Case No: HT-2017-000373

Neutral Citation Number: [2018] EWHC 177 (TCC)

**IN THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice

Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 8 February 2018

**Before** :

**THE HON MR JUSTICE COULSON**

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

**Between :**

**Equitix ESI CHP (Wrexham) Limited** **Cla**

**- and -**

**Bester Generacion UK Limited** **Defe**

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

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

**Mr Luke Wygas**

(instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimant**

**Mr Tom Owen** (instructed by **Decimus Fearon LLP**) for the **Defendant**

Hearing date: 29 January 2018

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

**Judgment**

**The Hon. Mr Justice Coulson :**

## 1. INTRODUCTION

1.
Pursuant to a contract dated 29 April 2016, the claimant engaged the defendant to design and build the Wrexham Biomass Fired Energy Generating Plant (“the Project”). The claimant is a SPV created specifically for the Project. The defendant is a contractor specialising in renewable energies.

2.
Initial progress on the Project was slow. On 23 February 2017, the claimant issued a notice of adjudication seeking a declaration that the defendant was not entitled to an extension of time. The adjudicator was Mr Michael Blackburne. By a decision dated 16 June 2017, he concluded that the defendant had no entitlement to an extension of time. On that basis, the defendant was therefore to blame for the delays which had accrued.

3.
At midnight on 17 July 2017, the claimant terminated the contract. On 28 July, the claimant notified the defendant that it had elected not to continue with the Project.

4.
On 16 August 2017, the claimant issued an Interim Account under the relevant clause of the contract dealing with the situation after termination, requiring the defendant to pay £11,592,733.67 by 5 September 2017. This amount was made up of around £8 million, which were the sums previously paid by the claimant to the defendant, and which the claimant now sought to be repaid; and about £3 million in respect of other claims.

5.
There was a dispute about the validity of the claimant's termination and the basis/accuracy of the Interim Account. The claimant referred that dispute to adjudication by way of a notice dated 13 October 2017. Mr Blackburne was again appointed the adjudicator. By a decision dated 22 November 2017, he ordered that the defendant pay to the claimant the sum of £9,805,032.27, with a further sum of £4,948.45 per day by way of interest.

6.
The claimant now seeks to enforce the adjudicator's second decision. That is resisted by the defendant on two grounds. The first is the contention that the contract included for works which were expressly excluded from the **Housing Grants (Construction and Regeneration) Act 1996** ("the 1996 Act") and that therefore the adjudicator had no jurisdiction to decide the second adjudication, so that his decision was invalid. The second ground relates to the first: it is whether the defendant properly reserved its right to argue the jurisdiction point and/or whether the defendant conferred ad hoc jurisdiction on the adjudicator. If the defendant is wrong to resist enforcement on both these grounds, there is a third issue relating to the stay of execution sought by the defendant. I am very grateful to both counsel for their faultless written and oral submissions.

## 2. THE CHRONOLOGY

7.
There are two aspects of the contract to which reference should be made. The first concerns the provision that applied where the claimant elected not to continue with the Project after termination (clause 15.7), and the second concerns the adjudication (and related) provisions (clauses 20.4-20.7).

8.
Clause 15.7 deals with the calculation of loss in circumstances where, following the claimant's termination of the contract, the claimant decides not to continue with the Project. It is prolix, but needs to be set out in full:

"15.7 **Actual Net Loss**

In circumstances where the Employer elects not to continue with the Works following termination of the Contract, the Employer shall prepare a net loss statement (and the Parties agree that the Employer may delay preparing such statement until all amounts to be comprised in such statement can be finally determined) which will calculate the amount of compensation and damages the Contractor shall pay to the Employer (the "**Net Loss Statement**"). The amount shall be calculated as follows:

**Actual Net Loss = F + G + H + I – J + K**

**F** is the total amount of any monies previously paid to the Contractor by the Employer pursuant this Contract;

**G** is the amount calculated as ten percent (10%) per annum (pro rata for part thereof) on the full amount of the Contract Price from the date of signature of this Contract until the date that full and final payment is made under this Clause by way of compensation for the Employer's committed costs of capital;

**H** (subject to Clause 15.7A (Decommissioning on Termination) below), is the costs incurred by the Employer in decommissioning the Works (to the extent that the Employer undertakes any decommissioning Works in accordance with Clause 15.7A (Decommissioning on Termination));

**I** is the additional costs and expenses (if any) actually incurred by the Employer after the date of termination of this Contract in determining the Actual Net Loss;

**J** is the amounts previously paid to or recovered by the Employer on an interim basis pursuant to Clause 15.7(b); and

**K** is the amount of any liability of the Employer in respect of third party claims (including claims under the Lease, the Power Purchase Agreement Management Services Agreement, the Fuel Supply Agreement and the Project Development Agreement) arising from the termination of the Project;

in each case without double counting. Such Actual Net Loss shall become due for payment (the "**Due Date**") to or by the Employer from or to the Contractor upon the date of the Net Loss Statement setting out the Actual Net Loss and the Employer shall promptly provide the Contractor with such supporting breakdowns, calculations and documentation as the Contractor may reasonably require to satisfy itself as to the basis for such calculation. The final date for payment shall be twenty (20) days after the Due Date. If the Contractor wishes to dispute the amounts set out in the Net Loss Statement the Contractor shall give written notice to the Employer within ten (10) days of receipt of the Net Loss Statement and the matter shall be referred for determination pursuant to Clause 20.2 (Referral to Adjudication). The amount determined by the adjudicator as payable in relation to the Net Loss Statement shall be payable ten (10) days after such determination, Either Party shall be entitled to refer the matter for further determination pursuant to Clauses 20.5 (Notice of Dissatisfaction) and 20.7 (Courts).

(a) The Employer shall be entitled to certify an on account payment (the "**Interim Account**") calculated in accordance with Clause 15.7 (Actual Net Loss) Such Interim Account shall be calculated by the Employer within thirty (30) days of the date of termination of this Contract as follows:

**Interim Account F + G + H + I + L**

Where:

**F, G, H** and **I** are as specified in Clause 15.7(a) above; and

**L** is the forecast amount of any liability of the Employer in respect of third party claims (including claims under the Lease, the Power Purchase Agreement Management Services Agreement, the Fuel Supply Agreement and the Project Development Agreement) arising from the termination of the Project.

in each case without double counting. Such Interim Account shall become due for payment (the "**Due Date**") to or by the Employer from or to the Contractor upon the date of the Interim Account setting

out the Actual Net Loss and the Employer shall promptly provide the Contractor with such supporting breakdowns, calculations and documentation as the Contractor may reasonably require to satisfy itself as to the basis for such calculation. The final date for payment shall be twenty (20) days after the Due Date. If the Contractor wishes to dispute the amounts set out in an Interim Account the Contractor shall give written notice to the Employer within ten (10) days of receipt of the Interim Account and the matter shall be referred for determination pursuant to Clauses 20.2 (Referral to Adjudication). The amount determined by the adjudicator as payable in relation to the Interim Account shall be payable ten (10) days after such determination. The decision of the adjudicator shall be final and binding for the purposes of the Interim Account and shall not be referable by either Party for further determination pursuant to Clauses 20.5 (Notice of Dissatisfaction) or 20.7 (Courts) or otherwise.

15.7A **Decommissioning on Termination**

In circumstances where Clause 15.5(b) (Compensation on Termination) applies, the Contractor shall fully decommission the Works at its own cost within a reasonable period following termination of this Contract and in any case in accordance with any obligations of the Employer in relation to timing of any such decommissioned Works. The Parties agree that if the Contractor fails to decommission the Works in accordance with this Contract the Employer may carry out the decommissioning work itself or by others at the Contractor's cost and the Contractor shall (pursuant to Clause 15.7 (Actual Net Loss) be liable to the Employer for the costs incurred by the Employer in decommissioning the Works.

15.7B Title to any decommissioned items shall pass to the Contractor only once the Contractor has fully and finally settled all liabilities due under this Contract."

9.
In short, the final accounting between the parties, in circumstances where the defendant's contract has been terminated and the Project has come to an end, is achieved by way of the Net Loss Statement. The contract gives no timeframe for the calculations and discussions necessary for the completion of the Net Loss Statement. But it makes plain an entitlement on the part of the claimant to an Interim Account in respect of the eventual final Net Loss Statement. The last four lines of clause 15.7 provide in terms that, if there is a dispute about the Interim Account which is referred to adjudication, the decision of the adjudicator as to the amount of the Interim Account is final and binding.

10.
The adjudication (and related) provisions are at clauses 20.4-20.7 as follows:

"20.4 **Procedure for Adjudicator's Determination**

The referring Party shall, not later than seven (7) days after the date of service of the notice referred to in Clause 20.2 (Referral to Adjudication), refer the dispute in writing to adjudication.

The seat, or legal place of the adjudication, including all hearings and meetings, shall be London.

The Nominating Body shall be the Technology and Construction Solicitors' association.

The Parties shall promptly make available to the adjudicator all information, access to the Site, and appropriate facilities, as the adjudicator may require for the purposes of making a decision on such dispute.

The adjudicator shall act impartially in carrying out his duties and avoid incurring unnecessary expense and may take the initiative in ascertaining the facts and the law necessary to determine the dispute.

Each Party shall be responsible for the adjudicator's costs arising out of a reference to the adjudicator pursuant to this Clause as determined by the adjudicator.

The adjudicator shall not be deemed to be an arbitrator but shall render his decision as an expert, and the provisions of the Arbitration Act 1996 and the law relating to arbitration shall not apply to the adjudicator or his determination or the procedure by which he reached his determination.

Within:

(a) twenty-eight (28) (or, where the referring Party so consents, forty-two (42)) days after service of the notice referred to in Clause 20.2 (Referral to Adjudication); or

(b) such period exceeding twenty-eight (28) days after service of the notice referred to in Clause 20.2 (Referral to Adjudication) as may be agreed by the relevant Parties after the dispute has been referred to adjudication,

the adjudicator shall give his decision, which shall be reasoned and shall state that it is given under this Clause. The decision shall be binding on the Parties, who shall promptly give effect to it unless and until it shall be revised, cancelled or varied in an amicable settlement or is finally determined by legal proceedings.

Neither the adjudicator nor any employee or agent of the adjudicator shall be liable for anything done or omitted in the discharge or purported discharge of the functions of the adjudicator.

20.5 **Notice of Dissatisfaction**

If a Party is dissatisfied with the adjudicator's decision, that Party may, within twenty-eight (28) days after receiving the decision, give notice to the other Party of its dissatisfaction and intention to refer a decision of the adjudicator to the High Court. If the adjudicator fails to give his decision within the relevant period referred to in Clause 20.4 (Procedure for Adjudicator's Determination) above, then any relevant Party may, within twenty-eight (28) days after this period has expired, give notice to the other Party of his dissatisfaction.

In either event, this notice of dissatisfaction shall state that it is given under this Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction.

If the adjudicator has given his decision as to a matter in dispute to the both Parties, and no notice of dissatisfaction has been given by either Party within twenty-eight (28) days after it received the adjudicator's decision, then the decision shall become final and binding upon both Parties.

20.6 **Adjudication Time Periods**

For the purposes of Clause 20.4 (Procedure for Adjudicator's Determination) and 20.5 (Notice of Dissatisfaction) only, where a period of time would include Christmas day, Good Friday or a day which under the English legislation, the Banking and Financial Dealings Act 1971 is a bank holiday in England that day shall be excluded from the reckoning of the period of time.

20.7 **Courts**

Failing a resolution under Clauses 20.1 – 20.5 (Disputes), the Parties agree that all disputes shall be tried by a judge sitting as such in the High Courts of the Justice in London. The Parties further agree that, where the nature of the dispute so allows, the dispute shall be tried by a Judge of the Technology and Construction Court."

11.
It has been the claimant's case throughout that, for rather technical reasons, those adjudication provisions did not comply with the 1996 Act, so that the Scheme for Construction Contracts applied instead. Both notices of adjudication referred expressly to the Scheme, and both adjudications were conducted in accordance with the Scheme. There was never any dissent to that course from the defendant.

12.
The first notice of adjudication, dated 23 February 2017, went to the defendant's entitlement (or otherwise) to an extension of time. It appears that this notice did not come entirely out of the blue: there had been discussions between the parties about the delays and the claimant's claims, and the documents evidence an express agreement to refer that dispute to adjudication (see paragraph 3 of the letter of 3 March 2017 from the defendant's solicitors, quoted in paragraph 13 below). However, the defendant was unhappy with what it considered to be the precipitate way in which the claimant had acted when commencing the first adjudication.

13.
Thus, on 3 March 2017, the defendant's solicitors wrote in these terms to the adjudicator:

"Jurisdiction

2. The Responding Party respectfully reserves its position regarding your jurisdiction and is proceeding on that express basis.

3. The parties agreed to refer a dispute to adjudication. Unwittingly, the Responding Party may have been lured into an ambush. The Referring Party did not share its evidence, in particular Ms McGahey's Programming Report, with the Responding Party before the Referral.

4. The Responding Party therefore has concerns about whether all the new information can be addressed fairly within the normal timeframe of an adjudication. To that end, we have written to CMS Cameron McKenna with a proposed procedure to fairly and economically dispose of the issues and we have invited the Referring Party's agreement to this.

5. You accepted your appointment before you could have been aware that the evidence upon which the Referral is based would be new to the Responding Party. While it is not the case that such a claim cannot be addressed properly within an adjudication, if the Referring Party does not agree with the proposal set out in our letter to CMS Cameron McKenna, you may wish to reconsider your appointment and, if you think it impractical to deal with what is essentially a new claim within the statutory timeframe, decline to proceed.

6. We hope that the Referring Party will adopt a pragmatic approach and that this will not be necessary."

14.
It was apparent from this letter and subsequent emails that the defendant's solicitors were concerned about the potentially short timetable. But it is also apparent that they thought, with proper co-

operation, that this was capable of being resolved: see their references to pragmatism above, and also their proposals in the second letter of 3 March 2017, this time sent to the claimant's solicitors. Thereafter, there were email exchanges between the parties and the adjudicator and, in the adjudicator's email of 7 March 2017, it appears that a detailed timetable was broadly agreed. In response to the adjudicator's timetable, the defendant's solicitors said that the "timetable is acceptable to the Referring Party (subject to the concerns and reservations already expressed)". This led to a further email from the adjudicator of 8 March 2017 checking one final timetabling issue. It appears that, on that day, all the timetabling matters were agreed.

15.
On 16 June 2017, by way of his first decision, the adjudicator decided that the defendant was not entitled to any extension of time. On 27 June 2017, the defendant sent to the claimant a Notice of Dissatisfaction in respect of that decision.

16.
The second notice of adjudication related to the defendant's subsequent failure to pay all or any part of the Interim Account pursuant to clause 15.7. Mr Blackburne was again nominated. In reply to the adjudicator's announcement of his nomination, the defendant's solicitors wrote to him on 19 October 2017 to say:

"Thank you for your email confirming that you have accepted the appointment to adjudicate. I have added the words 'Adjudication 2' to the subject above in case it helps distinguish between adjudications.

I attach a copy of the terms of appointment you issued for Adjudication 1, to which the Responding Party is happy to consent. If of course there had been any modifications to your terms since then, please let us know."

It was subsequently confirmed that there were no such modifications and Mr Blackburne was appointed by agreement of both parties.

17.
At the end of a 90 page decision dated 22 November 2017, the adjudicator declared that the claimant's termination of the contract was not unlawful. He went on to make findings broadly in favour of the claimant as to the proper make-up of the Interim Account. He identified the sum of £9,805,032.27 as being due from the defendant to the claimant, together with interest accruing at £4,948.45 per day. The defendant issued a Notice of Dissatisfaction in respect of that decision dated 15 December 2017. It is that second decision which the claimant now seeks to enforce in this court.

## 3. ISSUE 1: CONSTRUCTION OPERATIONS

### 3.1
### The Law

18.
Section 104 of the 1996 Act defines a construction contract as an agreement for the carrying out of construction operations. Section 104(5) provides that "where an agreement relates to construction operations and other matters, this Part applies only so far as it relates to construction operations." Thus the 1996 Act expressly envisages that there may be contracts which are hybrid in nature, covering the carrying out of both construction operations and operations which are not construction operations as defined in the Act. In such circumstances, the relevant provisions of the Act – including

those relating to adjudication – only apply to that part of the contract which relates to construction operations.

19.
Section 105(1) defines construction operations and includes, at s.105(1)(e) “operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this sub-section, including site clearance, earth moving, excavation…”

20.
Section 105(2) identifies operations which would, on any sensible definition of the words, also be construction operations, but which Parliament has decreed should be excluded from the Act [1] . Those excluded operations include at (2)(c):

“assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is -

(i) …power generation…”

21.
Hybrid contracts have given rise to numerous jurisdictional difficulties over the years. In **North Midland v A E & E Lentjes**[2009] EWHC 1371 (TCC), Ramsey J said at paragraph 81:

“I do not consider that it was the intention of the Act for there to be a minute analysis to find an item which arguably was a construction operation or was within the exclusion, so as to defeat the purpose of giving or excluding the rights of the Act to what on a straightforward and commonsense analysis is a contract for construction operations within s.105(1) or excluded operations under s.101(2).”

22.
In **Cleveland Bridge (UK) Limited v Whessoe-Volker Stevin Joint Venture**[2010] EWHC 1076 (TCC), Ramsey J restated the principle that, because the operations described in s.105(2) can generally be brought within the description of operations in s.105(1), the intention of the 1996 Act was to exclude a specific operation from the more general description of ‘operations’. Stuart-Smith J relied on this approach in **Severfield (UK) Limited v Duro Felguera UK Limited**[2015] EWHC 2975 (TCC) where he noted at paragraph 15 of his judgment that the narrowness of s.105(2)(c) “is a function of its terms. It only applies to ‘erection…of steelwork for the purposes of supporting or proving access to plant or machinery’”.

23.
Two other points arise from the **Cleveland Bridge** decision. First, the result in that case was a hybrid contract, where some of the operations were excluded. On the facts, the judge concluded that it was impossible to sever the adjudicator’s decision (which evaluated claims in respect of both kinds of operations) in accordance with **Cantillon v Urvasco**[2008] EWHC 282 (TCC). In addition, in that case, although steelwork to the pipe racks and the pipe bridges was excluded by s.105(2)(c), Ramsey J found that those exclusions did not include prior activities such as fabrication drawings, off-site fabrication or delivery to site of the fabricated steelworks.

**3.2**
**The Facts**

24.

Unhappily, although this Project has apparently cost a good deal of money, very little was ever achieved. It is common ground that the defendant's works never moved beyond the preparatory stages. As Mr Steensma, the claimant's solicitor, noted in his second statement, "excavation on site had not yet taken place at the point of termination. No plant, machinery or steelwork has ever been assembled, installed or erected on site." The evidence of Mr Martinez, the claimant's project manager, does not dispute that.

25.
About 80% of the £10 million odd awarded by the adjudicator in the second adjudication was made up of the first four Payment Milestones which the claimant had originally paid to the defendant. Milestone 1, called 'Financial Close', involved all manner of preparatory work, including the preparation of bonds and a business plan; Milestone 2 related to the placing of the steam turbine order; Milestone 3 was the completion of the drawings and calculations; and Milestone 4 was the completion of the site compound. Together, those four Milestones represented 40% of the total contract sum, being 15% for Milestone 1; 10% for Milestone 2; 10% for Milestone 3; and 5% for Milestone 4.

**3.3**
**Arguments and Analysis**

26.
On behalf of the defendant, Mr Owen argued that, on any view, the contract as a whole involved some excluded operations, as defined in s.105(2)(c). He pointed out the references in the Employer's Requirements to the installation of plant. So, he said, taking as an example element G of the Interim Account in clause 15.7 (which was 10% of the contract price), that figure must be taken to have included or allowed for some excluded operations. On that basis, he said, the adjudicator had no jurisdiction. In addition, Mr Owen submitted that the preparation of bonds and a business plan were also excluded operations, and he drew a distinction between that work and the items listed as preparatory/ancillary items in s.105(1)(e), which are all items of physical works.

27.
In response, Mr Wygas submitted that, even on the defendant's own evidence, no part of the four Milestone payments was anything to do with excluded operations: the site had not even been excavated. As to element G, he said that the way in which the parties had decided to pay one another was irrelevant to whether or not excluded operations had been carried out and were the subject matter of the dispute that had been referred to adjudication.

28.
Mr Owen's focus was on the scope of the overall contract (assuming it was completed), not the dispute which had actually been referred to adjudication. I think that is a misreading of s.104(5). Although s.104(5) refers to the agreement, that is just to emphasise that it is only that part of the agreement which relates to construction operations which will bring with it the rights and obligations in respect of adjudication. Thereafter, as **North Midland**, **Cleveland Bridge** and **Severfield** all make plain, what matters for the purposes of jurisdiction is whether or not some part of the dispute referred to the adjudicator related to or arose out of excluded operations, narrowly defined. If it did not, no jurisdiction issue can arise.

29.

So the real issue before me concerns what was done by the defendant (because that was what the disputed Interim Account went to) and whether what was done amounted to excluded operations in accordance with s.105(2)(c).

30.
Starting with the preliminary or ancillary works, it is, in my view, wrong in principle to say that preparatory arrangements, such as the preparation of the bonds or a business plan, are excluded operations. Such things are often preparatory steps prior to a major construction contract and therefore caught by s.105(1)(e). In my view, they are akin to the drawings to which Ramsey J referred in **Cleveland Bridge**.

31.
The fact that the preparation of bonds or drawings or a business plan are not physical site works, like the other examples of preparatory works in s.105(1)(e), is nothing to the point. Those are merely examples, as denoted by the word “including”: they are not to be taken as exhaustive. The draftsman was there dealing with physical operations because that is what both parts of s.105 focus on.

32.
It would make a nonsense of the Act if every preparatory/ancillary operation not expressly identified in s.105(1) became an excluded operation. That would require s.105(1) to list everything that might ever be preparatory or ancillary, making it absurdly long. It would also be contrary to the authorities noted above: they establish that, if something is covered by the broad expression ‘construction operations’ (including things preparatory or ancillary to such operations), then the adjudication provisions apply. It is only if the operation in question can be shown to be an excluded operation (narrowly defined) that those provisions are excluded.

33.
More broadly, I consider that the dispute about the Interim Account in the second adjudication could not have related to excluded operations. Since the excavation works had not even started, there was never any question of any of these payments relating to the narrowly-defined excluded operations in s.105(2). No plant was ever brought to site, let alone installed.

34.
In my judgment, the fact that the Milestone Payments and/or element G of the Interim Account were based on a percentage of the contract price is immaterial. That was simply the agreed mechanism by which the defendant was paid for the early and preparatory work on the Project: on the face of it, it involved a considerable front-loading of the costs but, for a contract of this kind, that is not unusual. But the fact that this was how the agreed payments were calculated is irrelevant to the question of whether or not excluded operations were in any way the subject matter of the second adjudication. They were not: how could they be when they were never carried out?

35.
For those reasons, therefore, I conclude that the dispute which the adjudicator decided in the second adjudication related to the validity of the claimant’s termination and the sums due in consequence by way of the Interim Account. Since it is common ground that no excluded operations were ever carried out by the time of the termination, there can be no jurisdictional issue.

36.

If I am right about that, then Issue 2 become irrelevant. However, if we assume that I am wrong about Issue 1, and the subject of the second adjudication included (at least in part) 'excluded operations', it is then necessary to go on and consider Issue 2.

## 4. ISSUE 2: RESERVATION OF POSITION / WAIVER

### 4.1
### The Law

37.
The courts have held that, depending on the facts, it is quite possible for the parties to a contract to agree to resolve their dispute by way of an agreement to adjudicate, regardless of the nature of the contract: see for example **Nordot Engineering Services Limited v Siemens Plc** (2000) Construction Industry Law Letter, September 2001; **Galliford Try Construction Limited v Michael Heal Associates Limited**[2003] EWHC 2886 (TCC). There can be a link between this kind of 'ad hoc' adjudication and the failure of the responding party to reserve its position as to jurisdiction: see for example **Harris Calnan Construction Co Limited v Ridgewood (Kensington) Limited**[2007] EWHC 2738 (TCC); **Allied P&L Limited v Paradigm Housing Group Limited**[2009] EWHC 2890 (TCC) and **GPS Marine Contractors Limited v Ridgeway Infrastructure Services Limited**[2010] EWHC 283 (TCC).

38.
**Allied P&L** is important because the responding party took various points on jurisdiction, each of which failed. Although they subsequently discovered a much better argument on jurisdiction, because they had not previously referred to it, or reserved their position in respect of it, the court found that they could not rely on it subsequently to resist enforcement. By contrast, a general reservation of position can, depending on the circumstances, be effective, as Ramsey J found (with some hesitation) in **Laker Vent Engineering Limited v Jacobs E&C Limited**[2014] EWHC 1058 (TCC). However it all depends on the facts: the court will usually look with disfavour on an unspecific general reservation of the responding party's position on jurisdiction if it thinks that it was worded in that way to try and ensure that all options (including ones not yet even thought of) could be kept open.

39.
Also of relevance to the matters before me, is the decision of Jefford J in **Dacy Services Limited v IDM Properties LLP**[2016] EWHC 3007 (TCC). There, there was an argument about whether a jurisdictional objection could be waived if the objecting party subsequently agreed to the nomination of an adjudicator. Jefford J said at paragraph 30 of her judgment:

"Dacy's argument is founded on two things: firstly, that IDM Properties agreed to the nomination of Mr Eyre not only once but twice and, secondly, that once they had agreed to his nomination, it was too late to challenge his jurisdiction. It seems to me that these are really one point, namely that that if a party agrees the nomination of a particular adjudicator it cannot then object to his jurisdiction. Although there may well be circumstances in which that was the case, I cannot see that the mere agreement to the nomination of an adjudicator can have that effect. Parties may often want to agree the identity of a putative adjudicator rather than leave it in the lap of a nominating body but something more would be needed for that to amount to agreement to his appointment with jurisdiction over a particular dispute."

I note that, in that case, the defendant maintained throughout that there was no contract between the parties and that this point had been taken, fairly and squarely. In those circumstances, on the

defendant's case, there could be no dispute which was capable of being referred to adjudication in any event.

**4.2**
**The Facts**

40.
I have set out at paragraph 13 above the defendant's solicitor's letter of 3 March 2017. That reservation of the defendant's position arose in the first adjudication. It is the only express reservation put forward by the defendant in either adjudication.

41.
That reservation of the defendant's position on jurisdiction was expressly dealt with by the adjudicator in his decision in the first adjudication. Section 2 of his decision was headed "Timetable, Jurisdiction and Submissions". The adjudicator then set out in great detail, from paragraphs 2.1 to 2.28 of the decision, the terms of the defendant's solicitors' letter of 3 March 2017, and all the subsequent events relating to the alleged ambush, the prior discussions, the debate about the timetable and the way in which the timetable was developed, agreed and subsequently revised.

42.
I have already indicated that, following the service of the notice of adjudication in the second adjudication, the defendant's solicitors wrote to the adjudicator in the terms set out at paragraph 16 above. Mr Owen fairly accepts that there was no further reservation of the defendant's position in respect of jurisdiction, either in that email or at any other stage in the second adjudication.

**4.3**
**Arguments and Analysis**

43.
On behalf of the defendant, Mr Owen argued that the letter of 3 March 2017 was a general reservation of the defendant's position as to jurisdiction. He said that that reservation was never retracted, so that it applied to both the first and the second adjudication. In any event, he said, the two adjudications were linked so that the reservation of the position related to both adjudications.

44.
On behalf of the claimant, Mr Wygas said that the reservation of 3 March 2017 arose solely in the first adjudication and that, in any event, it related only to ambush/timetabling, an issue which ultimately fell away when the timetable was agreed. He said that there was no reservation in respect of the second adjudication and/or that the defendant's acceptance of the adjudicator's terms and conditions for the purposes of the second adjudication also meant that any continuing reservation had been waived.

45.
In my view, the starting point is that there were, in this case, two ad hoc agreements to adjudicate. It was agreed that the contractual provisions as to adjudication were non-compliant (because the 28 day period went from the notice of adjudication rather than referral, and because there was no provision permitting the adjudicator to correct his decision to remove clerical or typographical errors). Instead, the parties agreed that the Scheme should apply, and expressly agreed to refer the two disputes to adjudication on that basis. For the first adjudication, the letter of 3 March 2017 (paragraph 13 above) confirmed the parties' agreement "to refer a dispute to adjudication"; for the second, the email of 19

October (paragraph 16 above) also confirmed the agreement to refer the subsequent dispute to adjudication.

46.
Accordingly, this seems to me to be a clear case of ad hoc agreements to adjudicate. All of the relevant terms were agreed and operated between the parties. The remaining issue is whether, despite that apparent agreement, the defendant somehow reserved its position as to the adjudicator's jurisdiction in the second adjudication.

47.
In my view, the reservation of the defendant's position in the first adjudication, as set out in the letter of 3 March 2017, was not a general reservation relating to jurisdiction. Instead it took a very specific point: the reservation related to the defendant's concerns about ambush, and whether or not the information which they had only just seen could be properly addressed within what they called "the normal timeframe of an adjudication". That was the only point that gave rise to the reservation. The reservation was referred to again on 7 March 2017, again in the context of timetabling (paragraph 14 above). It was dealt with by the parties and the adjudicator so that, by the time of the decision in the first adjudication, the issue had fallen away.

48.
That is the only sensible reading of the letter itself. The letter makes no reference to a general reservation of the defendant's position about jurisdiction. Under the heading of 'Jurisdiction', the defendant's solicitor identified the reservation of position in paragraph 2, and then went on to explain how it arose in paragraphs 3-6. It also indicated the way in which the problem could be resolved, which is ultimately what happened.

49.
That the reservation as to jurisdiction went to the issue of ambush/timetabling only can be seen from the fact that this was precisely how the adjudicator dealt with it in Section 2 of his first decision. That contained a lengthy analysis of the ambush/timetabling point and how it had been resolved. Thus everyone, including the adjudicator, was in no doubt about the narrow basis of the reservation and its resolution.

50.
Mr Owen questioned that analysis because, he said, as a matter of law, questions of ambush/ timetabling went to natural justice, not jurisdiction. But, as I pointed out during argument, not only is the line between those two concepts blurred (see **Whyte and Mackay Ltd v Blyth and Blyth Consulting Engineers Ltd**[2013] CSOH 54), but in adjudications, solicitors very often raise all kinds of natural justice points under the rubric of jurisdiction, and vice versa. I am entirely satisfied that is what happened here.

51.
Accordingly, I take the view that the original reservation of position as to jurisdiction related to ambush/timetabling, a matter that was resolved in the first adjudication. There was no general reservation about jurisdiction and the point had fallen away by the end of the first adjudication. There was nothing, therefore, for the defendant to rely on by way of a reservation of position in the second adjudication.

52.

If I am wrong about that, and the letter of 3 March 2017 might in some way be said to be a general reservation of the defendant's position as to the adjudicator's jurisdiction, then I consider that it was inadequate. If one party wants to reserve its position generally as to jurisdiction, it should do so in a clear and open way. That did not happen here.

53.
Furthermore, I have no hesitation in saying that any such general reservation related only to the first adjudication. It was not raised in or for the purposes of the second adjudication. There was no reservation of the position as to jurisdiction in the second adjudication.

54.
Mr Owen's ingenious way round that obstacle was to say that, in some way, the second adjudication was so closely linked to the first that they should be regarded as part of the same process. I do not accept that. The second adjudication was only linked to the first in the same way as any serial adjudication links one to the next: the first was about the delays; the second was about the consequences of those delays. They were different adjudications which decided different things. The same adjudicator may not necessarily have been appointed for each. He or she may have had a jurisdiction to reach one decision but not the other. The two adjudications have to be treated separately.

55.
Thus a party who wants to do so has to reserve its position as to jurisdiction in each successive adjudication, because each adjudication is different and the limits of the adjudicators' jurisdiction in each are also different. For example, if (which I do not accept) there was a reservation of the position in the first adjudication, that cannot have been on the basis of 'excluded operations', because the first adjudication was concerned with the actual delays to the Project, and it is common ground that no such excluded operations were ever carried out. So, on the facts of this case, any jurisdictional challenge in the first adjudication could not have been based on the same jurisdictional challenge in the second.

56.
Although it is unnecessary for me to decide the point, given my other views, I also think that Mr Wygas may well be right to say that, on the particular facts of this case, the defendant's solicitors' express agreement to the adjudicator's terms of appointment (paragraph 16 above), in circumstances where no simultaneous issue was taken at all as to his jurisdiction, was also capable of amounting to a clear and unqualified acceptance of the adjudicator's jurisdiction in the second adjudication. That may be an uncommon result (see **Dacy**) but, as Jefford J rightly emphasised, it will always turn on the facts.

57.
In essence, Mr Owen's ambitious over-arching submission was that, although at no time, in either adjudication, did the defendant's solicitors ever expressly say that the adjudicator had no jurisdiction because the dispute related to excluded operations under s.105(2)(c) of the 1996 Act, the defendant should be allowed at this stage to raise that point as an answer to the enforcement claim. I cannot accept that that is a fair or sensible conclusion for the court to reach on the facts. It is also contrary to all the authorities about reservations of position, noted above.

58.

As final confirmation of this analysis, I note that, during the second adjudication, the defendant's solicitors raised again a complaint about the compression of the timetable. In an email dated 7 November 2017, they said:

"Moreover, the Responding Party's time to respond should not be artificially curtailed on such a slim pretext as the Referring Party's say so and its rigid insistence on the statutory timeframe that only applies because of an express contractual provision rather than because the contract is one for 'construction operations'. The Contract would, of course, ordinarily be excluded from the scope of statutory adjudication under section 105(2)(c)(i) of the Act."

59.
Mr Owen was unable to explain precisely what was meant by the first sentence, and I agree that its meaning is opaque. But I agree with Mr Wygas that the second sentence could not be clearer: the defendant's solicitor was saying that the contract would ordinarily have been excluded from the 1996 Act, but that the defendant had agreed to adjudicate the dispute in any event (and so, it was said, the defendant ought to be accommodated in respect of the time they required to take certain steps). That only confirms my view that both parties were operating on the basis that, regardless of the subject matter of the contract, there was an ad hoc agreement to adjudicate the dispute about the termination and the Interim Account, with no reservations in respect of jurisdiction.

60.
For those reasons, therefore, there is no defence to the claim to enforce the decision in the second adjudication. The claimant is entitled to summary judgment in the sum of £9,805,032.27 plus interest.

## 5. ISSUE 3: STAY OF EXECUTION

### 5.1
### The Law

61.
I summarised the law relating to stays of execution in adjudication enforcement cases as long ago as 2005 in **Wimbledon Construction Company 2000 Limited v Vago**[2005] EWHC 1086 (TCC). At paragraph 26 I said this:

"26. In a number of the authorities which I have cited above the point has been made that each case must turn on its own facts. Whilst I respectfully agree with that, it does seem to me that there are a number of clear principles which should always govern the exercise of the court's discretion when it is considering a stay of execution in adjudication enforcement proceedings. Those principles can be set out as follows:

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 (see **AWG**).

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**).”

62.
It was, of course, not my intention that this summary should be set in stone. It was simply a summary of the main points established by the cases up to that time. It does not, for example, deal with the position where allegations of fraud are made, particularly in circumstances where those might affect the financial standing of the referring party (who is almost always the party opposing the stay).

63.
My attention has been drawn to two further cases, dealing with the topic of a stay, which are said to be relevant to the present dispute. The first is the well-known case of **Galliford Try Building Limited v Estura Limited**[2015] EWHC 412 (TCC). In that case, Edwards-Stuart J concluded that Estura were not entitled to start a second adjudication to establish the true value of an interim payment, in circumstances where they had failed to serve their own payless notice. However the problem in that case was that, although it concerned an interim application, it came after the end of the works and was an indicative final account. If Estura could not challenge the true value, it might be months or even years before the final account could be resolved, during which any over-payment would be retained by the contractor.

64.
Edwards-Stuart J was conscious that, in those circumstances, it would not be fair to enforce the judgment in full. The works were completed and therefore, as the judge said at paragraph 85, there was a real possibility that Galliford Try would have little or no incentive to remain on site and complete the outstanding items and snagging. Of the £4 million odd in dispute, he required Estura to pay £1,500,000, and said that enforcement of the balance should be stayed until further order. He also imposed various other conditions.

65.
In the present case there are arguments, which I address below, as to whether the claimant has given proper answers to the questions raised concerning its financial circumstances. In this regard, the claimant has sought to rely on the judgment of Stuart-Smith J in **LXB RP (Crown Road) Limited v Squibb Group Limited**[2016] EWHC 2669 (TCC) where he said at paragraph 17:

“I am not satisfied that LXB has been shown to be in a worse financial position or that it is a worse financial risk for Squibb than it was when the parties contracted in July 2014. When all is said and

done it was and is an SPV with limited assets. Whether Squibb appreciated that at the time of contracting is a moot point, but it is not remotely unusual for substantial construction projects to be carried out by SPVs in this way."

The claimant says that precisely the same situation applies here.

**5.2**
**The Financial Information**

66.
The financial information made available by the claimant, and thus available to the court, is unsatisfactory. I note in particular:

(a)
Accounts should have been filed on 11 November 2017. They are therefore overdue. That is a breach of the claimant's statutory obligations.

(b)
There is no explanation for this breach. Given that the defendant's solicitors sought the information as to their accounts on 16 January 2018, it is unsatisfactory that this request was ignored by the claimant's solicitors until the day of the hearing, when an internal email was provided. Even that email failed to give a proper explanation of why the accounts had not been filed.

(c)
The basis of the claimant's case, that their financial position is no different to that which it was when the contract was agreed, comes from information which Mr Steensma said in his statement was provided to him "by Equitix's directors". That is not good enough. The identification of a source of information in a witness statement, for what is otherwise hearsay evidence, needs to be precise, in order that it can if necessary be checked. His failure to identify the particular director(s) to whom he spoke is a breach of the CPR.

(d)
It appears that the claimant has a parent company and there are references to the provision by the parent of a "loan facility". Details of that loan facility have been sought but they have not been provided. In my view they should have been.

(e)
Moreover, the basis on which the documents relevant to this facility (to which the claimant's solicitor has expressly referred in correspondence) has not been disclosed is said to be:

"It is insufficient that there is a reference to a transaction which is alleged on the balance of probabilities to have been affected by a document for which inspection is sought: see White Book paragraph 31.14.2 and the authorities there cited."

This is difficult to follow and appears to misunderstand the basis of the request. There is no question of 'the balance of probabilities': the facility is a document to which Mr Steensma himself has referred.

67.
I regret, therefore, that I am bound to conclude that the claimant has been much too economical with the information relating to its financial position. There may be a number of reasons for that, but the absence of the information requested and required by the Companies Act is another factor when the court is considering a stay of execution.

**5.3**

**Arguments and Analysis**

68.
Mr Owen argues, principally by reference to **Estura**, that what he calls a “wide-ranging” stay should be imposed, and that it should not be for a short period. He also said that it should in some way be tied in to the proceedings which the defendant’s sub-contractor has commenced against the defendant in this court.

69.
Mr Wygas said that the defendant knew that it was contracting with an SPV and knew that the contract provided for at least the risk that the Project may come prematurely to an end. He also said that the documents showed that the defendant’s interest in the claimant’s financial position was very recent and that, since it was as a result of the first adjudication that the die was cast, the defendant should not be permitted to be able to sit on its hands for seven months and then obtain a stay at the last minute.

70.
In my view, when exercising the court’s discretion as to granting a stay in this case (and if so, on what terms), I should have particular regard to the following matters.

71.
First, I consider this to be an unusual case. Whilst I agree with what Stuart-Smith J said in **LXB**, that rather presupposes that the Purpose of the Special Purpose Vehicle is seen through to the end. In this case, the claimant is now an SPV with no P (because it has elected not to continue with the Project). That means that, not only does the claimant have no possible incentive to remain in existence for a minute longer than it needs to, once it has repaid its debts to its parent, but that it is also overwhelmingly likely that the claimant will be wound up sooner rather than later. Thus, the risk of overpaying and never being repaid faced by the defendant is very real and could not have sensibly been predicted when the contract was agreed.

72.
Secondly, the provisions of clause 15.7 mean that, even if the claimant did remain in existence so as to resolve all outstanding arguments, that could be months or even years down the line. As noted above, clause 15.7 expressly provides that there can be no challenge to the second adjudication decision relating to the Interim Account, so the defendant is stuck with it until the final accounting process (involving the Net Loss Statement) has been concluded. And the contract is silent as to when that should take place.

73.
Although Mr Wygas sought to argue that there was some correspondence which showed that the claimant’s solicitors had agreed that this aspect of the contract needed to be rectified, I consider that the correspondence shows the opposite. The question of rectification of clause 15.7, so as to allow a challenge to the Interim Account, was raised by the defendant’s solicitors in correspondence, and it was expressly rejected by the claimant’s solicitors. Thus, the court can only approach this issue on the basis that any final reckoning by reference to the Net Loss Statement is far off in time.

74.

Accordingly, this is a similar case to **Galliford Try v Estura**, involving a large disputed claim on an interim application and a final account off in the future, and no opportunity to redress the balance before then. It leaves the payer (in Mr Owen's words) 'caught between two stools'.

75.
There is some force in Mr Wygas' submission that the defendant's difficulties arise directly out of the first adjudication which, beyond the Notice of Dissatisfaction served seven months ago, they have done nothing to address. Given the sums at stake, I think that there is an obligation on the defendant to get on with it. On the other hand, it is not as if the defendant's solicitors have spent those seven months idling: the second adjudication, which resulted in a 90 page decision, has obviously taken up much of the time since.

76.
In my view, the court is entitled to consider that there is a bona fide challenge to the result of the first adjudication, and therefore the whole premise of the decision in the second adjudication. That cannot of course prevent summary judgment to enforce the adjudicator's decision, but it is a relevant factor when considering a stay.

77.
For these reasons, I conclude that, as a matter of fairness and justice between the parties, some form of stay is necessary.

78.
I am confirmed in that conclusion by what I find to be the deliberately limited financial information made available by the claimant so far. It is not appropriate for a party to recover £10 million by way of an adjudication and then, in answer to legitimate concerns raised by the other side as to their financial position, effectively stonewall the requests until the last minute and beyond.

**5.4**
**Nature and Scope of Stay**

79.
The parties have not addressed me as to the precise nature of any stay that I might order. Mr Wygas rightly noted that the defendant had made no offer of any kind, unlike Estura's offer in **Galliford Try v Estura**.

80.
Summary judgment will be given in the sum of £9,805,032.27. With interest, that gives rise to a figure well in excess of £10 million. In my view, it would do broad justice between the parties to require the defendant to pay to the claimant **£4.5 million** without any qualification. After all, that would still leave them about £3.5 million in credit (because they had received £8 million overall from the claimant).

81.
In addition, I consider that the defendant should bring a further **£1 million** into court, to remain there until further order of the court. I would order a general stay in respect of the remaining £4.5 million plus. I would not make any order linking this case to any other proceedings.

82.

I would be prepared to consider further submissions from the parties, not on the figures in paragraphs 80 and 81 above, but on any other conditions which either of them considers to be appropriate in all the circumstances.

## 6. CONCLUSIONS

83.
For the reasons set out in **Section 3** above, I conclude that no part of the dispute in the first or the second adjudications related to excluded operations. The adjudicator therefore had the necessary jurisdiction to come to the conclusions that he did in both the first and the second adjudication.

84.
For the reasons set out in **Section 4** above, I conclude that there was no general reservation of the defendant's position on jurisdiction. These were ad hoc adjudications. The reservation that was made on 3 March 2017 was specific and related only to ambush/timetabling. That matter was resolved before the end of the first adjudication. There was no proper general reservation relating to jurisdiction. Even if there had been, it was not raised in the second adjudication in any event. The emails of 19 October and 7 November 2017 confirmed (in their different ways) the defendant's agreement that the adjudicator in the second adjudication had the necessary jurisdiction.

85.
For the reasons set out in **Section 5** above, although the claimant is entitled to summary judgment in the full amount ordered by the adjudicator, I order that the defendant is obliged to pay only **£4.5 million** now, and to bring a further **£1 million** into court. There will be a stay of execution in respect of the remaining sum (around £4.5 million) until further order. I will hear the parties on any other conditions that they consider to be appropriate.

---

[1] The reasons for this were and remain obscure. The distinction creates major practical difficulties for all of us involved in the implementation of the 1996 Act.