) and not thereafter, I consider, with respect, that the decision in ***Ritchie Brothers*** is a correct statement of the law. It seems to me that a decision reached outside the 28 day period is a nullity unless there is an agreed extension of that period. Of course, in the present case, the real question is the extent, if at all, to which these cases are of relevance to the issue before me, which is concerned, not with the end of the 28 day period, but the beginning of that same period, and the failure to provide a referral notice within the seven day period stipulated in para.7 of the Scheme. That is, therefore, the first jurisdiction point to which I now turn.

2.3 The Effect Of The Delay In The Provision Of The Referral Notice:

47 Mr. Quiney maintains that the 1996 Act treats the seven day period for the referral notice in a different way to the 28 day period for the provision of an adjudicator's decision. He contrasts the language of s.108(2)(b), where the seven days is set out as part of the timetabling provisions, and s.108(2)(c), where he says that the reference to the 28 days is mandatory. He argues that if the adjudication was to be treated as a nullity if the referral notice was not provided within seven days, the 1996 Act would have said so. He also argues that the effect of the delay in the provision of the referral notice was a point of law which the adjudicator decided and that, therefore, in accordance with the authorities set out above, this court could not now interfere with that decision, regardless of whether or not the court agreed with his ruling on that point.

48 Mr. Butler submits that the Scheme, which is implied into this contract, makes clear at para.7(1) that the referral notice must be provided "not later than seven days" after the notice of intention to refer. Since in this case it was not provided in that stipulated period, he submits that the referral notice was plainly invalid and that the adjudicator did not have, and indeed never had, the necessary jurisdiction.

49 My initial reaction to this point was to consider that, in the overall scheme of things, it might be difficult to say that the delay of one day in the provision of the

referral notice should be accorded great significance, and that it would be harsh to rule that the whole adjudication was a nullity because of that one day's delay. But, on a more detailed analysis, I do not consider this reaction to be so easy to justify. Indeed, all kinds of difficult questions arise if the failure to comply with the time period is ignored: What if the delay was not one day, but one month? What if important events occurred during the period of any delay in the provision of a referral notice which put the responding party in a much worse position as against the referring party than it would have been if there had been no delay? If the words "not later than seven days" are to be qualified in some way, then how is such a qualification to be formulated, let alone assessed? 'Not later than seven days and perhaps one or two more'? 'Not later than a period that seems just and equitable in the circumstances'?

50 The whole point of adjudication is that speed is given precedence over accuracy. What matters is a quick decision, not necessarily a correct one. There is a summary timetable with which both the parties and the adjudicator must comply. If the swift timetable is kept to, the vast majority of adjudicators' decisions are then enforced by this court in accordance with the 1996 Act. If the timetable can be extended without consent either, as here, at the beginning of the process or, as in ***Simons***, at the end of the 28 days, there is a great danger of uncertainty and of a watering-down of the critical importance of the tight timetable on which the entire adjudication process is based. In other words, if, as I consider it to be, ***Ritchie*** is a correct statement of the position at the conclusion of the 28 days, it seems to me that the same principle must also apply to the event which signals the commencement of the same 28 day period, namely the provision of the referral notice within 7 days of the intention to refer.

51 I agree with Mr. Quiney that the provisions of the 1996 Act at ss.108(2)(b) and (c) address the 28 day period for the decision in different, and possibly stronger, language than the seven days for the referral notice. But, even then, the Act requires the appointment and the referral notice to be "secured" within seven days. Moreover, the Scheme is, I think, entirely clear on this point. The referral notice must be provided by a date which is not later than seven days after the notification of the notice of intention to refer. If it is not, it cannot be a referral notice in accordance with the Scheme. In that event, of course, the responding party may consent, expressly or by implication, to waive the irregularity. There was no such waiver here. If the responding party does not waive the irregularity the referring party must start again, which is precisely the same course of action envisaged in ***Ritchie***. Larchpark had that choice to make. They decided not to start again, and it seems to me that they are, therefore, obliged to accept the consequences of that decision.

52 At one point Mr. Quiney, with customary acuity, suggested that the adjudicator could extend without consent the seven day time limit as part of his general powers under para.13 of the scheme. That was a typically ingenious argument,

but I do not believe that it can be right. Everything done pursuant to the Scheme, including the 28 day period for the adjudication itself, flows from the date of the referral notice. The adjudicator is not seized of the adjudication until the referral notice is provided and the 28 day period starts to run. He therefore has no power until he gets the referral notice; thus he has no power to extend the seven day period which occurs before his jurisdiction begins. In any event, I do not consider that para.13 of the Scheme permits the adjudicator to disregard the time limits set out in the Scheme if the relevant extension is not agreed to. He certainly could not do so retrospectively, which is what I consider the adjudicator purported to do here.

53 This leads me to a related aspect of Mr. Quiney's submissions, namely the argument that the adjudicator's decision retrospectively to grant an extension of the seven day period (which extension was expressly not agreed) was a matter of law which, rightly or wrongly, the adjudicator was entitled to make. I reject that contention. If, as I have found, the adjudicator had no jurisdiction to consider the adjudication, because the referral notice was invalid, and that invalidity was not waived, then the fact that he went on to consider the issue and concluded (wrongly) that he did have jurisdiction is ultimately irrelevant to the powers of this court. The validity of the referral notice went to the heart of the adjudicator's jurisdiction and was not an issue on which he could bind the parties. The line of authority, starting with ***C & B Scene***, is therefore of no application in this case.

54 Accordingly, I have concluded that the referral notice was irregular/invalid because it was not served in accordance with the 1996 Act or para.7 of the Scheme. Hart were entitled to refuse to waive that irregularity, which they did. The adjudicator, therefore, had no jurisdiction to enter on the reference and the award was a nullity. I therefore decline to enforce it.

2.4 Was There A Contract Which Complied With s.107(2)(c)?

55 The adjudicator relied on counsel's advice and decided that there was a binding contract in the form of the three numbered items set out in the letter of 1st November 2002 (see para.30 above). He went on to find that this constituted an agreement in writing in accordance with s.107(2)(c).

56 Mr. Butler submitted that following the reasoning in ***RJT*** the default provisions of the letter of intent (paras.1, 2 and 3, set out in para.30 above) did not amount to written evidence of all of the terms of the contract. It creates, he said, a framework, but no more, and a good deal of other material is necessary in order to see what the contract actually involved. Furthermore, he said, the second letter of intent, which was a vital document because it removed the cap on spending which otherwise would have limited Larchpark's recovery to just £20,000, was a source of confusion because it appeared to have been written on behalf of a

completely different employer. It was not a document relied on by the adjudicator.

57 In response, Mr. Quiney submitted that the right test was that set out by Auld L.J. in ***RJT***, namely that only the material terms needed to be in writing. For the reasons already given in para.39 above, I decline to accept that submission as a matter of law. Mr. Quiney's basic point, however, was that the letter of intent contained a written framework which was sufficient to regulate the parties' legal relationship and that therefore the whole of the contract was in writing for the purposes of s.107(2)(c) of the Act.

58 I have given this issue careful consideration because I am aware that arrangements similar in form to the letter of 1st November 2002 are very common in the UK construction industry.[1] I am also aware that there is no reported case on whether this type of arrangement complies with s.107(2)(c) of the 1997 Act. For the reasons set out below I consider that it does not.

59 The first question is whether the three numbered paragraphs constitute a binding/enforceable contract at all. On analysis, it is not easy to say that they do. Essentially Hart are saying to Larchpark that if they, Hart, ask Larchpark to carry out work, Larchpark would be paid their reasonable costs for so doing. If it is a framework, it is of the loosest and vaguest kind.

60 Even if these provisions did constitute a binding/enforceable contract, it is clear that the sort of clarity of terms envisaged by s.107(2)(c) and the Court of Appeal in ***RJT*** is wholly absent. It is trite law that in order to have a building contract you usually need agreement as to parties, workscope, price and time. There was plainly no agreement as to time, so that the best that could be said was that there would be an implied term to the effect that the work would be concluded within a reasonable time. The agreement as to price was limited to the costs reasonably incurred. There was uncertainty over the identity of the parties because the second letter of 6th December 2002 (para.31 above), which was not relied on as a contract document by the adjudicator, introduces uncertainty as to who the employer actually was. Moreover, contrary to the adjudicator's decision, I consider that the letter of 6th December cannot be ignored because, without it, the cap was £20,000, and both parties are agreed that that was not the basis upon which the work was done by Larchpark. That point alone may be enough to warrant the conclusion that the adjudicator was wrong and that, even on Larchpark's own case, the letter of 1st November did not contain all the terms of the contract.

61 However, the biggest difficulty comes with a consideration of the contract workscope. The workscope, according to the letter, is work which will, or might

[1] Whether or not they should be so common is very doubtful – see ***Cunningham v. Collett & Farmer*** [2006] EWHC 1771 TCC, paras.82 to 92.

be, the subject of orders in the future, whether written or oral. That might be sufficient for a binding contract, although I do not think it is and, as I have indicated, enforcement of it would be next to impossible. More importantly, such a definition of workscope is a recipe for confusion and dispute of the very sort which s.107(2)(c) is designed to avoid. This point can be emphasised by reference to Hart's own pleading in this case. In para.3 of the particulars of claim Hart defined the contractual workscope as including:

> "The retention and preservation of the front and side facades of the property, the removal of the main part of the building and the construction of the basement and the reconstruction of the building above the new constructed basement area."

This workscope is plainly not discernible from the letter of 1st November. It is based on subsequent orders, instructions and the like which may, or may not, have been reduced to writing. If the contract document does not even begin to define the contract workscope it seems to me impossible to say that all the terms, or even all the material terms, are set out in writing.

62 The fact that the three paragraphs of the letter of 1st November were designed to be a fall-back position, only relevant at all if no formal/full contract was ever concluded, also militates against the submission that this was a contract in writing containing all the terms that had been agreed by the parties. On the contrary, it seems to me that it was designed to provide a very basic framework that would only be operated if, contrary to all expectations, a formal/full contract was not agreed. By definition, at the time that it was written, it could not allow for or address future events, such as the particular workscope that might be required or ordered. It was a simple fall-back position to regulate the parties' relationship if no formal/full contract was agreed. The three paragraphs in the letter of 1st November were not themselves designed to be a complete record of the parties' proposed agreement. They could not be; if they had been, there would have been no need for a formal/full contract at all.

63 I have acknowledged in para.61 above that, as a matter of strict contractual analysis, it might be said that, just looking at the letter of 1st November, the contract workscope was what Hart asked for as the work on site progressed, and that the remuneration was what the parties agreed was a reasonable figure for Larchpark's costs. On this simple basis, it might be argued that this was (just) enough for the 1996 Act. As I have explained, in my judgment this arrangement, without more, was not only unenforceable in any practical sense, but was insufficient to come within s.107(2)(c). The whole point of that section is to ensure that the swift adjudication process is only operated in circumstances where the underlying contract is clear, so that the adjudication will not become bogged down in allegations about unwritten or unclear contract terms. The rationale of ***RJT*** was the importance of clarity in the underlying contract, which

could only be provided if all the terms of that contract were in writing, and thus beyond argument.

64 It seems to me that even if, which I do not accept, the three paragraphs of the letter on their own constituted a binding and enforceable contract, such an arrangement, where nothing of any importance was defined in writing, was not a contract for the purposes of s.107(2)(c) of the 1996 Act. To hold otherwise would be contrary to the reasoning of the Court of Appeal in ***RJT***. In consequence, the absence of a contract within the definition of s.107(2)(c) is a second reason why I decline to enforce the adjudicator's award.

2.5 Entering Judgment/Stay Of Execution:

65 In the light of my decision that, for two separate reasons, the adjudicator did not have the necessary jurisdiction to reach his decision, it is strictly unnecessary for me to consider the last issue between the parties, namely whether, as a result of Larchpark's insolvency, judgment should not be entered on the counterclaim in any event or, if judgment was entered, there should be a stay of execution. However, in deference to counsel's careful submissions, and because I have reached a clear view on the point, I set out in short order my conclusions on this issue. It will be seen that they amount to a third and over-arching reason why I decline to give judgment on the counterclaim.

66 Mr. Quiney's first point was that judgment should be entered on the counterclaim and that there should be no stay of execution because of what he described as an absence of mutuality in respect of Hart's claim and Larchpark's cross-claim. He relied on the decision of the Court of Appeal in ***BCCI v. Prince Fahd Abdul Asis Al-Soud***, 23rd July 1996, and in particular the passages in the judgment of Neill L.J. which stressed that not all debts which are eligible for proof are eligible for set-off under r.490 of the Insolvency Rules. Debts must be mutual.

67 I reject the submission that there is no mutuality between Larchpark's counterclaim, based on the adjudicator's decision, and Hart's claim for damages. Larchpark's counterclaim is based on the work which they carried out at the property after and as a result of its collapse on 5th February 2004. The work was necessitated by the collapse. Hart's claim in the main action was for the financial consequences of that self-same collapse. The mutuality between claim and counterclaim is, I consider, clear and obvious.

68 I am inclined to agree with Mr. Butler that this submission confused mutuality and merit, because, in making his case, Mr. Quiney relied mainly on matters such as the adjudicator's finding that there was no proof of Hart's claim, as tending to show the weakness of Hart's claim that Larchpark were responsible for the collapse. I do not consider that the strength of a claim and/or cross-claim can be a matter which is relevant to the issue of mutuality. In any event, I consider that

a claim which blames a catastrophic collapse of a part of a property on the builder who had excavated the ground next to the property immediately before the collapse cannot fairly be categorised as fanciful or speculative.

69 Accordingly if, contrary to my conclusions, I had decided that the adjudicator did have the necessary jurisdiction to reach his decision, the issue would then have been limited to whether, as a result of Larchpark's insolvency, I should decline to enter judgment on the counterclaim at all or, alternatively, enter judgment but then impose an immediate stay of execution. As a result of the clear mutuality of the claim and counterclaim I would not simply have entered judgment on the counterclaim and declined a stay.

70 As to this next issue, namely whether I would have entered judgment and then stayed that judgment, or not entered judgment at all, the starting point is r.490 of the Insolvency Rules. The material parts of r.490 provide as follows:

> "(1) This rule applies where, before the company goes into liquidation there have been mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the liquidation.
>
> (2) An account shall be taken of what is due from each party to the other in respect of the mutual dealings and the sums due from one party shall be set off against the sums due from the other …
>
> (4) Only the balance (if any) of the account is provable in the liquidation. Alternatively (as the case may be) the amount shall be paid to the liquidator as part of assets."

71 In ***Bouygues***, Dyson J. (as he then was) had entered summary judgment to enforce an adjudicator's decision in favour of an insolvent contractor. The Court of Appeal did not disturb that conclusion. However, Chadwick L.J. said that, had the point been argued, he considered the right course would have been for judgment not to have been entered at all. He said:

> "In circumstances such as the present where there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of an adjudication which is necessarily provisional. All claims and cross-claims should be resolved in the liquidation in which full account can be taken and a balance struck. That is what r.490 of the Insolvency Rules 1986 requires."

72 In his careful submissions, Mr. Quiney argued that, if I concluded that the adjudicator had had the necessary jurisdiction, judgment should be entered on

Larchpark's counterclaim and, assuming that I found that there to have been sufficient mutuality, which I have, a stay of execution then imposed. He argued that although the concern about entering judgment in favour of an insolvent contractor appeared to be the adverse effect this might have on the position of other creditors, there was, in truth, no difference between judgment being entered with an immediate stay and judgment not being entered at all. He also relied on the speech of Lord Hoffmann in ***Stein v. Black*** [1996] 1 AC 243, and submitted that, under the Insolvency Rules, there was a mandatory and self-executing process by which the claim and the mutual set-off became one claim in respect of the net balance. He said that it did not follow that the claims between the parties were extinguished. He also said that here they would not be extinguished because they had not been finally determined. Instead the actions continued and formed part of the netting process.

73 I consider that Mr. Quiney's analysis may well be right as far as it goes. However, I consider that the essential point is that, in the present case, to enter judgment might amount to an inaccurate assertion of the parties' substantive rights because, after all, such a judgment would be based upon a decision which is only temporarily binding. There is at least a risk of inaccuracy. Thus, I respectfully agree with Chadwick L.J.'s ruling in ***Bouygues*** that, because of the operation of the rules, insolvency is a compelling reason to refuse summary judgment. On that basis, Larchpark's insolvency would mean that, even if I had concluded that the adjudicator had the necessary jurisdiction to reach his decision, I would not have entered judgment on the counterclaim in any event.

74 For completeness, I should say that Mr. Quiney also referred to my own decision in ***Wimbledon Construction v. Vago*** [2005] BLR, 374, which set out the principles applicable to the granting of a stay of execution and argued that, by analogy with my reasoning in that case, judgment should be entered on Larchpark's counterclaim and then a stay imposed. However, ***Wimbledon Construction*** was not a case where the contractor was in insolvent liquidation. I was simply recording there that, if judgment was entered in favour of a contractor who was in insolvent liquidation, a stay would almost certainly be granted.

75 It seems to me that, although the result of this debate is somewhat academic, I am bound to conclude that Mr. Quiney's careful analysis does not amount to a good reason why I should not follow Chadwick L.J.'s instruction in ***Bouygues***. Thus I consider that it would not have been appropriate for me to enter summary judgment in favour of Larchpark on the counterclaim even if, contrary to the views expressed above, I had decided that the adjudicator had the necessary jurisdiction to reach his decision.

2.6 Conclusion On The Summary Judgment Application

76 For all these reasons, therefore, Larchpark's claim for summary judgment on the counterclaim fails. I decline to enforce the adjudicator's decision because there were two separate reasons why he did not have the necessary jurisdiction. In any event, even if he had had the necessary jurisdiction, I would still have declined to enter judgment in favour of Larchpark in view of the fact that they are in insolvent liquidation.

SUMMARY:

77 Accordingly, on the first application I set aside the default judgment against Larchpark in the main action. On the second application I decline to enter judgment on Larchpark's counterclaim. That leaves over Hart's application for security for costs on that counterclaim which, if it cannot be agreed, will have to be the subject of a further hearing.
