Case No: HT-13-334 209

Neutral Citation Number: [2013] 3576 EWHC (TCC)

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 18th November 2013

Before:

MR JUSTICE AKENHEAD

- -

Between:

WESTSHIELD LIMITED **Cla**

- and -

MR DAVID WHITEHOUSE AND MRS LISA WHITEHOUSE **Defe**

- -

- -

Philip Vickers (of **Greenwoods Solicitors LLP**) for the **Claimant**

Christopher Cook (instructed by **DWF LLP**) for the **Defendant**

Hearing date: 8 November 2013

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JUDGMENT

Mr Justice Akenhead:

1.
It would be wrong to suggest that the basis upon which challenges to the enforcement of adjudicators' decisions are necessarily limited to jurisdictional or breach of natural justice arguments. This case raises head-on what impact a CVA ("Company Voluntary Arrangement") may have on an otherwise enforceable adjudication decision.

Background

2.
By a written contract ("the Contract") made in August 2007, Mr and Mrs Whitehouse ("the Whitehouses") employed Westshield Ltd ("Westshield") to carry out largely sub-structure work for a house at 35c Bollin Hill, Wilmslow, Cheshire. The Contract was in the standard Joint Contracts Tribunal form for minor Building Works. The contract sum was £262,074.07. The Works were to be completed by 18 January 2008, it being intended that they should be started some 5 months before. Article 6 of the Contract provided for adjudication for disputes or differences arising under the Contract. Provision was made for payment certificates (from an Architect), variations and quality requirements.

3.
Any facts to which I refer are not intended to be finally binding but are based on the documentation before the Court. The works were finished late (in about April 2009), although it is said that no practical completion certificate was ever issued. Westshield thereafter claimed sums well over the original contract sum attributing the increases to variations and delays. Some £371,000 had been paid by the Whitehouses. At some stage, the superstructure was built on to the sub-structure with other contractors being deployed.

4.
By the end of 2010 and whilst there were continuing issues between the parties, Westshield, due to financial difficulties, decided to seek a CVA for itself. The Directors produced a CVA Proposal which named Messrs Paul Stanley and Paul Barber as joint "nominees" and "supervisors". It highlighted initial successes in trading in the construction business but then difficulties as the economic climate worsened from 2008 onward. Westshield proposed to pay under the CVA at the rate of £10,000 a month for 36 months, albeit that assets would be sold for the benefit of secured creditors; there would be staff redundancies, reductions in salaries and reduced overheads. £1.8million's worth of retentions and disputed monies said to be due were identified. Essentially, subject to certain contingencies, all creditors would be bound by the terms of the CVA and would be bound to accept the dividends payable in full and final satisfaction of their debt (Paragraph 6.9 of the Proposal). As the name implies, the supervisors were to administer the CVA. The attached Estimated Statement of Affairs showed as at 15 November 2010 a balance sheet deficiency of some £4.4 million.

5.
The CVA could only become binding if 75% if the creditors (by value) agreed. There is no dispute that this happened and the CVA came into effect on 7 December 2010. The list of creditors at that stage did not include the Whitehouses.

6.
The CVA incorporated "Standard Conditions for Company Voluntary Arrangement". The relevant provisions were as follows:

"5. The approval by Creditors and Members of the Arrangement pursuant to the [Insolvency] Act and the [Insolvency] Rules shall be deemed to include agreement, approval and acceptance of these Conditions in all respects.

6. Upon the approval of the Arrangement pursuant to the provisions of the Act and the Rules:-

(i) the Arrangement shall come into effect; and

(ii) the Supervisor shall exercise the functions given to him by the Arrangement and under the Act and Rules.

12. (a) The Supervisor shall exercise the functions given to him by the Arrangement and under the Act and Rules provided that such exercise shall be within the unfettered discretion of the Supervisor who shall be under no obligation to exercise all or any of the functions and powers conferred upon him whether the same be expressly provided for in this Proposal or implied by law…

20…(b) The Company shall continue its business on his own account and:-

(i) in its own name…

(e) For the avoidance of doubt, it is hereby stated that:-

(i) the Company shall carry on with business as principal and shall be solely responsible for any subsequent creditors arising and any liabilities incurred therein after the approval of the Arrangement…

23. (c) No creditor shall be entitled to receive any payment or dividend from the Supervisor or any other person under the terms of the Arrangements unless:-

(i) he is bound by the Arrangement…

(ii) the Supervisor has admitted his claim for the purpose of participation in any payment or dividend under the Arrangement…

(iii) Unless otherwise agreed by the creditors in general meeting or otherwise provided for in the proposal, no creditor shall be entitled to participate in the Arrangement unless that creditor's debt is one provable in a Liquidation within the meaning of the Act and Rules.

(d) The amount on which payments or dividends to a creditor are to be calculated under the Arrangement shall subject as set out in paragraphs 23(e) and 23(f) of these Conditions, be the sum for which a proof would have been admitted had a Winding-up Order being made against the Company on the day the Proposal was approved.

(e) Where before the Proposal is approved there have been mutual credits, mutual debts or other mutual dealings between the Company and any person claiming to be a creditor of the Company, 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. Only the balance (if any) of the account owed by the Company to the creditor shall be claimable by the creditor.

(f) A proof may be admitted for inclusion in the Arrangement by Supervisor either for the whole amount claimed by creditor or for part only of that amount, and if the Supervisor rejects a proof in whole or in part he shall prepare a written Statement of his reasons for doing so and shall send it forthwith to the creditor. In the event of the Proof of Debt or claim of any creditor or purported creditor being rejected (whether in whole or in part) by the Supervisor, the creditor or purported creditor shall have the right application to the Court on the admissibility or otherwise of such Proof of Debt or claim provided that any such application must be made within 21 days of the creditor receiving the written Statements mentioned previously in this paragraph."

7.
In May 2011, Westshield submitted its Valuation No 40 in the sum of £644,717.63 to the Whitehouses or their consultants; allowing for the payments made, over £270,000 was said to be due. There was little or no reaction to this. There was a limited exchange between the parties in 2012.

8.
On 6 March 2013, Westshield served on the Whitehouses a Notice of Adjudication claiming a total of £279,956 together with other relief.

The Adjudication

9.
On 7 March 2013, the Whitehouses' solicitors (DWF) wrote to Westshield's claims consultants saying that no dispute had crystallised and asking for confirmation that Westshield would not be referring the matter to adjudication. Following an e-mailed response that matters were proceeding, DWF wrote again on 8 March saying that, as there was no dispute which had crystallised, their clients were

reserving their position on jurisdiction; they also indicated their understanding that Westshield was in a CVA, going on to say:

“Whilst we need to review any contract between our respective clients (which is not admitted) deals with such an insolvency, it would appear that in any event your client will be unable to enforce any Adjudicator’s Award because our client would succeed in applying for a stay of execution."

In neither of these two letters was there any reference to there being any counterclaim or set off.

10.
Mr Paul Jensen was appointed as adjudicator and he wrote to the parties on 15 March 2013. DWF wrote to the adjudicator on 25 March 2013 repeating their reservation in relation to the lack of a crystallised dispute but also adding for the first time extensive arguments about the ramifications of the CVA. This letter raised for the first time a contention that the Whitehouses had "a valid and substantial counterclaim…for negligence including but not limited to membrane defects and drainage defects at the property”. They raised the point that Clause 23 of the CVA conditions required the supervisor to address the extent of the mutual dealings between the parties. They reserved their clients’ position on jurisdiction in this regard also.

11.
On 27 March 2013, the Whitehouses served their Response to the Referral Notice served by Westshield on 13 March 2013. The Response reserved the Whitehouses’ position on the crystallised dispute and CVA points and then went on to challenge the Westshield claim on its merits, attaching a witness statement of a quantity surveyor, Mr Cranfield, which sought to challenge the Westshield claim on an item by item basis. Some alleged variations were challenged on the basis that they involved the repair of defects for which Westshield was responsible. Westshield served a Reply on 5 April 2013 which was followed by a Rejoinder on 10 April 2013, itself responded to by a “Surrejoinder” on 15 April 2013.

12.
The Adjudicator produced his 18 page decision on 16 April 2013. He had previously indicated that he believed that he had jurisdiction. He decided that the Whitehouses should pay Westshield £132,667.56 inclusive of interest and that the Whitehouses should pay his fees.

13.
The Whitehouses paid the adjudicator’s fees but have not paid Westshield. However, since the decision, they have through DWF written to the CVA Supervisor on a number of occasions with a somewhat increasing degree of refinement:

(a) The first letter from DWF is dated 23 April 2013 and sought to put the Supervisor on notice that their clients intend to launch a claim as creditor in relation to "significant cost and expense which our clients incurred in remedying defective work carried out by Westshield" enclosing a list of some but not all of the alleged defects, quantified at about £98,000.

(b) The Supervisor replied by e-mail on the same day saying that the claim "will be rejected" on the basis that there was an adjudicator’s decision in favour of Westshield.

(c) DWF replied by letter on 24 April 2013 to the effect that it was the Supervisor’s responsibility under Condition 23 of the CVA Conditions to agree and admit claims, adding that the adjudicator did not consider any claim or counterclaim for defects.

(d) On 10 October 2013, after these enforcement proceedings had been started, DWF wrote again saying that their clients considered themselves to be creditors in the CVA in respect of a claim for damages in relation (at least primarily) to defects either put right by Westshield (but for which Westshield claimed the rectification cost) or put right by others. They enclosed a "proof of debt form and a statement setting out the details of the claims". The form was in a creditor claim form for CVAs and the statement identified £43,150 as involving errors in the adjudicator's decision, an over-claim of more than £10,000 for putting right some damp proof membrane defects, a suggestion supported by a witness statement that delays attributable to a piling variation could not be nearly as much as has been suggested, various suggested increased costs from the superstructure contractor attributable in some way to poor workmanship and site supervision on the part of Westshield and various other matters. This led to the conclusion that there was a net £199,805 due to the Whitehouses.

(e) The Supervisor replied on 16 October 2013 that he did not think it was his job to second guess the adjudicator particularly when the same issue was being put to the court. It does go on to say that if the "Court does not get involved for some reason, then of course I will adjudicate on the quantum of any claims" albeit that he would require a greater level of evidence than had been provided so far.

(f) DWF wrote again on 30 October 2013 which continued the argument and asked for further information from the Supervisor.

The Proceedings

14.
Westshield issued the current proceedings on 17 September 2013, seeking to enforce the adjudicator's decision. The Particulars of Claim attached various appendices. Mr Christie of DWF submitted a detailed statement which raised much of the above history, essentially putting forward jurisdictional challenges on the grounds that there was no crystallised dispute and that by reason of the CVA there was in effect no subsisting basis for adjudication and asserting that, even if the adjudication decision was binding, it simply established a debt but the CVA arrangements applied to enable the counterclaim to be deployed and the Supervisor must deal with that first. Finally he argued that there should be a stay of execution by reason of the financial position of Westshield.

15.
That was met by statements from Mr Waldron and Mr Stanley, the Supervisor. Mr Waldron challenged the credibility of the counterclaim, pointing to its very late emergence and its lack of detail and support; he further points to the commercial viability of his company. Mr Stanley explained that the CVA is coming to an end and that Westshield has complied with the terms of it. He says that Westshield has a substantial order book and that the latest filed accounts give a misleading picture of the company's value because it still contains the CVA debt, which will be almost entirely removed at the end of the CVA.

16.
Belatedly and without permission (albeit given at the hearing), the Whitehouses submitted two more statements, one from Mr Whitehouse who explained as an experienced insolvency practitioner that he knew of "Westshield's parlous financial position" and, although he was aware of issues with defective work he decided not to throw good money after bad. Mr Cranfield's statement gave more detail about defects and produced different figures from before as to the sum due to his client.

17.

Counsel for the Whitehouses abandoned, properly, the argument about the non-crystallisation of the dispute. The argument proceeded on the previous lines.

Discussion

18.
I infer from what Mr Whitehouse has said as well as from DWF's letters in March 2013 that he knew from a fairly early stage (well before 2013) of the CVA and also that he was aware that he had an arguable cause for complaint against Westshield from 2009 onwards. He took what he believed was an informed decision not to register his possible claim against Westshield with the Supervisors. This claim has primarily emerged as a reaction to the adjudication decision and was not raised to any great extent in the adjudication. That said, the Whitehouses have now belatedly raised sufficient to assert that they have some sort of bona fide counterclaim for defects and some at least partial challenge to the detail of the adjudicator's decision. Although there are discrepancies, inconsistencies and some lack of substantiation in what has been raised by them, I could not say that, if an account was taken of the financial position as between them and Westshield, there would definitely not be some credit to them.

19.
The decision of the Court of Appeal in **Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd** [2000] EWCA Civ 507 is particularly apposite, albeit that it raised issues arising out of the insolvency of the successful party in the adjudication. The claimant in that case was in liquidation from before the relevant adjudication. The Court recognised that an adjudicator's decision made within jurisdiction was enforceable but was "provisional" in the sense that it was only binding for the time being; it was not final and binding, the parties' agreed final dispute resolution forum (usually the courts or arbitration) being where such a decision would be made. Lord Justice Chadwick dealt with the impact of the Insolvency Act and the Insolvency Rules:

"29. The second question raised by the appeal is whether the judge was right to give summary judgment to Dahl-Jensen for the amount which the adjudicator had decided Bouygues should pay. In the ordinary case I have little doubt that an adjudicator's determination under section 108 of the 1996 Act, or under contractual provisions incorporated by that section, ought to be enforced by summary judgment. The purpose of the Act is to provide a basis upon which payment of an amount found by the adjudicator to be due from one party to the other (albeit that the determination is capable of being re-opened) can be enforced summarily. But this is not an ordinary case. At the date of the application for summary judgment - indeed at the date of the reference to adjudication - Dahl-Jensen was in liquidation.

30. In those circumstances rule 4.90 of the Insolvency Rules 1986 has effect. The rule is in these terms, so far as material:

"(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.

(3) ...

(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 the assets."

31…There is no doubt that the rule has statutory force. It applies wherever there have been mutual dealings, giving rise to mutual obligations and mutual credits, between a company which subsequently goes into liquidation and another party.

32. The effect of the rule was explained by Lord Hoffman in his speech in the House of Lords in Stein v Blake [1996] 1 AC 243 . In that appeal Lord Hoffman was addressing the provisions of section 323 of the Insolvency Act 1986, which is applicable in an individual insolvency or bankruptcy. But the provisions of section 323 of the Act and Rule 4.90 of the Rules are indistinguishable. The rule-making body, in 1986, incorporated into corporate insolvency provisions which had, for many centuries, been part of the law in relation to individual bankruptcy. What Lord Hoffman had to say about section 323 of the Act is equally applicable to corporate insolvency; to which rule 4.90 applies. At page 251 D-F Lord Hoffman explained the difference between bankruptcy set-off and legal set-off outside bankruptcy:

"Bankruptcy set-off, on the other hand, affects the substantive rights of the parties by enabling the bankrupt's creditor to use his indebtedness to the bankrupt as a form of security. Instead of having to prove with other creditors for the whole of his debt in the bankruptcy, he can set off pound for pound what he owes the bankrupt and prove for or pay only the balance. So in Forster v Wilson (1843) 12 M & W. 191, 204, Parke B said that the purpose of insolvency set-off was 'to do substantial justice between the parties'. Although it is often said the justice of the rule is obvious, it is worth noticing that it is by no means universal. It has however been part of the English law of bankruptcy since at least the time of the first Queen Elizabeth."

33. The importance of the rule is illustrated by the circumstances in the present case. If Bouygues is obliged to pay to Dahl-Jensen the amount awarded by the adjudicator, those monies, when received by the liquidator of Dahl-Jensen, will form part of the fund applicable for distribution amongst Dahl-Jensen's creditors. If Bouygues itself has a claim under the construction contract, as it currently asserts, and is required to prove for that claim in the liquidation of Dahl-Jensen, it will receive only a dividend pro rata to the amount of its claim. It will be deprived of the benefit of treating Dahl-Jensen's claim under the adjudicator's determination as security for its own cross-claim.

34. Lord Hoffman pointed out, at page 252 in Stein v Blake that the bankruptcy set-off requires an account to be taken of liabilities which at the time of the bankruptcy may be due but not yet payable, or which may be unascertained in amount or subject to contingency. Nevertheless, the insolvency code requires that the account shall be deemed to have been taken, and the sums due from one party shall be set off against the other, as at the date of insolvency order. Lord Hoffman pointed out also that it was an incident of the rule that claims and cross-claims merge and are extinguished; so that, as between the insolvent and the other party, there is only a single claim - represented by the balance of the account between them. In those circumstances it is difficult to see how a summary judgment can be of any advantage to either party where, as the 1996 Act and paragraph 31 of the Model Adjudication Procedure make clear, the account can be reopened at some stage; and has to be reopened in the insolvency of Dahl-Jensen.

35. Part 24, rule 2 of the Civil Procedure Rules enables the court to give summary judgment on the whole of a claim, or on a particular issue, if it considers that the defendant has no real prospect of successfully defending the claim and there is no other reason why the case or issue should be disposed of at a trial. 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 rule 4.90 of the Insolvency Rules 1986 requires…"

It will be noted that Rule 4.90 of the Insolvency Rules bears a striking similarity to Condition 23(e) of the CVA Conditions adopted here.

20.
It is clear that a company subject to a CVA, whilst bound by the terms of the CVA, can otherwise carry on business. Indeed, in this case, Conditions 20(b) and (e) expressly confirm this. It follows that the company can sue and be sued albeit that, if sued by a creditor for debts or other claims arising before the CVA, it may be subject to the CVA provisions and there may be a limited recovery. This was confirmed by Rimer J (as he then was) in **Alman v Approach Housing Ltd** (4 December 2000) at Paragraphs 7-9).

21.
There is little authority in relation to the impact of CVAs on the enforceability of adjudicators' decisions, although in **Mead General Building Ltd v Dartmoor Properties Ltd** [2009] EWHC 200 (TCC) this was considered in relation to stays of execution:

"23. There is, so far as I can tell, no authority dealing with the position of a claimant who is the subject of a CVA and who seeks to avoid a stay of execution. Ms. McCafferty was also unable to identify any such authority. However, it seems to me that, applying the principles that I have already noted:

(a) The fact that a claimant is the subject of a CVA will be a relevant factor for the court to take into account when deciding whether or not to grant a stay under RSC Order 47.

(b) However, the mere fact of the CVA will not of itself mean that the court should automatically infer that the claimant would be unable to repay any sums paid out in accordance with the judgment, such that a stay of execution should be ordered.

(c) The circumstances of both the CVA and the claimant's current trading position will be relevant to any consideration of a stay of execution.

(d) Also of relevance will be the point noted in paragraph 26(f)(ii) of the judgment in **Wimbledon** (which was also one of the live issues in **Michael John Construction Ltd. v. Golledge & Others**) [2006] EWHC 71 (TCC)), namely whether or not the claimant's financial position and/or the CVA is due, either wholly or in significant part, to the defendant's failure to pay the sums awarded by the adjudicator."

22.
There can be no doubt that in the current circumstances Westshield had the right to pursue recovery of sums said to have been due to it from the Whitehouses. It was an obvious part of its business to collect old debts. It could have had little reason to believe that there was any or any sizeable cross-claim from the Whitehouses as none had been registered for the CVA, although there was some fairly informal indication in about 2009 that there was some criticism about the quality of work. Whether it was prudent to launch adjudication proceedings without first trying to ascertain what might be the defences and cross-claims is another matter.

23.
As a matter of jurisdiction, the existence of the CVA does not act as some sort of bar on adjudication which prevents a company such as Westshield from pursuing adjudication for a pre-CVA debt and the adjudicator was right to disregard it as valid challenge, particularly here. A CVA is not akin to a liquidation whereby it is the liquidator who must take proceedings and there are restrictions even on that. No set-off or cross-claim had been raised, clearly or even at all, by the Whitehouses before the adjudication; neither the Company nor the Supervisors can be criticised for not actually then knowing that there was or might be a viable cross-claim from the Whitehouses.

24.
As the argument about the crystallisation of the dispute has been abandoned, it follows that the adjudicator had jurisdiction as such to decide what he did. Prima facie, the decision is therefore enforceable. The impact of the CVA might have been a defence in the adjudication but it was never argued as such by the Whitehouses who chose to put it as a jurisdictional reservation.

25.
However as in the **Bouygues** case, there is a real issue as to whether, in the events which have happened since the launching of the adjudication, the decision can at least at this time be summarily enforced. The impact of a CVA is set out in Section 5 of the Insolvency Act 1986 as amended:

"2" The voluntary arrangement—

(a) takes effect as if made by the company at the creditors' meeting, and

(b) binds every person who in accordance with the rules—

(i) was entitled to vote at that meeting (whether or not he was present or represented at it), or

(ii) would have been so entitled if he had had notice of it,

as if he were a party to the voluntary arrangement."

This is reflected in the CVA conditions in this case. It follows that the Whitehouses are bound by the CVA although they did not participate or register their claim. It is unclear if they had notice of the creditor's meeting but it matters not as the statute makes clear.

26.
One must therefore construe the CVA conditions in effect as if they were contractually binding as between Westshield and the Whitehouses. One must do this in the context of the Whitehouses having submitted at least by now and belatedly a just sufficiently credible challenge to the substance of the adjudicator's decision as well as raising an arguable counterclaim; there are undoubtedly gaps in what they have submitted and there is arguably a general lack of hard evidence at the moment. However, the Court cannot say that the claims, supported as they are by statements submitted to the Court in defence against the application, are so lacking in support as not to be bona fide.

27.
In that context, one can break down Condition 23 (e) of the CVA Conditions:

(a) Were there before the Proposal was approved "mutual credits, mutual debts or other mutual dealings between the Company and any person claiming to be a creditor of the Company"? The answer is that any cause of action in contract (which the Whitehouses have) had arisen before the CVA because the works were completed and taken over in April 2009. There were mutual dealings in

that there was a contract between the parties and the claim for the account and the cross-claim arise out of or in connection with that contract. The Court can not say that there were definitely debts or credits because they have not been proved in the CVA or established in these proceedings.

(b) Can “an account…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”? There is no obvious reason (and certainly not one advanced in these proceedings) why such an account can not be done by the Supervisors; indeed they say that they can “adjudicate” upon it. If and when that is done, “the balance (if any) of the account owed by the Company to the creditor” can be ascertained.

(c) Once that exercise is done, if it shows money due to Westshield, that can be paid subject to the right which the Whitehouses have to refer the matter to Court within a short time. The Court can then consider what effect (if any) the adjudication decision may have on its decision as to what should be done. If the accounting shows money due to the Whitehouses, they will get however many pennies in the pound as are available to creditors from the CVA. I was told by Counsel for the Whitehouses that this could be 1 penny or less.

28.
In my judgment, the position is exactly analogous to what was being addressed by Lord Justice Chadwick in the **Bouygues** case, although his reasoning was related to the direct impact of the Insolvency Act and Rules. That in reality involves a distinction without a difference in the current case. The reason is that the Company and the Whitehouses as arguable creditors are bound by the CVA Conditions. To borrow from the wording of his judgment:

(a)
The effect or “incident” of Condition 23 (e) is that “claims and cross-claims merge and are extinguished; so that, as between the insolvent and the other party, there is only a single claim - represented by the balance of the account between them”.

(b)
“In those circumstances it is difficult to see how a summary judgment can be of any advantage to either party where, as [Condition 23(e)] make[s] clear, the account can be reopened at some stage”.

29.
It has not been suggested that the Supervisors have any discretion as to whether the account under Condition 23(e) is taken. How they go about the exercise is a matter for them. They may give greater or lesser weight to the adjudication decision at least so far as the credit due to Westshield is concerned, albeit it might well be prudent to have regard to the points now raised by the Whitehouses as well as the Westshield claim to a higher figure than was awarded by the adjudicator (if pursued by the directors). Provided the exercise is carried out in a bona fide way and can be said to be an accounting under Condition 23(e), that should suffice.

30.
The long stop is that there may be rights of recourse to the Court at least for the Whitehouses as set out in Condition 23 (f). Whether such an exercise is cost effective will be a matter for them. It will almost inevitably be for the best if the Supervisors, Westshield and the Whitehouses sought to resolve this matter amicably as soon as possible.

31.

Essentially, Mr Vickers' primary argument for Westshield was that the decision was binding and should be enforced, with reliance being placed on Section 108 of the Housing Grants, Construction and Regeneration Act 1996. That however is undermined by the fact that the adjudication clause in this case was not a statutorily imposed one because the contract related to a residential development for the Whitehouses (see Section 106 of the 1996 Act). It is also undermined by the impact of the Insolvency Act provisions about CVAs, for which see above and the actual CVA Conditions in this case. The fact that the counterclaim was not raised effectively in the adjudication proceedings matters not in circumstances where it can be said to be a facet or consequence of the "mutual dealings" envisaged by Condition 23(e). There is no res judicata or issue estoppel arising out of the adjudication.

32.
As for a stay of execution, as no summary judgment is to be entered, it matters not whether a stay would have been granted. I would not have granted a stay as it is clear that the most recently filed accounts contain the pre-CVA losses or deficits which will largely be wiped out when Westshield emerge in a few weeks' time from the CVA; it is largely these deficits on the balance sheet which are relied upon. There is no reason to doubt the evidence that Westshield have a strong order book currently; the fact that it has paid all the sums due under the CVA is some evidence of this.

33.
The vice of there being no stay here would be that (absent the stay) the full sum due under the adjudication decision would be paid without set-off or challenge and the Whitehouses' cross-claim would fall for consideration under the Condition 23(e) account and, even if successful, would be worth in reality a very small fraction of any credit found to be due. The vice is obviously that one side of the equation or the account will have been paid without set-off in circumstances in which the CVA Conditions (which bind the parties to this litigation) call for an accounting which allows for both claim and cross-claim and the net balance to be paid one way or the other, subject to the Court's intervention.

Decision

34.
It follows from the above that the application for summary judgment is dismissed. Any further steps in these proceedings must await the outcome of the Supervisors' account and the proceedings will be stayed until further order. I leave open whether, following this accounting exercise, Westshield may issue a further summary judgment application.