Claim no: HT-06-35

Neutral Citation Number: [2006] EWHC 761 (TCC)

IN THE HIGH COURT OF JUSTICE

TECHNOLOGY AND CONSTRUCTION COURT

St. Dunstan's House

133-7 Fetter Lane

London

EC4A 1HD

Monday, 20 th March 2006

Before:

MR. JUSTICE RAMSEY

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W I L L I A M V E R R Y L I M I T E D

Claimant

- v -

T H E M A Y O R A N D B U R G E S S E S O F T H E L ON D O N

B O R O U G H O F C A M D E N

Defendant

- - - - - - - - - - - - - - -

MS RAWLEY (instructed by Reynolds Porter Chamberlain, 278-282 High Holborn, London WC1) appeared on behalf of the Claimant.

MR. MATTHIAS (instructed by the legal Department for the London Borough of Camden) appeared on behalf of the Defendant.

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JUDGMENT

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JUDGMENT

MR. JUSTICE RAMSEY

Monday, 20 th March 2006

1. On this application for summary judgment, William Verry Limited, ("Verry") seeks to enforce the decision of the adjudicator, Dr. Francesco Mastrandrea, made on the 23rd January 2006, as amended on the 31st January 2006, in which he decided that the Defendant, the Mayor and Burgesses of the London Borough of Camden, ("Camden") should pay Verry £532,351.61 plus certain other sums.

Introduction

2. Camden entered into a contract with Verry ("the Contract") on or about the 5th February 2001, for the refurbishment of a Victorian housing scheme known as the Bourne Estate, Holborn, London EC1. The work consisted of external redecoration and repair to 13 blocks of flats, typically 5 stories high. Those flats were either owned by Camden or had been sold and were in private ownership. That represented "the Works". A formal contract was not entered into, but it is common ground that the Contract is a valid construction contract for the purposes of the Housing Grants, Construction and Regeneration Act 1996.

3. The Contract was in the JCT Intermediate Form of Contract 1998 Edition, incorporating amendment 1 and TC/94/IFC. The contract sum was £6,478,522.19. The completion date was the 14th April 2003, as found by the adjudicator in decision number 3 at paragraph 25. Liquidated and ascertained damages were specified at a rate of £14,113.84 per week, or part thereof. The contract administrator (CA) was Capita Symonds Limited. Initially, Capita Symonds Limited were also the Quantity Surveyor, but in May 2003 Barry Maltz Associates Limited was nominated to act as Quantity Surveyor in place of Capita Symonds.

4. Practical Completion of the Works was achieved on the 19th December 2003. On the 25th July 2005 the contract administrator granted Verry an extension of time of 27 weeks plus 5 days for bank holidays, which the adjudicator upheld an adjudication number 3. When applied to the date of the 14th April 2003, this gives a revised completion date of the 27th October 2003, as found by the adjudicator in adjudication number 3. Prior to the adjudication before Dr. Mastrandrea, there had been two other adjudications. The first, adjudication number 1, was in relation to a dispute referred by Verry concerning Verry's application for payment dated June 2003. It was the subject of a decision by Mr. Mason dated the 25th August 2003. The second adjudication, adjudication number 2, was in relation to a dispute referred by Camden concerning the valuation of certain specific elements of Verry's account at the material time. It was the subject of a decision by Mr. Dight, dated the 18th November 2003. It is therefore convenient to refer to the adjudication before Dr. Mastrandrea, as adjudication number 3, as I have done.

5. The decision of the adjudicator in adjudication number 3, leading up to the financial award was in the following terms:

(a) As at practical completion Verry was entitled to an extension of time, 27 weeks plus 5 days for bank holidays, resulting in an extended date for completion to the 27th October 2003 when this period is applied to the original contract date for completion of the 14th April 2003.

(b) The gross amount due as the interim payment on practical completion, subject to retention and deduction of sums previously paid by Camden, is £6,487,648.37.

(c) The total retention relating to the interim payment on practical completion is £155,561.09.

(d) Camden is entitled to deduct liquidated damages for non completion from the interim payment on practical completion, the sum of £81,295.72.

(e) Camden shall forthwith pay to Verry the sum of £532,351.61 together with such VAT thereon as may be applicable being the amount of the interim payment due on practical completion after deduction of retention, amounts previously paid and all other amounts that Camden are entitled to deduct from this amount.

(f) Camden shall forthwith pay to Verry a further £3,409.12 in respect of interest resulting from late payment of the sums due pursuant to the decision in adjudication number 1.

6. Prior to the adjudication notice served by Verry on the 10th October 2005 the quantity surveyor, Mr. Barry Maltz, had submitted a draft final account to Verry on the 12th September 2005. That final account was in the gross value of £5,755,655.51 compared to Verry's claim in the adjudication of £6,997,800.71.

7. On the 13th January 2006, before the adjudicator made his decision in adjudication number 3, the contract administrator wrote to Verry enclosing a certificate for payment, number 22 (final certificate) and stated:

"Pursuant to clauses 4.6, 4.7 and 4.8 of the contract (as amended by the contract preliminaries page 6) please find enclosed herewith final certificate in respect of the above. Note that the gross valuation coincides with the statement of adjusted contract sum issued to you by the quantity surveyor under cover of his letter dated the 10th January 2006 and his final valuation as at January 2006 enclosed herewith."

8. That final certificate showed a gross valuation of £5,764,459.16, which after deduction of sums previously paid, left a balance due to Verry of £46,020.11.

9. On the 9th February 2006 Verry gave an adjudication notice in respect of the final certificate and those proceedings have been stayed by consent. I shall refer to that adjudication as adjudication number 4.

10. The decision in adjudication number 3 was issued on the 23rd January 2006 and amended on the 31st January 2006.

11. On the 30th January 2006 Camden wrote to Verry in these terms:

"We write to give you formal notice under clauses 2.7, 4.2.3 (b) and 8.6 of the Contract that an amount of £81,295.72 will be deducted/levied as liquidated damages for your delay to the above works. This amount is as found by the adjudicator Dr. Franchesco Mastrandrea, in his adjudication dated 23rd January 2006. There is therefore a balance due on the adjusted contract sum as set out in the final certificate of 13th January 2003 [that should be 2006] of £35,275.61 in our favour, and will be pleased to receive your cheque made payable to Camden at your earliest convenience."

12. On the 9th February 2006 Camden served on Verry a notice of adjudication and a further adjudication, adjudication number 5, in which it sought a decision on a claim for defects in the works. It claimed that it was entitled to £2,438,128.05 as damages for breach of contract.

13. On the 9th March 2006 Verry submitted its response to the referral notice in adjudication number 5 in which it contends that the adjudicator, Mr. Eamon Malone, should dismiss the claim. It is

expected that the adjudication decision under adjudication number 5 will be given on the 5th May 2006.

14. In these proceedings Camden sought to resist summary judgment and immediate payment to Verry of the sum due on adjudication decision number 3 on the following grounds:

(1) It relied on the final certificate which shows that the sum of £46,020.11 is due to Verry, which is extinguished by Camden's claim for liquidated and ascertained damages.

(2) It relied on the claim in adjudication number 5, and the fact that a decision is expected on the 5th May 2006.

(3) It raised concerns about Verry's financial ability to meet an award of damages in adjudication number 4, and the sum awarded in adjudication number 3 of £532,351.61, if they were ordered to be repaid.

The Final Certificate

15. Mr. David Matthias, who appears for Camden, submits that Verry's entitlement to an interim payment on practical completion on the 19th December 2003 under clause 4.3 of the contract, as subsequently determined in adjudication decision number 3, is superseded by the final certificate issued under clause 4.6.1.1 of the Contract on the 11th January 2006. He submits that the obligations of the parties are now regulated by the final certificate issued under clause 4.6. The Contract states that the final date for payment of the amount due under the final certificate is 28 days from the issue of the certificate, and under clause 9A.7.2 the parties' obligations to comply with the decision of an adjudicator is without prejudice to their other rights under this contract which must include the rights under clause 4.6.

16. Mr. Matthias relies on the decision of His Honour Judge LLoyd QC in KNS Industrial Services (Birmingham) Limited -v- Sindall Limited [2001] 75 Const. L. R. 71, in particular, paragraphs 14 and 28; the decision of His Honour Judge Thornton QC in Bovis Lend Lease --v- Triangle Development [2003] B.L.R. 31, para. 37; and the decision of the Court of Appeal in Parsons Plastics Limited -v- Purac Limited [2002] B.L. R. 334. He submits that in every case it is a matter of construing the contract in question and the circumstances of the particular case in order to determine whether a countervailing contractual obligation should override the contractual obligation to comply with an adjudicator's decision. This, he submits, follows from the fact that whilst section 108 of the Housing Grants Act requires construction contracts to include a term that a adjudicator's decision is binding, it does not provide for the enforcement of such decisions, still less does it purport to give the contractual obligation to accept an adjudicator's decision as binding, a status that overrides all other contractual rights and obligation.

17. In the present case he submits that Camden's contractual rights in respect of the final certificate issued on the 11th January 2006 and the withholding notice served by Camden in respect thereof on the 31st January 2006 should be viewed as superseding Verry's entitlement to enforce the adjudicator's decision in adjudication number 3 in spite of that final certificate and withholding letter.

18. Ms Dominique Rawley, who appears for Verry, submits that section 108(3) of the 1996 Act, as implemented in clauses 9A.7.1 to 9A.7.3 leads to the conclusion that Parliament has provided that adjudicator's decisions are enforceable unless set aside and should be enforced. She refers to the decision of the Court of Appeal in Ferson Contractors Limited -v- Levolux AT Limited [2003] B.L.R. 118 and the decision of His Honour Judge Gilliland QC in David Maclean Contractors Limited -v- The

Albany Building Limited (unreported 10th November 2005) . She submits that the final certificate in this case is not conclusive under clause 4.7.1, and is no more than a statement of the valuation by the quantity surveyor and contract administrator, which is contested by Verry. That valuation, she contends, cannot supersede the adjudicator's decision in adjudication number 3. She also submits that the final certificate is not valid, on its face, as the subsequent letter of the 31st January 2006 shows that the contract administrator had not given effect to all the terms of the contract, as required in clause 4.7.1.

Defects Counterclaim

19. Mr. Matthias submits that the defects counterclaim, a claim for unliquidated damages for breach of contract, is a right under the contract and therefore under clause 9A.7.2, the obligation to comply with the decision of the adjudicator is without prejudice to that right. He submits that this should be accorded the status of an effective defence by way of set-off to Verry’s claim.

Ms Rawley submits that the defects counterclaim is a disputed counterclaim and not a sufficient reason to refuse to enforce the adjudicator's decision, given the statutory requirements in section 108 of the Act and the provisions of the contract.

Stay

20. Mr. Matthias accepted that in the light of the evidence served by Verry in the form of the witness statement of Mr. Greg Healey, financial director at Verry, Camden’s submissions as to Verry's financial position were weakened. He therefore emphasised the aspect of timing in this case, and submitted that the court should, in any event, exercise its discretion to stay any judgment, given the fact that there was now a final certificate and that the defects counterclaim was currently the subject of an adjudication in which the adjudicator was to give his decision on the 5th May 2006. He relies on the principles set out by His Honour Judge Toulmin CMG QC in AWG Construction Services -v- Rockingham Motor Speedway [2004] EWHC 888, para. 108-190; the decision of His Honour Judge Thornton QC in William VerryLimited -v- North West London Communal Mikvah [2004] B.L.R. 308, para. 59-60; and His Honour Judge LLoyd QC in Jarvis Facilities Limited -v- Alstom Signalling Limited [2004] EWHC 1285, para. 19-20 .

21. Ms Rawley, emphasises the evidence of Mr. Healey, and submits that there are no grounds for granting a stay. She relies on the decision of His Honour Judge Wilcox in Absolute Rentals Limited -v- Gencor Enterprises Limited (2000) CILL 1637 and the decision of His Honour Judge Coulson QC in Wimbledon Construction Co 2000 Limted -v- Derek Vago [2005] B.L.R. 374. She submits that the intention of Parliament is that an adjudicator's decision should be enforced and the timing of matters such as the adjudication on the defects counterclaim should not deprive Verry of the benefit of a judgment on sums due at practical completion.

Decision

22. I first consider the extent to which Camden can resist payment on the basis of the final certificate or defects counterclaim. It is to be noted that no challenge is made to the adjudicator's decision in itself on this application. The questions raised in this case relate to the ability of a party to resist payment of sums in an adjudicator's decisions on the grounds that:

(i) Those sums are inconsistent with sums certified in a certificate issued subsequent to the certificate which forms the subject matter of the adjudicators decision.

(ii) The opposing party has a counterclaim for unliquidated damages for breach of contract in respect of defects, which is currently the subject of adjudication.

23. An adjudicator's decision is the outcome of an adjudication which, in the case of construction contracts, is imposed by statue in the form of section 108 of the Housing Grants Act. Whilst the means by which Parliament decided to impose the obligations is by implying contractual terms, the contractual terms must be construed in the light of that statute and the statutory intention. The statutory intention was set out in what has now become a classic statement on this aspect by Mr. Justice Dyson in Macob Civil Engineering Limited -v- Morrison Construction Limited [1999] B.L.R. 93, para. 24:

"The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decision of adjudicators to be enforced pending the final determinaion of disputes by adjudication, litigation or agreement."

24. That statement has formed the basis on which the Court of Appeal has proceeded in Bouygues -v- Dahl-Jensen [2000] B.L.R. 522 and Ferson Contractors -v- Levolux AT Limited [2003] B.L.R. 118. The reference by Mr. Justice Dyson to the intention of Parliament being to require the decisions of adjudicators to be enforced pending the final determination of disputes, must be understood as a reference to the word "binding" in section 108(3) of the Act. That word is used in a number of different contexts. For instance, in section 58(1) of the Arbitration Act 1996 it is provided that an award by the tribunal pursuant to an arbitration agreement is final and binding.

Whilst adjudication is not arbitration, in my judgment, the phrase "the decision of the adjudicator is binding" is intended to provide a similar degree of compliance by the parties, except that in the case of an adjudicator's decision, the decision is not “final” but is “interim” unless the parties agree to accept it as finally determining the dispute. The intention of Parliament must be that the decision is binding and enforced an interim stage. If the decision were no more than another contractual obligation, which could be breached or could be reduced or diminished by other contractual obligations, then the fundamental purpose of providing cash flow in the construction industry would be undermined. As Lord Justice Mantell said in Ferson -v- Levolux at para. 30, "the contract must be construed so as to the give effect to the intention of Parliament, rather than to defeat it." In my judgment, that can only be done by giving proper effect to the word "binding" by enforcing the decision of adjudicators.

25. Where there are potentially competing disputed rights and obligations those disputes must give way to the enforcement of the decision of an adjudicator, otherwise it is evident that such claimed rights and obligations would defeat the binding nature of the adjudicator's decision and the intention of Parliament that such adjudicator's decisions should be complied with in the interim.

26. Prior to the decision of the Court of Appeal in Ferson -v- Levolux , there had been decisions which appeared to contemplate that a contractual right might allow a party to avoid in whole or in part the obligation to comply with the adjudicator's decision. In Bovis Lend Lease --v- Triangle Developments Limited His Honour Judge Thornton QC, considered a number of previous decisions and summarised four general conclusions, which he derived from those decisions. His third conclusion was in these terms:

"Where other contractual terms clearly have the effect of superseding or providing for an entitlement to avoid or deduct from a payment directed to be paid by an adjudicator's decision, those terms will prevail."

27. In considering the correctness of that conclusion by His Honour Judge Thornton QC, Lord Justice Mantell at paragraph 30 of Ferson -v- Levolux stated that, if that conclusion were right then the intended purpose of section 108 of the Housing Grants Act would be defeated. Instead he said that the contract must be construed so as to give effect to the intention of Parliament rather than to defect it. He added that if that cannot be achieved by way of construction of the contract then the offending clause must be struck down.

28. Whilst on the facts of Ferson -v- Levolux paragraph 30 might be argued to be obiter , the Court of Appeal set out in clear terms the principle which applies to the implementation of the intention of Parliament. It is that principle which I intend to follow in approaching the two issues which arise in this case. In my judgment, the effect of those statutory provisions and of the passages in Levolux is generally to exclude a right of set-off from an adjudicator's decision.

It is right, though, that I should deal in more detail with Mr. Matthias' submissions that there is a line of authority, which he relies upon, and which permits cross claims and defences to be raised to defeat applications for summary judgment. He relies on the decision of His Honour Judge LLoyd QC in KNS Industrial Services, para. 28 . In that case His Honour Judge Lloyd QC, dismissed the application by KNS for the reasons set out in his judgment up to paragraph 26. He then went on to consider what would otherwise have been the position, and in doing so considered the terms of clause 38A.7.2, which is in identical terms to clause 9A.7.2 in this case. He came to the conclusion that clause 38A.7.2 meant that "other rights under the contract which were not the subject of the decision remain available to the relevant party." For the reasons set out below I come to the same conclusion. That, however, raises the question of how those rights remain available.

His Honour Judge LLoyd QC then concluded that those rights were available to prevent a party having to pay sums which were required to be paid by an adjudicator's decision. That gave rise, in my judgment, to the third proposition derived by His Honour Judge Thornton QC in Bovis Lend Lease at paragraph 37, and which, as set out above, was not accepted as being correct in Levolux .

Equally, Mr. Matthias relies on the decision of His Honour Judge LLoyd QC in David McLean Housing Limited -v- Swansea Housing Association Limited [2003] B.L.R. 125 in which he held that the employer was entitled to deduct liquidated damages from the adjudicator's decision where the adjudicator had determined the appropriate extension of time, but had not dealt with liquidated damages.

That particular question has been the subject of a subsequent decision by Mr. Justice Jackson in Balfour Beatty Construction -v Serco Limited [2004] EWHC 3336 in which, having considered the relevant decisions including David McLean, Bovis Lend Lease, Parsons Plastics and Fersons –v- Levolux, he derived the following two principles:

(i) Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor, pursuant to the adjudicator's decision provided that the employer has given proper notice (insofar as required).

(ii) Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the employer is entitled to set off liquidated and ascertained damages against sums awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case.

29. The particular issue of whether liquidated damages can be deducted when the adjudicator’s decision deals with extensions of time but does not deal with the consequential effect on an undisputed or indisputable claim for liquidated damages raises, I consider, a distinct question of the manner and extent of compliance with the adjudicator's decision. It does not, in my judgment, raise a question as to the ability to set-off sums generally against an adjudicator's decision.

30. Finally, Mr. Matthias relies on the Court of Appeal decision in Parsons Plastics –v- Purac [2002] B.L.R. 334. However, as is clear from the facts of that decision, that was a case where section 108 of the Act did not apply and where there was a provision at clause 31 as follows:

"Nothing contained in this Deed whether expressly or by incorporation or by implication shall, in any way, restrict [Purac's] equitable or common law rights of set off. Without prejudice to the generality of the foregoing, [Purac] shall have the right to set off against any sum due to [Parsons] whether hereunder or otherwise a fair and reasonable sum in respect of or on account of any claim or claims that have been made or which are to be made against [Purac] by the Purchaser the subject of matter of which touches or concerns the Sub-Contract Works."

31. That case was considered in Levolux and Lord Justice Mantell stated that it was important to note that in Parsons Plastics the Court of Appeal did not have to consider the impact of section 108, which was clearly of central importance in Levolux . Equally, it is evident that the decision in Parsons Plastics was made on the particular wording of clause 31, which, as it can be seen, expressly permitted set-off in respect of matters which were “claims” from the adjudicator's decision.

Having considered the decisions relied upon by Mr Matthias as establishing a line of authority for the proposition that generally permits cross claims and defences to be raised to defeat applications for summary judgment, I have therefore come to the conclusion that in the light of Levolux there cannot be said to be such a line of authority.

Rather, in my judgment, the decisions of His Honour Judge Gilliland QC in MJ Gleeson plc -v- Devonshire Green Holdings Limited and David McLean Contractors Limited –v- The Albany Building Limited set out the general position. In the latter case His Honour Judge Gilliland QC said this at paragraphs 29 and 31:

"29. This was a point which came before this court over a year ago in a decision of my own in Gleeson -v- Devonshire Green Holdings Limited . … What I have held in the previous decision was that when one looks at the clause in the agreement in relation to adjudication (clause 39.7) one finds provisions which, I took the view in the Gleeson case, had the effect of excluding a claim to a set-off, such as was raised in that case. That again was a claim for a set-off in relation to a future sum which might or might not become payable. I took the view that, to put it briefly, it would be inconsistent with the policy of the adjudication scheme to allow the adjudicator's award to be effectively rendered nugatory by simply raising a cross claim which might or might not succeed at the end of the day. Of course, I will assume that a cross claim is a genuine claim, but until it is established it is not actually in law a legal set-off. It would operate as a defence in equity under the principles of Hammack -v- Green by way of equitable set-off. In the ordinary way, that is a defence and would normally, provided the cross claim equalled or exceeded the amount of the claim, prevent summary judgment from being given,

and the matter would have to go to trial.I took the view that that reasoning and that principle did not apply where you had an adjudicator's award because the parties have agreed that they will comply with the adjudicator's award. That means that you cannot get out of the obligation to comply by raising a cross claim, and it seems to me that that is a sound principle, which I should follow in the present case.

31. Mr. Singer has drawn my attention to a decision of His Honour Judge LLoyd, where the provisions were different and clause 39.7 did not apply to the adjudication there. In that case His Honour Judge LLoyd saw no difficulty, I think it is fair to say, in permitting a cross claim to defeat an adjudicator's award. I am bound to say however that that was part of a series of decisions which were considered by the Court of Appeal in Levolux , and I take the view that the Court of Appeal did not accept the general principle in that line of authority, particularly that of KNS Industrial Services and David McLean and Bovis Lend Lease and preferred the view, effectively, of His Honour Judge Hicks in another decision; basically taking the view that I do, that adjudicator's award should not be frittered away by allowing cross claims to be made.

34. The decision of His Honour Judge Hicks QC to which reference is made is the decision in VHE Construction plc –v- RBSTB Trust Co Limited [2000] B.L.R. 187 where Judge Hicks had regards to the overall purpose of Part II of the Housing Grants, Construction and Regeneration Act 1996 and concluded that the employer’s obligation to comply with the adjudicator’s decision meant: “…comply, without recourse to defences or cross claims not raised in the adjudication.”

I respectfully agree with the principles set out in those decisions, which seem to me to reflect the general position following the Court of Appeal decision in Levolux . The provisions of clause 39.7 referred to by His Honour Judge Gilliland, were similar to those in clause 9A.7 in the present case.

In the present case those relevant provisions, which are the ones which comply with section 108 of the Housing Grants Act are as follows:

"9A. 7.1 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 or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given.

9A 7.2 The Parties shall, without prejudice to their other rights under this Contract, comply with the decision of the Adjudicator; and the Employer and the Contractor shall ensure that the decision of the Adjudicator is given effect.

9A.7.3 If either Party does not comply with the decision of the Adjudicator, the other Party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 9A.7.1."

35. Those provisions, in my judgment, amply reflect the intention of Parliament. I deal below with an argument which arises from the reservation in clause 9A.7.2.

36. I now turn first to consider the final certificate. Adjudication number 3 related to a dispute arising from the certificate issued by the Contract Administrator under clause 4.3 of the contract. This provides:

"The Contract Administrator shall, within 14 days after the date of Practical Completion, certify payment to be made by the Employer to the Contractor of 97½% of the total value referred to in clause 4.2.1(a) and 100% of any amounts payable pursuant to clause 4.2.2…. less the amount of any

advance payment made pursuant to clause 4.2(b) and less any sums previously certified for payment. The final date for payment of the amount pursuant to the certificate shall be 14 days from the date of the issue of the certificate."

37. The certificate under clause 4.3 was based on an interim valuation produced by the quantity surveyor on the 5th January 2004, Practical completion having been certified on the 19th December 2003. Verry disputed the quantity surveyor's valuation on two bases as set out by Dr. Mastrandrea at paragraph 75 of his decision, together with the submission of Camden. Those were:

(a) Mr. Maltz was bound by the values ascribed to certain items upon the decision of Mr. Mason (issued on 25 August 2003). Thus Mr Maltz's valuation was wrong insofar as it ascribed different values to any of those items. Camden disputes that proposition. Mr. Maltz was not so bound, indeed was positively obliged accurately to value the items in question upon the basis of all relevant information at his disposal in December 2003/ January 2004.

(b) Mr. Maltz undervalued certain items (which had not been considered in previous adjudications) in his interim valuation. Camden disputes that proposition too; Mr. Maltz accurately valued the items in question upon the basis of all relevant information at his disposal in December 2003/January 2004.

38. Dr. Mastrandrea went through each of the disputed aspects of valuation and decided whether to adopt the value placed on the item by Mr. Mason (the adjudicator in adjudication number 1) or adopt a value for the item on the basis of the further information put before him. In adjudication number 3 Verry contented for a gross valuation of £6,997,800.71; the QS's valuation was £5,851,516.67 and the adjudicator valued the works, at practical completion, in a gross value of £6,487,648.37. In coming to that valuation the adjudicator adopted the principles set out in paragraphs 34 and 35 of his decision where he sets out this:

"34. In relation to the question of other relevant information, I accept that what I should consider is the information which was or ought to have been available to the quantity surveyor on the 4 January 2004.

35. In this context however, it is significant that from my appreciation of the facts in this case, Mr. Maltz did or ought to have had available to him on the 4 January 2004 in respect of the major areas of what Camden considers new information, information which was consistent with that information supplied later or its equivalent: ..."

39. In this way, the decision of the adjudicator was that Verry was entitled to £532,351.61 in respect of the certificate under clause 4.3, in respect of the interim payment at Practical Completion. It follows that if the Contract Administrator had issued his certificate in December 2003/January 2004, then Verry would have been entitled to the sum of £532,351.61 after allowing for liquidated and ascertained damages due to Camden, which the adjudicator had deducted in his decision to arrive at that sum. If that had happened, then there would have been no question of a final certificate impacting on that payment. The process of computation of the adjusted contract sum together with the issue of the final certificate under clauses 4.5 and 4.6 takes time to complete, particularly given the requirement for a certificate that defects have been made good under clause 2.10, prior to the issue of the final certificate. In principle therefore, the subsequent issue of a final certificate should not prevent a contractor from being paid the sum properly due at Practical Completion. In this case the fact that Verry only referred the dispute over the clause 4.3 certificate to adjudication in October 2005 after the QS had sent through his computation of the adjusted contract sum under clause 4.5 in

September 2005, meant that the process of adjudication on the certificate of Practical Completion overlapped with the final certification under clause 4.6.

40. Mr. Matthias submitted that the adjudication of the clause 4.3 certificate was an “ambush” by Verry, and relied on statements made by Verry in the adjudication that "for the avoidance of doubt, Verry does not bring this adjudication in relation to its final account or the draft final account issued on behalf of Camden."

41. It is submitted by Camden that as a result, Camden did not put before the adjudicator its case on valuation as developed in the computation of the adjusted contract sum compiled by the quantity surveyor in September 2005.

42. I consider that the use of the word "ambush", a common term in the context of adjudication, is inappropriate in the sense that a complaint can be made as to the conduct of Verry. At any time after January 2004 Verry could have commenced an adjudication in respect of the clause 4.3 certificate. Whilst the choice of October 2005 to do so might have been tactical, Verry cannot be criticised for relying on their entitlement to adjudicate at any time. In fact, it seems to me that Camden were in a better position in October 2005 to deal with the valuation than they would have been had the adjudication taken place in early 2004, given the work carried out by the quantity surveyor leading up to the computation of the adjusted contract sum in September 2005. Whilst it is clear that Verry wished the adjudication to proceed on the basis that it considered the valuation at practical completion, that did not preclude Camden from relying on matters which were or ought to have been known in January 2004. The final certificate issued by the contract administrator valued the work at £5,764,459.16 compared to the valuation of £6,487,648.38, decided by the adjudicator in adjudication number 3. It can be seen from the table at section 6 of the witness statement of Barry Maltz, the Quantity Surveyor, that his valuation for the final certificate had been based on various contentions that Dr. Mastrandrea's valuation was incorrect or for instance, that there is no authorised instruction for various works. In principle, these matters could have been raised in adjudication number 3. The overall effect is that the final certificate represents the view of the quantity surveyor on the gross valuation of the works. That view is disputed and is subject to adjudication number 4, which is currently stayed by consent.

43. In such circumstances, should the sums found due in adjudication decision number 3 give way to the disputed valuation in the final certificate? In my judgment, they should not for the following reasons: First, for the reasons set out above, I consider that the binding nature of the adjudicator's decision and the agreement of the parties to comply with that decision means that, prima facie, the adjudicator's decision should be enforced.

Secondly, if payment of an adjudication decision on the sum due on an interim certificate had to be subject to the view of the Contract Administrator/Quantity Surveyor in a subsequent certificate, then the intention of parliament and the purpose of adjudication would be defeated. Each successive certificate would defeat the decision by an adjudicator on the previous certificate.

Thirdly, the provision in clause 9A.7.2 that compliance is without prejudice to their other rights under this contract is, in my judgment, to be read as requiring compliance with the decision of the adjudicator, but that such compliance does not prejudice the other rights under the contract. Those rights are preserved and are not prejudiced by compliance with the adjudicator's decision. That, in my judgment, gives binding effect to the adjudicator's decision, but emphasises that it is on an interim provisional basis, which does not affect the parties rights under the contract.

Fourthly, this accords with the principle that a party is entitled to the sums due under the certificate under clause 4.3 at Practical Completion, and that ordinarily the position on the final certificate would not prevent payment of sums properly due on the clause 4.3 certificate.

Fifthly, the final certificate in this case has no conclusive effect, given that adjudication number 4 was commenced within 28 days of the final certificate. In addition, clause 4.7.1 provides that it is not conclusive on any matter which is the subject of proceedings, including adjudication commenced before the date of the final certificate. In my judgment, provided that a matter is the subject of adjudication number 3, then the final certificate could not, in any event, be conclusive as to that matter. As a result, the final certificate has only the status, in my judgment, of a payment certificate which is disputed and has no conclusive effect.

However, I do not consider that Verry is correct in submitting that the final certificate is invalid because Camden changed the liquidated and ascertained damages figure in their letter of the 30th January 2006 to accord with adjudication decision number 3. If the final certificate had been conclusive, then it would have been conclusive that all and only such extensions of time, if any, as are due under clause 2.3 have been given. It was not conclusive and therefore Camden are not bound by it. In any event, the fact that an annex to the certificate sets out the position on liquidated damages does not, in my judgment, necessarily affect the validity of the certificate. As raised in argument, it seems to me much more arguable that the final certificate could not have been given under clause 4.6.1.1, because the contract administrator had not issued a certificate under clause 2.10.

44. However, whatever the position on the validity of the final certificate, this cannot affect the entitlement of Verry to payment in respect of adjudication decision number 3, either as a matter of principle arising from the intention of Parliament and the terms of the contract, or from the application of those terms to the circumstances of this case.

I therefore consider that Camden cannot resist payment of sums due on adjudicator's decision number 3 on the basis of the final certificate issued on the 13th January 2006.

45. I now turn to the defects counterclaim. Camden contends that there are defects in the works and claims the sum of over £2 million as damages for breach of contract. It is clear from the witness statement of Mr. Andrew McDermott, the project manager for Camden, that there were various schedules of defects drawn up for the south side and the north side of the project alleging that they were defective works.

On the 18th March 2005, the Contract Administrator on behalf of Camden wrote to Verry in these terms:

"I refer to the defects schedules issued pursuant to Clause 2.10 of the Contract, in respect of the above and advise as follows:

Camden have decided that these defects are to be dealt with by another contractor under a separate contract. Consequently, they will be instructing the Quantity Surveyor to make an appropriate deduction to the contract sum. Thus, in accordance with Clause 2.10 of the Contract, I hereby instruct you not to attend to the defects noted on the previously issued schedules.

For the avoidance of doubt, this instruction relates to the schedules issued in respect of both the north and south sides of the Bourne Estate."

46. In principle, as set out in that letter, there can be a deduction from the value of the works for defects in the works. The valuation of the works consists of the "total value of the work properly executed by the contractor" (see clause 4.2.1(a)). Equally, clause 2.10 provides that an appropriate deduction shall be made from the contract sum in respect of defects, shrinkages or other faults not made good, and this is relevant to the computation of the adjusted contract sum (see clause 4.5). However, Camden have not sought to take the alleged defects into account, either in the valuation which was the subject of adjudication number 3, nor in the adjusted contract sum, which formed the basis of the final certificate.

In such circumstances, should the sums found due in adjudication decision number 3 be subject to a set-off for the claim by Camden for defects? In my judgment, it should not for the following reasons: First, again for the reasons set out above, I consider that the binding nature of the adjudicator's decision and the agreement of the parties to comply with that decision means, prima facie, the adjudicator's decision should be enforced.

Secondly, if an adjudicator's decision on the sum due on an interim certificate was subject to a set-off in respect of a disputed counterclaim for unliquidated damages, then the intention of Parliament and the purpose of adjudication would be defeated.

47. As I have said, in my judgment, the effect of the statutory provisions is generally to exclude a right of set-off from an adjudicator's decision. In this case, the adjudicator expressly dealt with the question of extension of time and liquidated damages. These matters were raised by Camden, but issues of defects were not raised in the adjudication. If they had been raised, then evidently they could have been taken into account to the extent possible, and Camden could not now raise a set-off. By failing to raise them, I do not consider that Camden can be in a better position by setting-off a disputed, unliquidated counterclaim against the adjudicator's decision.

Thirdly, as set out above, the provision in clause 9A.7.2 that compliance is without prejudice to their other rights under this contract, is to be read as requiring compliance with adjudicator's decision number 3, but in doing so, that does not prejudice Camden's rights to make a claim for unliquidated damages for breach of contract in respect of the defects.

Fifthly, Camden did not seek to withhold sums for defects against the certificate under clause 4.3 for interim payment on Practical Completion. Verry would therefore have been entitled to receive payment of the sum awarded in the adjudicator's decision of practical completion without being able to deduct from it.

Sixthly, Camden have commenced an adjudication for the sums claimed for damages for defects and if and when any sum is held to be due to Camden for defects, then similarly, they will be entitled to payment on the basis of that adjudicator's decision. This does not give Camden the right to deduct sums in the interim.

48. Accordingly, I consider that Camden cannot resist payment of sums due to Verry under adjudication decision number 3 on the basis of the unliquidated disputed counterclaim for defects.

49. I now turn to consider the question of a stay. In the light of the evidence of Mr Healey, the financial director of Verry, it is clear that the company has a substantial turnover of the order of £100 million with improving profitability and a significant cash reserve of the order of £10 million. In such circumstances, I do not consider that the question of the ability of Verry to repay sums or potential

liquidation of that company are matters which I need to give any significant weight to in considering arguments that there should be a stay. Rather the evidence goes the other way.

50. Mr. Matthias places more reliance on the fact that the defects counterclaim is currently the subject of an adjudication, and the date of the adjudicator's decision is expected to be the 5th May 2006. It is clear from the documents I have seen that Verry contests the claim and has raised familiar arguments on the jurisdiction of the adjudicator. The outcome of that adjudication both in terms of the adjudicator's decision and any subsequent proceedings is uncertain, and it is not a matter on which I consider I should speculate. In such circumstances, staying enforcement of adjudicator's decision number 3 so as to await the outcome of that adjudication, is something which I consider should only have been done if strong grounds are shown for the exercise of the discretionary stay.

In this case, the sums which the adjudicator found as due to Verry should have been included in the certificate in December 2003/January 2004, and should have been paid, in any event, after the adjudicator's decision in January 2006.

51. In the absence of a serious risk that any sum paid could not be recovered in appropriate circumstances, I consider that the principles set out by His Honour Judge Toulmin CMG QC in AWG Construction Services -v- Rockingham Motor Speedway [2004] EWHC 888, apply. That is that the intention of Parliament is that adjudication decisions should be enforced summarily and the successful party should not be prejudiced by being kept out of its money. These factors militate strongly against the grant of the stay, and accordingly, I refuse Camden's application to stay the execution of the judgement as there are no special circumstances which render it inexpedient to enforce the judgment.

Summary

52. As a result, Verry is entitled to judgment for the sum of £532,351.61 together with such VAT thereon as may be applicable, and £3,409.12, as set out in paragraphs 254(e) and (f) of the decisions of Dr. Mastrandrea, made on the 23rd January 2006, as corrected on the 31st January 2006.