Neutral Citation Number: [2009] EWHC 605 (TCC)

Case No: HT-08-342

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 27th March 2009

Before :

THE HONOURABLE MR JUSTICE AKENHEAD

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Between :

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF CAMDEN **Cla**

- and -

MAKERS UK LIMITED **Defe**

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David Matthias QC (instructed by **The London Borough of Camden**) for the **Claimant**

KarimGhaly (instructed by **Fenwick Elliott**) for the **Defendant**

Hearing dates: 20 March 2009

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Judgment

Mr Justice Akenhead :

Introduction

1.
The London Borough of Camden (“Camden”), the Claimant, obtained judgment against Makers UK Ltd (“Makers”), the Defendant, in default of defence. Makers applies to set aside that judgment on the grounds that it has a good arguable defence. Camden, whilst accepting that there is a properly arguable defence, argues that, given the financial position of Makers, conditions should be imposed whereby Makers should be prevented from pursuing adjudication against Camden and it should be required to provide security for costs of pursuing its counterclaim in these court proceedings. The case raises issues about the right to adjudicate at any time, the basis upon which default judgments may be set aside, and whether it is right or acceptable to impose a condition on a party not to adjudicate in circumstances in which it would appear likely that there would or could be a stay on any enforcement of an adjudication decision obtained by that party by reason of its poor financial position.

2.
This case follows on from an earlier decision of this Court on a claim in which Makers sought to enforce against Camden an earlier adjudicator's decision, [2008] EWHC 1836 (TCC); I gave judgment in favour of Makers.

The History

3.
Makers was a building contractor employed by Camden under a contract in writing dated 21 June 2006 ("the Contract") to carry out extensive refurbishment works at Whittington Estate, Highgate, New Town, London N19 ("the Site"). The Contract sum was £4,337,511.17 or such other sums as might be due under the Contract from time to time. There was an adjudication clause, Clause 9, pursuant to which each party would pay its own costs of the adjudication.

4.
Although dated in June 2006, the contract was made in September 2005 and Makers commenced the Works on 17 October 2005. Issues arose between the parties over variations and delays. Camden apparently sought to resolve these issues by dismissing the independent Contract Administrator on 18 April 2007 and appointing itself as Contract Administrator. Whilst Camden did appoint another independent firm on 3 May 2007, relations between the parties became very strained.

5.
By notice dated 3 July 2007 ("the Default Notice"), Camden alleged that Makers was in default of their contractual obligation to proceed regularly and diligently with the Works. By notice dated 27th July 2007 ("the Determination Notice"), Camden asserted that Makers had "continued the default for 14 days from receipt of the Default Notice" and purported to determine Makers' employment under the Contract. Makers disputed this determination and sought to argue that it was invalid. It asserted that Camden had itself repudiated the Contract.

6.
In January 2008, Makers referred to adjudication the dispute as to whether there had been a valid contractual determination or a repudiation by Camden. A Mr Harris was duly appointed adjudicator in January 2008 to resolve this dispute. He duly issued his decision in March 2008 to the following effect:

(a) Makers was failing to proceed regularly and diligently with the Works at the time of service of the Default Notice.

(b) Makers did not continue the default for 14 days from receipt of the Default Notice.

(c) Camden incorrectly served its Determination Notice on 27 July 2007. In serving the Determination Notice and requiring Makers to vacate the Site, Camden had repudiated the Contract.

(d) Makers had not repudiated the Contract.

It was this decision which Makers successfully sought to enforce in July 2008, in so far as it required Camden to pay the Adjudicator's fees; the Adjudicator had not been required to address any matters of quantum. Camden had attempted to challenge this enforcement on jurisdictional and bias grounds.

7.
Camden was and remains wholly dissatisfied with the decision of the Adjudicator, which it considers went against the weight and sense of the evidence that was before him on the adjudication. It was and

is concerned that Makers was by then winding down its trading activities and that its latest accounts showed a very poor trading and asset position. It feared however that Makers or its holding company Keller Group plc ("Keller") would take advantage of its "winning" the liability issue before the adjudicator and initiate a further adjudication to seek to recover a substantial sum of money possibly due to Makers consequent upon that decision. The problem would then be, Camden believed, that any money decision in favour of Makers would result in that money disappearing to satisfy Makers' debts in particular to Keller; if, it is found ultimately that, as Camden asserts, it did terminate Makers' contractual employment lawfully, there will be, it believes, a net sum due to it from Makers. The sum obtained by Makers pursuant to such second adjudication will simply never be paid back and Makers is and will be insolvent.

8.
Camden issued the current somewhat pre-emptive proceedings on 26 November 2008. Essentially, Camden seeks to establish that it lawfully terminated Makers' employment under the Contract and to recover the net sum of over £1m said broadly to be due to it as a consequence of that termination. There is an argument as to whether or not there was a requirement on Camden to comply with the Pre-Action Protocol but nothing turns on that on this application.

9.
An Acknowledgment of Service was filed by Makers on 10 December 2008 (that is, within the time permitted by the rules – see CPR Part 10.3(1)(b)). According to Dr Critchlow of Makers' solicitors, Fenwick Elliott, his recollection is that Mr Roberts (the solicitor with conduct of the case for Camden at the time) had previously on 5 December 2008) agreed an extension of time for service of the Defence until the 12th January 2009; however, it is accepted that the alleged extension was not confirmed in writing and cannot be evidenced; Makers does not rely upon it for the purposes of its present application.

10.
The Defence was due nominally on 26 December 2008 in accordance with the rules (28 days after service of the Particulars of Claim – see CPR Part 15.4(1)(b)); in practice, no extension to that period had been agreed. Camden wrote to the Court requesting Judgment in Default, in the absence of a Defence, on 7 January 2009 (some 12 days after the date by which the Defence should have been filed).

11.
Judgment in default was duly entered against Makers by the Court on 8 January 2009. On 12 January 2009 a Defence and Counterclaim was purportedly served by Makers and was filed with the Court on the same day. Makers by its Counterclaim claims some £4m of which only a relatively small part relates to the consequences of the repudiation; the bulk relates to the allegedly unpaid and uncertified sums for work done.

12.
Thereafter, the parties discussed through solicitors the possible setting aside of the judgment with Camden seeking agreement that a condition of the setting aside should be that Makers should not commence any adjudication without the Court's permission or until the issue of liability had been finally resolved by the Court. That could not be agreed and thus it was that Makers issued their application to set aside the judgment in default. There is no suggestion that there was any unreasonable delay in making the application.

The Financial Position of Makers

13.
The latest company accounts filed by Makers are for the year ending 31 December 2007. In the Directors' report, the following appears:

"On 20 August 2007, Keller group plc, the company's ultimate parent, announced its decision to withdraw from the Makers UK Limited business. As the directors do not believe the company will continue to trade once existing contracts have been completed, they have not prepared the financial statements on a going concern basis…"

14.
The following illustrates the trading and asset position as indicated on the company accounts put before the Court:

Year ending	[Loss]/Profit on ordinary activities before taxation*	[Loss] Profit for the financial year*	Total assets less current liabilities**	Net Assets/ liabilities**
31/12/07	[£10,428,000]	[£8,541,000]	[£8,661,000]	[£10,268,000]
31/12/06	[£3,789,000]	[£2,957,000]	[£1,769,000]	[£1,831,000]
31/12/05	[£2,141,000]	[£1,356,000]	£2,081,000	£1,081,000
31/12/04	£413,000	£437,000	£1,709,000	£1,474,000
31/12/03	[£6,969,000]	[£6,598,000]	[£1,728,000]	[£4,728,000]
31/12/01	£2,289,000	£1,588,000	£1,898,000	£1,898,000

* From Profit and Loss account

** From Balance Sheet

15.
Thus, on these figures and based on the largely unchallenged evidence of Mr Cornmell, an expert accountant who prepared a report dated 12 March 2009 on behalf of Camden which was put before me, it seems clear that:

(a) based on the latest filed accounts, Makers is insolvent in that, without the support of its parent, Keller, which was effectively rescinded or removed in August 2007, its business is loss making and it has a substantial negative value. If anything up to £8m was paid over to it, it would be unable to repay it.

(b) based on the accounts (year ending 31 December 2004) available at the time that the Contract was entered into (September 2005), Makers was in profit from its trading activities and worth in capital terms a significant amount.

16.
The accounts for the year ending 31 December 2008 have not been provided or filed yet.

17.
The only reason advanced by Makers as to why it is not insolvent is contained in the statement of Mr Whitehouse, a financial consultant to Makers, who says that there are no winding up petitions, statutory demands or resolution liabilities against Makers. That however does not mean that Makers is not insolvent. All that suggests is that the primary creditor of Makers is Keller which has no interest in liquidating Makers.

The Issues

18.
Camden invites the Court only to exercise its discretion to set aside the regular default judgment, upon conditions that:

(a) Makers does not institute any further adjudications covering issues addressed in these proceedings, and

(b) Makers gives Camden security for the costs likely to be incurred by Camden in defending Makers' intended Counterclaim herein.

19.
The issues have been properly defined in the skeleton submissions of Mr Matthias QC, albeit I have slightly amended his second issue:

a)
What is the nature and scope of the jurisdiction to impose conditions upon setting aside a regular default judgment? (**"The Jurisdiction Issue"**).

b)
Is Makers insolvent and based on the evidence currently before the Court will it probably be unable to repay any sum awarded to it by an adjudicator upon a future adjudication in respect of its quantum claim against Camden and/or is there reason to believe that it will be unable to pay Camden's costs of defending the intended Counterclaim in this litigation if ordered to do so ("**The Insolvency Issue**").

c)
Granted that that at this stage the Court is bound to conclude that Makers has a real prospect of successfully defending the claim, is there some other good reason why judgment in default should be set aside ("**The Other Good Reason Issue**").

d)
Should the Court exercise its discretion to set aside the regular default judgment, upon conditions that:

i)
Makers does not institute any further adjudications covering issues addressed in these proceedings, and

ii)
Makers gives Camden security for the costs likely to be incurred by Camden in defending Makers' intended Counterclaim.

("**The Conditions Issue**")

The Jurisdiction Issue

20.
CPR Part 13.3 provides that, apart from when a judgment is obtained irregularly, in “any other case the court may set aside or vary a judgment entered under Part 12 if (a) the defendant has a real prospect of successfully defending the claim”. Thus there is no doubt that the setting aside of the default judgment is a matter of discretion rather than of obligation. In the exercise of that discretion, the Court is empowered to attach conditions to any order it is minded to make. CPR Part 13.3 in fact states in terms that “Rule 3.1(3) provides that the court may attach conditions when it makes an order”. It is not uncommon that terms may be imposed in circumstances where, for instance, although the defendant has a real prospect of successfully defending the claim, elements of that defence are what used under the old Rules of the Supreme Court practice to be called “shadowy”.

21.
CPR Part 3.1(3) provides that when “the court makes an order, it may – (a) make it subject to conditions, including a condition to pay a sum of money into court; …” Part 3.1(2) identifies a list of the court’s general powers of case management, concluding at sub-paragraph (m) that: “Except where these Rules provide otherwise, the court may – take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.”

22.
The overriding objective in CPR Part 1 is in essence to deal with cases justly. Part 1.1(2) identifies a number of aims in relation to the furtherance of the overriding objective, of which three are specifically relied upon by Camden: (i) “ensuring that the parties are on an equal footing”, (ii) “saving expense”, and (iii) “ensuring that (the case) is dealt with expeditiously and fairly”. CPR Part 1.4(1) stipulates that the “court must further the overriding objective by actively managing cases.”

23.
The Court can have regard to a wide range of individual circumstances in deciding whether to exercise its discretion to set aside and if so on what terms if any. Thus, the Court can have regard to the delay or promptness with which the application to set aside is issued and the reasons why the Defence was not served in time. However, it is not the Court’s function to punish the defaulting defendant.The Court must do justice between the parties. For instance Chadwick L.J. in **Hussein v Birmingham City Council and Others**[2005] EWCA Civ 1570 said at paragraph 36:

“But it must be kept in mind that discretionary powers are not to be used to punish a party for incompetence - they must be exercised in order to further the overriding objective. In the present case, as the judge recognised, the essential question was whether the risk of injustice to the Governors (in denying them the opportunity to advance at trial a defence which – as the judge himself said – had a good prospect of success) outweighed the risk of injustice to the claimant and other defendants if the Governors were allowed (at this late stage) to participate in the proceedings.”

24.
So far as the Jurisdictional Issue is concerned, the Court undoubtedly has jurisdiction to impose conditions as part of the setting aside of the default judgment in question. That jurisdiction is tempered by at least two factors:

(a) The court is not to impose conditions to punish the defendant;

(b) In considering whether to impose conditions, the court must have regard to the imperative to act justly as between the parties.

The Insolvency Issue

25.
As indicated above, the currently available evidence overall clearly indicates that Makers is insolvent in the sense that it can not currently pay its debts as they fall due. It is taking no new work, Keller has removed any financial support or obligation to provide such support, its balance sheet position is dire and there is no obvious prospect of it ever, off its own bat, being able to pay back any sum which might be awarded due to it under a future adjudication decision. Furthermore, the latest accounts would normally satisfy a court that Makers would be unable to pay Camden's costs of defending the intended Counterclaim in this litigation if ordered to do so. I will return to this matter later in this judgment.

The Other Good Reason Issue

26.
This issue arises because the Court should set aside a judgment obtained in default if the defendant has a real prospect of successfully defending the claim or if there is any other good reason to do so. Subject to the question of whether conditions should be imposed, the only ground advanced by Makers is that Camden has behaved aggressively.

27.
This ground was not advanced with any great force at the hearing. In essence it amounted to an argument that, by the stance taken in correspondence both before and after the judgment was obtained Camden was acting unreasonably in seeking to persuade Makers to agree not to pursue adjudication. This ground was simply not made out. The commercial interests of Camden obviously lie in seeking to prevent Makers pursuing adjudication because a further adjudication decision will, as Camden accepts, probably result in a substantial financial award in Makers' favour; that sum will in effect not be recoverable, if a final court judgment reverses the first and second adjudication decisions, by reason of Makers' financial position. In any event, whatever the result of the second adjudication, the adjudication will result in irrecoverable costs, probably to the tune of some £100,000 or more. There is nothing in the correspondence which demonstrates that Camden was seeking to do other than protect its commercial interests. What was involved was certainly nothing more than the rough and tumble of litigation correspondence. Camden did not apply for the default judgment until nearly two weeks after the time for serving it had expired.

28.
Consequently, the Court should exercise its discretion to set aside the judgment because, although there is no "other good reason" to do so, there is, it is accepted by Camden, Makers has a real prospect of successfully defending the claim. Camden has properly conceded this because the first adjudicator decided on a relatively reasoned basis that Camden had repudiated the contract.

The Conditions Issue

29.
It is this issue which is primarily what has been argued before the Court. I start from the standpoint that, in one sense, the judgment obtained has arisen because Makers or their advisers simply made a mistake in overlooking the need to serve a defence in time or obtain a short extension of time for its service. The Defence was clearly in the process of being finalised at the time that the judgment was procured and there was, in the light of the first adjudicator's decision at least, an arguable defence. If the Defence had been served in time, there does not exist any jurisdiction in the court in effect to

enjoin Makers from pursuing any right to adjudicate. There does of course exist a jurisdiction for the Court to order security for costs.

30.
In **Herschel Engineering Ltd v Breen Property Ltd**[2000] EWHC 178 (TCC), Mr Justice Dyson, as he then was, addressed the issue of whether a party could pursue adjudication if there were concurrent court proceedings on the same topic or dispute. Having reviewed the terms of the Housing Grants, Construction and Regeneration Act 1996 and previous authorities relating to arbitrations, he said:

“18. In my view, the principles deriving from the authorities to which I have referred have no application to adjudications. Section 108(2)(a) of the 1996 Act expressly states that a party may refer a dispute to an adjudicator "at any time". It is true that the words "at any time" do not appear in paragraph 1(1) of the Scheme. But it is plain from section 108(5) that it was intended that the relevant provisions of the Scheme should be consistent with the requirements of section 108(1) to (4) of the Act. I do not consider that the omission of the words "at any time" from paragraph 1(1) of the Scheme is of any significance. Nor did Mr Davies suggest that it was. Parliament had litigation and arbitration proceedings very much in mind when drafting the Act. As I said in **Macob Civil Engineering Ltd v Morrison Construction Ltd**[1999] BLR 93, 97:

"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 decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement."

19. If Parliament had intended that a party should not be able to refer a dispute to adjudication once litigation or arbitration proceedings had been commenced, I would have expected this to be expressly stated. The relationship between adjudication on the one hand and litigation and arbitration on the other, was what informed the content of section 108(3) of the Act. The aggrieved claimant should not have to wait many months, if not years, before his dispute passed through the various hoops of a full blown action or arbitration.

20. In my view, there is no obvious reason why Parliament should have intended to draw a distinction between cases where litigation or arbitration proceedings have been started before a dispute is referred to an adjudicator, and those where the proceedings have been started only after an adjudication has been completed. The mischief at which the Act is aimed is the delays in achieving finality in arbitration or litigation. Why should a claimant have to wait until the adjudication process has been completed before he embarks on litigation or arbitration? If he is in a position to start proceedings, it is difficult to see why he should have to wait until a provisional decision has been made by an adjudicator. The normal rule that concurrent proceedings in respect of the same issue or cause of action will not be countenanced is justified on the grounds that (a) it is oppressive to require a party to defend the same claim before different tribunals, and (b) it is necessary to avoid the risk of inconsistent findings of fact. But it is inherent in the adjudication scheme that a defendant will or may have to defend the same claim first in an adjudication, and later in court or in an arbitration. It is not self-evident that it is more oppressive for a party to be faced with both proceedings at the same time, rather than sequentially. As for the risk of inconsistent findings of fact, on any view this is inherent in the adjudication scheme. The answer to Mr Davies' first submission has been provided clearly and unequivocally by section 108(2)(a). Parliament has decided that a reference to adjudication may be made "at any time". I see no reason not to give those words their plain and natural meaning.”

31.
That reasoning is correct. A party to a construction contract has a statutory right to adjudicate upon any dispute at any time. There is of course a finite point at which adjudication on a given dispute is no longer possible, that is when the Court or arbitrator has finally resolved the dispute one way or the other. The fact that court or arbitration proceedings have been instituted does not however prevent or bar a party's statutory or contractual right to adjudicate; that produces a decision which, although binding temporarily, is not final. If Parliament had intended that a party could not institute adjudication on a dispute if there were court proceedings addressing the same dispute already or later issued, it would have said so; such a state of affairs would or could produce an unfortunate race to issue the first set of proceedings.

32.
A concomitant of the right to adjudicate at any time is that this gives a party a commercial advantage and lever. Thus it is open and permissible to a party such as Makers in this case to threaten adjudication against the other party. It is a commercial lever for two reasons, the first being that the other party knows that it faces the risk of a decision against it which, if made fairly and within jurisdiction by the adjudicator, will be enforced by the Court. Secondly, the other party knows that in most cases it will incur costs of defending the adjudication proceedings which will be irrecoverable as the adjudicator is only rarely given a discretion to award such costs. Parliament must be taken to have known that such a commercial advantage and lever was being given. Parliament was certainly aware that the passing of the 1996 Act would alter the balance as between employers and contractors so far as cash flow was concerned.

33.
The issue thus arises as to whether the Court on setting aside a judgment should or even can impose a condition which prevents a party from pursuing a statutory right to adjudicate. One can state with certainty that it will, at the very least, be a very rare case in which it would be appropriate to impose such a condition.

34.
The Court however clearly has a jurisdiction, which derives from statute, under the CPR to impose conditions on a setting aside of a judgment in default (see Paragraphs 20-24 above). In considering whether to impose conditions and in the management of cases, the Court must have regard to the overriding objective. CPR Part 1.1 states as follows:

"(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with cases justly includes, so far as is practicable-

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate-

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the case;

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account resources to other cases."

35.
The list in CPR 1.1(2) is not exclusive. Dealing with cases justly and fairly must also include applying or permitting the application of the law of the land. Thus, if statute or a contract gives a party the right to adjudicate upon a dispute even though the Court is seised of the same dispute in concurrent proceedings, justice demands that, save at most in exceptional circumstances, the Rules should be operated so as not to prevent that party from pursuing such an adjudication. Adjudication usually involves a 28 day timetable from institution to decision which can usually be accommodated in the Court's timetable for the court proceedings. I do not rule out the possibility that, where an adjudication is threatened such that the just disposal of a court case is threatened, steps might be considered to limit the impact of the adjudication on the court proceedings.

36.
Reliance upon CPR 1.1(2) (a), the "equal footing" basis, involves primarily the equal footing in the court proceedings themselves. The "equal footing" may have to account for the fact that there is an adjudication decision in existence or to come into existence which may alter the commercial balance as between the parties. Ensuring the parties are on an "equal footing" does not require or even enable the Court to interfere with statutory or contractual rights except possibly in exceptional circumstances.

37.
As for CPR 1.1(2) (a), the "saving [of] expense" must relate primarily at least to the saving of expense in connection with the court proceedings in question. It would not usually relate to the need to prevent or limit the costs to be incurred by a party pursuing its legal right to adjudicate. Although the Rule refers to the saving of "expense" which might properly be considered as a wider expression than legal and witness costs of and occasioned by the proceedings, the expense in question should relate to the proceedings with which the Court is concerned. It would not relate, usually, to the expense of the institution of adjudication proceedings which a party was legally entitled to pursue. Parliament or the contractual parties in question are taken to have legislated or contracted for what is to happen in relation to the cost and expense of adjudication.

38.
As for CPR 1.1(2)(c), proportionate dealing, this relates to the dealing by the Court with the case in question and, generally, not to interfering with the legal rights of the parties.

39.
The need to deal with cases expeditiously and fairly, adumbrated in CPR 1.1(2)(d), does not assist Camden in this case. This court case will not get on any sooner whether there is an adjudication in the near future or not. At the conclusion of the hearing of this application, there was agreement that there should be a trial on liability first, addressing the issue of whether Camden was entitled to terminate makers' contractual employment. The first available date for such a trial is November of this year which also is about the earliest date which would enable a fair timetable for pleadings, disclosure, witness statement exchange and experts meetings and reports. Even if there was an adjudication, there is no obvious risk of the court timetable being significantly disrupted by it.

40.
CPR 1.1(2)(e) is not of any relevance here as what will be done in any adjudication will not materially impact adversely on the application of court resources.

41.
Camden's argument essentially is that, given that the Court has the opportunity to consider the setting aside of the default judgment and has wide case management powers in line with the overriding objective, it should take into account the likelihood that any future adjudication award against Camden will not be enforceable or any summary enforcement judgment against Camden will be stayed by reason of the poor financial position of Makers. Therefore, it contends, the Court should impose the condition about not adjudicating on Makers to save expense in a broad sense, to save time and resource which would better be deployed in preparing for the Court claim and to maintain an equal footing by not giving Makers an unfair advantage of being able to pursue an adjudication which is or may be pointless in practical terms. The proposed condition, it is argued, is designed to enable the Court to place the parties on an equal footing to contest the merits of the case in the litigation, and to avoid the defendant being placed in a superior and oppressive position in relation to Camden.

42.
To consider that premise, it is necessary to remind oneself of the point to which the law and practice has reached currently in relation to the relevance of the financial position of the party which successfully enforces an adjudication decision in its favour. The impact of insolvency or the likely inability of that party to repay any sums paid out pursuant to such an enforcement was properly and effectively reviewed and summarised in**Wimbledon Construction Co 2000 v Derek Vago**[2005] BLR 374 by HHJ Coulson QC (as he then was), having reviewed the cases, at Paragraph 26:

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

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

(c) In an application to stay the execution of summary judgment arising out of an Adjudicator's decision, the Court must exercise its discretion under Order 47 with considerations (a) and (b) firmly in mind …

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

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

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

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

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

I followed and applied this approach in **Air Design Kent Ltd v Deerglen (Jersey) Ltd**[2008] EWHC 3047 (TCC).

43.
I have found that, although Makers is not currently in liquidation, it is insolvent by ordinary standards. I assume that the only reason it is not in liquidation is that nobody currently wishes to put it into liquidation. It may well be the case that Keller, as the ultimate holding company, currently sees a financial advantage to it in not liquidating the company. In the ordinary course of events, based on the evidence currently before the Court, there would be a stay of execution on any judgment in Makers' favour if the Court was today addressing enforcement proceedings.

44.
One therefore needs to consider the two exceptions set out in Paragraph 26(f) (i) and (ii) of the **Wimbledon** judgment. I consider, based on the evidence before the Court that neither is made out:

(a) at the time that the relevant contract was made, that is in September 2005, the filed accounts showed Makers as solvent and trading profitably. Profits were some £400,000 and the capital value of the company was some £1.5m. That is to be compared with a trading loss of over £8m and a negative capital value of over £10m. The claimant's financial position is now wholly different to its financial position in 2005.

(ii) There can be no doubt that Makers' financial position is not on any count wholly attributable to Camden's failure to pay those sums which might be awarded by an adjudicator in the future. Makers' claims are for some £4m which in large part (over £3m) relate to uncertified or otherwise unpaid sums allegedly due for work done. Given the trading loss of over £8m and the capital liability of over £10m, even if Makers succeed in full before the adjudicator, the current insolvency is not wholly due to Camden's failure to pay other sums due to Makers. The reference in the Wimbledon judgment to the claimant's financial position being due "in significant part" to the defendant's failure to pay needs to be looked at in the context of it being a cause of the claimant's poor financial position, which is significant in all the circumstances. I would find it difficult to see that, where, as here, the bulk of Makers' financial problems must be attributable to factors other than to Camden's failure to pay, a "significant part" of those problems is attributable to Camden. The current insolvency of Makers would on any count still be present. It is difficult to express a final view unless and until one sees what an adjudicator decides and on what basis.

45.
This view is based only on what would currently be the position if there was an effective adjudication decision in favour of Makers. During argument, Mr Ghaly for Makers indicated that he was instructed that Keller would give a company guarantee that Keller would repay any sum paid out pursuant to a further adjudicator's decision. That might impact upon a decision by the Court as to whether to stay a summary judgment enforcing a future adjudicator's decision but that would probably depend on Keller's financial ability to repay, information on which is not before the Court. It is also at least possible that other financial information may be before the Court at that stage, such as the accounts for the year ending 31 December 2008.

46.

On balance, I decline to impose any condition preventing or limiting Makers from pursuing any further adjudication. My reasons are:

(a) The failure to serve a Defence within the permitted time, without securing an extension of time was an oversight on the part of Makers or its Solicitors. It was thus purely fortuitous that Camden was able to enter judgment in default. But for that, the Court would have had no power to prevent Makers from pursuing an adjudication concurrently with the Court proceedings.

(b) It will at best be an exceptional course for the Court on setting aside a judgment to prevent a party from pursuing a statutory right to adjudicate at any time.

(c) This is not an exceptional case. Although the evidence currently before the Court shows clearly that Makers is insolvent and would be in no position to pay back any money paid out by Camden pursuant to any future adjudication, it is at least possible that other information and circumstances may be applicable at that later stage.

(d) Parliament has altered the commercial balance as between employers and contractors by passing the 1996 Act. It has given parties the lever of adjudication. The threat to adjudicate might encourage settlement; an actual adjudication decision might induce a final settlement.

(e) If Makers or those financing Makers wish to take the risk of proceeding to adjudication, they will bear in mind the potential advantages in so doing and the very real risk that a Court could well stay any judgment to enforce any adjudication decision in Makers' favour by reason of insolvency and inability to repay. The Court should generally not interfere in the commercial relationship between the parties. The parties should be permitted to pursue such courses as are open to them.

48. I now turn to consider whether any condition should be imposed with regard to security for the costs of the counterclaim. I can deal with this shortly as it was not ultimately pressed by Mr Matthias QC for Camden. In my judgement, it would be inappropriate in this case to impose, at least at this stage, any condition so far as security for costs is concerned. My reasons are as follows:

(a) Unless grounds exist pursuant to CPR Part 25 upon which to order security for costs, the imposition of a security would in effect involve punishing the Defendant in this case. However, in an appropriate case, it is open to the Court to impose a condition requiring security for costs on setting aside a default judgment where the defendant is also a counter-claimant.

(b) Although the evidence establishes in this case that Makers would be unable to pay Camden's costs if ordered to do so (within the meaning of CPR Part 25.13.1), this would be an inappropriate stage at which to order security.

(c) The court may make an order for security from costs in favour of a claimant such as Camden in respect of the counterclaim brought against it if the counterclaim raises issues which go beyond the defence of its claim (see **Thistle Hotels Ltd v Gamma Four Ltd** 2004 EWHC 322)

(d) Camden's claim against Makers is predicated upon the basis that it was entitled to terminate the contract. Makers' defence is that Camden was not entitled to terminate the contract and that Camden repudiated the contract

(e) As the parties have agreed and the court will order, there will be a trial on liability which will take place in November 2009. Directions will be given accordingly so that costs will not be incurred to any significant extent in relation to the counterclaim. If any order for security for costs was to be made, the most appropriate time to make it would be at the stage immediately after any judgement on

liability when it becomes clear that the counterclaim will be pursued and that the parties will commence incurring expenditure in relation thereto.

(f) As security for costs will not be ordered against a defendant in relation to its defence of a claim against it, it should not be ordered at this stage when costs are only or primarily being incurred in relation to the pursuance of Camden's claim and Makers' defence of that claim.

Costs

47. It was resolved that all its use relating to costs should be dealt with in writing. Makers argue that because it "won" its application to set aside the default judgement Camden should pay its costs. Makers rely on two authorities **Littman v Costa** 2002 EWHA 2608 (Ch) and **Osborne v Leighton** (30 April 1999). Against that, Camden argues that costs should be in the case or, at worst, Makers costs should be "in the case". Camden argues that there are a particular circumstances which make it inappropriate for Makers to be awarded its costs of the hearing. These are that it one on three of the issues (Jurisdiction, Insolvency and Other Good Reason) it won, that my judgement on the Insolvency Issue has given the parties useful guidance about the likely outcome of an application to enforce a monetary award resulting from any future adjudication, that the court expressed some sympathy for Camden, that it was only during the hearing that for the first time Makers through its Counsel offered a parent company guarantee and finally that Camden behaved reasonably in raising and pursuing its arguments for the imposition of the proposed conditions. Makers' costs bill is for £11,090.

48. Having considered all the arguments, Camden should pay Makers' costs in the sum of £5000. My reasons are as follows:

(a) Makers has won its application; the need for such application however arose as a result of Makers' default in serving its Defence in time. Makers offered to pay its own and Camden's costs at an early stage.

(b) Makers contested a number of issues in the course of the occasion upon which it failed; some time and costs was therefore wasted.

(c) Given that it was necessary to consider the Insolvency Issue, my findings on that aspect should be of use to the parties in planning for the future conduct of this case and for the saving of expense.

(d) Camden acted reasonably in defending the application.

(e) Makers' cost bill if assesses by a cost judge would probably have been reduced somewhat in any event.

Conclusion

49. The judgment in default will be set aside. No conditions will be imposed. Camden should pay Makers costs summarily assessed at £5,000 within 14 days.