Neutral Citation Number: [2011] EWHC 2989 (TCC)

Case No: HT-11-408

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2011

Before:

MR JUSTICE EDWARDS-STUART

- -

Between:

PARTNER PROJECTS LIMITED	**Claimant**
- and -	
CORINTHIAN NOMINEES LIMITED	**Defendant**

- -
- -

Mr Jonathan Selby (instructed by **Olswang LLP**) for the **Claimant**
Miss Stephanie Barwsie QC (instructed by **David Conway & Co**) for the **Defendant**

Hearing dates: 03 November 2011

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE EDWARDS-STUART

Mr Justice Edwards-Stuart:

Introduction

1. This is an application for summary judgment by the claimant ("PPL") to enforce a decision of an adjudicator, Mr Stuart Kennedy, made on 14 September 2011 by which he awarded the sum of £850,509.35, plus interest at a rate of £150.46 per day from 24 September 2011, to PPL. The application is resisted on the ground that an element of the decision, which is not severable, was made without jurisdiction with the result that the decision is not enforceable. Alternatively the Defendant ("Corinthian") seeks an order that any judgment is stayed pending the determination of Corinthian's Defence and Counterclaim.

2. In relation to the excess of jurisdiction, the issues are whether:

   (1) The adjudicator was entitled to award interest on sums which had not been certified by the architect (as opposed to sums certified but unpaid) under clause 30.1.1.1 of the building contract made between PPL and Corinthian. That contract was in the form of the JCT Standard Form of Building Contract, Private Without Quantities with Contractor's Design Portion, 1998 edition.

   (2) Alternatively, if and in so far as the adjudicator awarded interest under the Late Payment of Commercial Debts (Interest) Act 1998, he had jurisdiction to do so given that the claim under that Act was not made in the Referral but only in PPL's Reply.

3. The basis of the application for a stay is that PPL's financial position is such that should it be determined that the sum awarded by the adjudicator is in fact repayable, PPL will not be able to repay it at the time when it would be likely to fall due.

The facts

4. Corinthian is a company wholly owned and controlled by its sole director, a solicitor, Mr David Conway. In both the adjudication and these proceedings Corinthian has been represented by David Conway and Co, a firm of solicitors of which Mr Conway is, I think, the sole proprietor.

5. For the financial years ending 30 June 2004 through to 30 June 2008 Corinthian produced financial statements that were not audited by virtue of the exemption conferred by section 249AA(1) of the Companies Act 1985. In each of those years the Director's Report stated that during the relevant year the company had not traded and there had been no income or expenditure. It was stated also that the company had been dormant throughout the year. For the year ending the 30 June 2008 alone, the Director's Report included the additional statement that "*Any expenses have been met by the Director personally*".

6. By section 249AA(1) of the Companies Act 1985 the accounts of a company do not have to be audited if there have been no significant accounting transactions during the relevant period.

7. The contents of these financial statements are, perhaps, a little surprising since, on 10 October 2003, Corinthian entered into the building contract with PPL with a contract sum of about £1.6 million and that, between then and 3 August 2006, when Corinthian terminated the contract, about £1,689,050 (according to the adjudicator) was paid to PPL by Corinthian pursuant to the contract.

8. The subject of the building contract was the construction of a new five bedroom house at 25 Henstridge Place, St John's Wood, London. The property was then registered in the name of Corinthian, although the evidence shows that Corinthian held the property as a bare trustee for Mr and Mrs Conway. In November 2005 the property was transferred into the names of Mr and Mrs Conway. In October 2011 the property was sold by the Conways to a company incorporated in Panama. It is Mr Conway's evidence, which I have no reason to doubt, that this Panamanian company was not in any way connected with the Conways and that this was, in effect, an arm's length transaction. However, Mr Conway has not been willing to disclose the price for which the property was sold.

9. There is no evidence of the existence of any form of guarantee by Mr Conway of Corinthian's liabilities, so the effect of these arrangements appears to be that Mr Conway can effectively walk away from Corinthian's debts by the simple expedient of leaving them unpaid and letting Corinthian's creditors put it into liquidation if they so wish.

10. PPL is a building contractor owned and controlled by a Mr Martin Lovatt. It was formed in about mid 2003 with a paid-up share capital of £100,000. In addition, Mr Lovatt injected a further £100,000 by way of a director's loan. Accordingly, the company began with a working capital of £200,000. Mr Lovatt had formerly been the chairman of a group of companies known as the Alandale Group. In a letter dated 1 August 2003 PPL's accountants, the Maths Partnership, provided Corinthian with a reference for PPL and Mr Lovatt.

11. Since the terms of this letter have assumed a central role in this application I will set them out in full:

> "We confirm that we act for [PPL] as accountants, auditors and taxation advisors and have acted for Mr Lovatt in his personal capacity and his associations with the Alandale group of companies since 1995.
>
> We can confirm that [PPL] has already been incorporated with issued share capital of 100,000 ordinary shares of £1 each forming a capital base of £100,000. In addition to the issued share capital, Mr Lovatt has injected a further £100,000 from personal sources by way of long term director's loan capital making a total injection of £200,000 as personal investments into the above named company. In view of the personal investments by Mr Lovatt, the company's bankers have already expressed their willingness to assist in financing any projects that the company will undertake.
>
> Mr Lovatt has an outstanding record in the construction industry by increasing the turnover of associated companies during his chairmanship from circa £3 million in 1994 to £22 million when he left the associated companies in 2002. During his period of chairmanship of the Alandale

> group of companies, many large projects for lucrative and well-known clients were carried out successfully. In view of Mr Lovatt's previous record in successfully undertaking and delivering large projects, we are of the opinion that [PPL] under Mr Lovatt's chairmanship are well placed to carry out projects on behalf of [Corinthian].
>
> The above information is given on our normal basis that it is in the strictest of confidence without any legal liability on our part."

12. Mr Conway says that it was partly on the basis of this letter that he was prepared to enter into a contract with PPL. He now challenges the accuracy of the statements made about the success of Mr Lovatt's previous track record. Put shortly, he says that Mr Lovatt's track record as a businessman was far less impressive and successful than this letter suggested.

13. There may or may not be some truth in what Mr Conway says but I do not find it necessary to investigate it for the purposes of this application. However, I am prepared to accept that Mr Lovatt was presented to Mr Conway as a successful and enterprising businessman and that was at least a reason why Mr Conway was prepared to give the contract for Henstridge Place to PPL. In addition, Mr Lovatt undertook to arrange for a bond in the sum of £160,000 which was, in turn, backed by his own personal guarantee. For reasons which are not entirely clear to me, but which do not appear to be the result of any default on the part of Mr Lovatt, the bond has turned out to be worthless. Mr Conway submits that Mr Lovatt's personal guarantee is of no value either, given his present financial position.

14. Unfortunately, the contract did not proceed smoothly. PPL made substantial claims for variations, delay and significant increased costs and expenses resulting from the alleged delays and design changes. In the adjudication before Mr Kennedy PPL claimed an additional £1.4 million odd in addition to the £1.689 million that it had already been paid. Effectively, therefore, according to PPL the contract had almost doubled in value.

15. The adjudication before Mr Kennedy was in fact the sixth referral to adjudication in relation to this project. The adjudicator in the five earlier referrals was a Mr Christopher Linnet. These took place between 2006 and 2011. In adjudications 1, 2 and 4, Mr Linnet awarded extensions of time amounting to about 59 weeks in all. Before this the architect had only certified a 2 week extension of time. In adjudication 3 he rejected PPL's application for an extension of time. In adjudication 5 he decided that the contract had been wrongfully determined, or repudiated, by Corinthian on 3 August 2006.

16. PPL's conduct of these adjudications is the subject of criticism from Mr Conway. It is said that PPL should have claimed money by seeking payment of under-certified sums, rather than just confining its claims to extensions of time. It is said that this piecemeal approach has not only been costly, to both sides, but also has delayed the date when PPL could recover what it claims is owed to it. Mr Lovatt's answer to this criticism is that it was very difficult to determine the critical path owing to the volume of design changes, so that it made sense to

structure the claims for extensions of time in sections, and that he hoped that some early success in the adjudication process might lead to an overall settlement of the dispute. In this he was disappointed.

17. Again, I do not find it necessary on this application to enter into an analysis of the justification for the referrals being made as they were and the extent to which Mr Conway's criticisms may be justified. What is clear is that PPL's financial position must have been made worse than it would otherwise have been by having incurred the costs of these adjudications. However, it can be said that these costs were brought about, at least in significant part, by Corinthian's unwillingness to pay any further sums to PPL.

18. Mr Conway has taken the position that the real dispute here is between PPL and Corinthian's design team, and that he - or, more precisely, Corinthian - has just been a "pig in the middle".

19. It is Mr Conway's position that the documents correctly record that the building contract was made between Corinthian and PPL. In these circumstances it is clear that from October 2003 onwards Corinthian would be incurring liabilities under the building contract, and no doubt to members of its professional team also, which - according to its financial statements - it had no funds to meet. In the absence of any explanation, and there is none, the inescapable inference, it seems to me, is that between October 2003 and the termination of the contract in August 2006 Corinthian was trading whilst insolvent, and that this was done at the direction of Mr Conway.

20. Turning to the financial position of PPL, the evidence shows that throughout this period it has been financed by loans from Mr Lovatt so that it could pay its debts. However, since the termination of the contract in August 2006 PPL has remained effectively dormant. Mr Lovatt says that during this period he continued to look for opportunities both for PPL and himself (through other corporate entities) with a view to raising enough money to allow PPL to start trading again. It seems that he has not been successful.

21. The present state of PPL's balance sheet is not healthy. The balance sheet for the year ending the 31 December 2010 shows that PPL had total current assets of £1,424,631 and amounts due to creditors falling due within one year of £1,426,875, leaving net current liabilities of £2,244.

22. The profit and loss account for the year ended 31 December 2006 showed an accumulated loss of £98,791, PPL having made a trading loss of about £17,000 for that year, and, since 31 December 2007, the profit and loss accounts have consistently shown an accumulated loss of £95,673.

The challenge to the adjudicator's jurisdiction

23. Clause 30.1.1.1 of the Conditions of Contract provides, in so far as is relevant, as follows:

> "The Architect shall from time to time as provided in clause 30 issue Interim Certificates stating the amount due to the Contractor from the

> Employer specifying to what the amount relates and the basis on which that amount was calculated; and the final date for payment pursuant to an Interim Certificate shall be 14 days from the date of issue of each Interim Certificate.
>
> If the Employer fails properly to pay the amount, or any part thereof, due to the Contractor under the Conditions by the final date for its payment the Employer shall pay to the Contractor in addition to the amount not properly paid simple interest thereon for the period until such payment is made. Payment of such simple interest shall be treated as a debt due to the Contractor by the Employer. The rate of interest payable shall be five per cent (5%) over the Base Rate of the Bank of England which is current at the date the payment by the Employer became overdue."

24. Clause 41A.5.5 of the conditions provided:

> "In reaching his decision the Adjudicator shall act impartially and set his own procedure; and at his absolute discretion may take the initiative in ascertaining the facts and the law as he considers necessary in respect of the referral which may include the following:
>
> .5.1 using his own knowledge and/or experience;
>
> .5.2 subject to clause 30.9, opening up, reviewing and revising any certificate, opinion, decision, requirement or notice issued, given or made under this Contract as if no such certificate, opinion, decision, requirement or notice had been issued, given or made;
>
> . . .
>
> .5.8 having regard to any term of this Contract relating to the payment of interest, deciding the circumstances in which or the period for which a simple rate of interest shall be paid."

25. Miss Stephanie Barwise QC, who appeared for Corinthian, submitted that the adjudicator appeared in fact to have quantified interest only under the Late Payment of Commercial Debts (Interest) Act 1998. She submits that, had the original notice of intention or referral contained a claim of interest under the Act, the adjudicator would have been entitled to award interest under it. However, she submits that PPL did not do this. As to any award of interest under Clause 30.1.1.1 on sums not certified by the architect, she submits that this would always have been without jurisdiction because the adjudicator did not have the power to award interest on sums which had not been certified (but only on sums which had been certified).

26. At this point it is necessary to pause and to consider exactly what the adjudicator did in relation to interest. I need to set out the relevant part of his Decision in full (Corinthian is referred to as CNL):

> "87. As to my jurisdiction, I am satisfied that the claim for interest is included in the Notice of Adjudication and the Referral, is properly part of the

dispute referred to me and so I have jurisdiction to deal with it. In my view, PPL are entitled to rely on the Late Payment of Commercial Debts (Interest) Act 1998 even though it is not referred to in the Notice or the Referral. It is relied upon in the Reply and is, in my view, submitted in response to the matters raised in the Response. Following submission of the Reply by PPL, CNL made a further submission to me in response to the Reply and so there has been no prejudice or unfairness in this alternative basis of the claim for interest being raised in the Reply.

88. As I have found above, there are sums due to PPL which have not been certified or paid. I therefore have to consider whether I should award interest to PPL in respect of those sums I have found due.

89. As to the basis of the claim for interest, in my view PPL would have been entitled to interest under Clause 30.1.1.1 of the Contract. I consider that the sums I have found due should have been certified and paid in accordance with the terms of the Contract. If they had been so certified then interest would be due from the date they should have been paid to now. In my view, it would be wrong for CNL to avoid payment of interest due to the non-certification as this would result in CNL benefiting by its own breach. Therefore, I find that PPL are entitled to interest under Clause 30.1.1.1 of the Contract.

90. If I am wrong about that and Clause 30.1.1.1 does not apply, then in the alternative I find that PPL are entitled to interest under the Late Payment of Commercial Debts (Interest) Act 1998. This basis of interest also applies to sums I have found due as damages for breach.

91. As to the appropriate rate of interest, Clause 30.1.1.1 states that interest is due at 5% over the Base Rate at the date when the payment became overdue. I interpret this to mean that the rate of interest is fixed at the date the payment should have been made and it is not adjusted for later changes in the Base Rate. PPL submitted its account in December 2007 and in my view the payment became due then. The Base Rate in December 2007 was 5.5% and so the contractual interest rate is 10.5%.

92. Alternatively, if interest is due under the Late Payment of Commercial Debts (Interest) Act 1998 the appropriate rate is 8% over Base Rate. In December 2007 this would give an interest rate of 13.5% but the interest rate would then be adjusted for each change in the Base Rate. The Base Rate fell progressively from December 2007 until March 2009 since when it has remained at 0.5%. This would give current rate of interest payable of 8.5%.

93. As to the period for which interest should be paid, I take account of the fact that CNL wrongly terminated (repudiated) the Contract in August 2006. In theory, this is when all sums due became payable to PPL and PPL claim interest from this date. However, I take into account that PPL did not submit its final account until December 2007 and so it would have been difficult for CNL to properly ascertain the sum due until they received this account. I consider that the sums due became payable in

December 2007 and PPL are entitled to interest from 1st January 2008 up to the date of this Decision and continuing until payment is made.

94. In assessing the sum due to interest I have taken account of all of the circumstances and taken account of the fact that PPL have made certain amendments to the sums claimed and provided additional information.

95. I find that PPL are entitled to simple interest on the sums that I have found due at a rate of 8.5% from 1st January 2008 to the date of this Decision. I calculate the amount as follows:

Sum due (from Schedule A attached) £646,088.43

Period from 1/1/08 to 14/9/11 = 1,352 days

Rate: 8.5% per annum simple interest.

Interest:

$$£646{,}088.43 \times 8.5\% \times \frac{1{,}352}{365} = £203{,}420.48"$$

27. Whilst the rate of interest taken by the adjudicator was 8.5%, which would have been the rate payable under the Late Payment of Commercial Debts (Interest) Act 1998 from March 2009 onwards, it is clear that he was not awarding interest under the Act, otherwise he would have taken the higher rates that were applicable between December 2007 and March 2009. Instead the adjudicator took one rate of simple interest for the whole period, which accords with his view of what Clause 30.1.1.1 required.

28. His comments at paragraphs 93 and 94 suggest that he deliberately adjusted the contract rate and the period for which it should be paid in order to reflect the matters mentioned in those paragraphs. I consider that what he did was to take the contractual rate of 10.5% and reduce it by 2% to reflect those matters. This is a course which was open to him under clause 41A.5.5.8 of the Conditions.

29. In these circumstances I conclude that the adjudicator did not take the rate of interest that would have been payable under the Late Payment of Commercial Debts (Interest) Act 1998. Accordingly Corinthian's objection on the basis that the adjudicator awarded interest on the basis of this Act falls away.

30. This leaves the submission that the adjudicator had no jurisdiction to award interest under clause 30.1.1.1 on sums which had not been certified. I agree with Miss Barwise that the clause does not confer a power to award interest on sums which have not been certified. However, I consider that the adjudicator was able to award sums greater than those certified by the architect because the contract gives him the power to open up and review certificates.

31. In my view, what the adjudicator must be taken to have done is to have opened up, reviewed and revised the architect's certificates and to substitute for the sums actually certified the sum that he considered should have been certified. Thus the effect of the adjudicator's decision is to substitute for the sums certified by the

architect in the certificates the sums found due by the adjudicator. Once this has been done, the adjudicator must be entitled to award interest on the sums due under the corrected certificates. This was not an excess of jurisdiction.

32. I have reached this conclusion without any reference to authority. But I consider that my conclusion is supported by some observations of Dyson LJ (as he then was) in *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814. At paragraph 23 of his judgment he said this:

> "It does not, however, follow from the fact that a certificate is a condition precedent that the absence of a certificate is a bar to the right to payment. This is because the decision of the Engineer in relation to certification is not conclusive of the rights of the parties, unless they have clearly so provided. If the Engineer's decision is not binding, it can be reviewed by an arbitrator (if there is an arbitration clause which permits such a review) or by the court. If the arbitrator or the court decides that the Engineer ought to have issued a certificate which he refused to issue, or to have included a larger sum in a certificate which he did issue, they can, and ordinarily will, hold that the Contractor is entitled to payment as if such certificate had been issued and award or give judgment for the appropriate sum."

33. This seems to me to accord precisely with my own analysis set out above. The sheet anchor of Miss Barwise's submissions to the contrary was the judgment of Chadwick LJ in *Carillion Construction v Devonport Royal Dockyard* [2006] BLR 15. Jackson J (as he then was) had to consider a contract that contained a provision that was in terms which were not materially different from those of Clause 41A.5.5.8. He concluded that this provision conferred a freestanding power to award interest, in the sense that the jurisdiction existed whether or not (i) the contract itself provided for interest on moneys outstanding or (ii) the parties had agreed that an award of interest should be within the scope of the adjudication. In the Court of Appeal Chadwick LJ said, at paragraph 90:

> "The question, in the present context, is whether the power [to award interest] exists where the parties (for whatever reason) have chosen not to include such a provision in the underlying contract. We do not accept that, if [the clause in question] had a meaning for which [Devonport] contends, it would be unnecessary. It would, for example, enable the adjudicator to decide whether circumstances in which the contract provided for the payment of interest had arisen, the date from which interest was payable under the contractual provisions and (if not specified in the contract) the rate at which and the basis on which (whether simple or compound) interest should be paid."

34. The court therefore gave permission to appeal from Jackson J's decision that the adjudicator had power to award interest. In the event, the court concluded that he did have the power to award interest having regard to the circumstances of the case. Whilst I do not disagree with the proposition that Miss Barwise drew from that case, namely that an adjudicator has no freestanding or inherent power to grant interest in the absence of any contractual provision granting such power, in

my view he did have the power in this case to award interest on the sums that he found due for the reasons that I have given.

35. Miss Barwise also relied on a passage in *Hudson's Building and Engineering Contract*, 12th Edn, at paragraph 7-065, in which the authors say:

> "It is suggested that, consistently with the well-known position that an Employer does not warrant the competency, but only the honesty, of the Certifier who is also the Employer's agent, clear language is needed to support an interpretation involving payment of interest where there has been a bona fide under-certification by the Certifier and the Employer has paid in full, particularly if the interest provision, as is usually the case in English forms of contract, only contemplates Employer liability or underpayment and there is no corresponding "reverse" interest liability of the Contractor in cases of overpayment . . ."

Whilst these observations are made by eminent authors, they cannot in my view prevail over a proper construction of the contractual provisions in suit.

36. However, I would also reject Miss Barwise's submissions on a wider ground. The Notice of Intention to refer the dispute to adjudication specifically invited the adjudicator to decide whether, pursuant to clause 30.1.1.1 of the Conditions, PPL was entitled to interest on the sum found due to it at the rate of 5% above base rate from the date of payment became due under the Contract until such date as payment was made. Accordingly, the question of PPL's entitlement to interest under clause 30.1.1.1 on sums that had not been certified was squarely covered by the adjudicator's terms of reference.

37. In this context I was referred also to the decision of the Court of Appeal in *C&B Scene Concept Design v Isobars* [2002] BLR 93, in which the court said that the real question in that case was whether the error on the part of the adjudicator went to his jurisdiction, or was merely an erroneous decision of law on a matter within his jurisdiction.

38. At paragraphs 29 and 30 of his judgment, with which Rix and Potter LJJ agreed, Sir Murray Stuart-Smith said this:

> "29. But the adjudicator's jurisdiction is determined by and derives from the dispute that is referred to him. If he determines matters over and beyond the dispute, he has no jurisdiction. But the scope of the dispute was agreed, namely as to the Employer's obligation to make payment and the Contractor's entitlement to receive payment following receipt by the Employer of the Contractor's Applications for interim payment Nos 4, 5 and 6 (see paragraph 12 above). In order to determine this dispute the adjudicator had to resolve as a matter of law whether clauses 30.3.3-6 applied or not, and if they did, what was the effect of failure to serve a timeous notice by the Employer. Even if he was wrong on both these points that did not affect his jurisdiction.
>
> 30. It is important that the enforcement of an adjudicator's decision by summary judgment should not be prevented by arguments that the

> adjudicator has made errors of law in reaching his decision, unless the adjudicator has purported to decide matters that are not referred to him. He must decide as a matter of construction of the referral, and therefore as a matter of law, what the dispute is that he has to decide. If he erroneously decides that the dispute referred to him is wider than it is, then, in so far as he has exceeded his jurisdiction, his decision cannot be enforced. But in the present case there was entire agreement as to the scope of the dispute, and the adjudicator's decision, albeit he may have made errors of law as to the relevant contractual provisions, is still binding and enforceable until the matter is corrected in the final determination."

39. In the light of the terms of the Notice of Intention which I have summarised above, if the adjudicator had concluded that PPL was entitled to interest under clause 30.1.1.1 when, on a true construction of that clause, it was not entitled to such interest, then he would have made an error of law when determining a question that was referred to him. It would not have been a case of answering the wrong question; rather he would have answered the right question in the wrong way. It is well settled that such circumstances do not afford a ground for challenging an adjudicator's decision: see, for example, *Bouygues v Dahl Jensen UK Ltd* [2000] BLR 49.

40. Accordingly, in spite of Miss Barwise's customarily succinct, direct and forceful submissions, I consider that the adjudicator did not exceed his jurisdiction in relation to interest. Therefore PPL is entitled to summary judgment to enforce the adjudicator's decision. I now turn to the question of whether there should be a stay of execution of the judgment.

The stay

41. The application for the stay is put on the basis that there would be a serious injustice to Corinthian if, as appears likely, once PPL is put in funds (that is to say, when the sum awarded by the adjudicator is paid to PPL) Mr Lovatt may call in all or part of his £1.13 million loan to PPL. Corinthian points out that Mr Lovatt has given no undertaking not to do this if the sum awarded is paid to PPL.

42. Corinthian submits that the fact that Mr Lovatt has not waived the loan, converted it to share capital or made some agreement by which repayment of the loan is deferred, suggests that Mr Lovatt wishes to preserve his right to call in the loan at any time. Corinthian submits further that, since PPL is dormant and has been since 2007, there can be no injustice in granting a stay. Corinthian does not accept Mr Lovatt's assertion that further work might become available to PPL if the sums being subject of the award were paid to it.

43. Miss Barwise rightly points out that the question is not whether PPL could repay the amount now, but whether or not it is likely to be able to repay it at a time when it is likely to fall due for repayment. That, she submits, is likely to be in about 12 months time (assuming a trial takes place in about October 2012). I see no reason to disagree with this assessment.

The authorities

44. The power to grant a stay of execution of a judgment is given by RSC, Order 47, which remains part of the CPR by virtue of Part 50. Order 47, Rule 1(1) provides as follows:

> "Where a judgment is given or an order made for the payment by any person of money, and the court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution
>
> (a) that there are special circumstances which render it inexpedient to enforce the judgment or order
>
> . . .
>
> . . . the court may by order stay the execution of the judgment or order . . . either absolutely or for such period and subject to such conditions as the court thinks fit."

45. As HH Judge Peter Coulson QC (as he then was) explained in *Wimbledon Construction v Vago* [2005] BLR 374, it is well established that the probable inability on the part of a claimant to repay the judgment sum is a special circumstance within the meaning of RSC Order 47(1)(a), and that the rule can properly be invoked on an application to stay the execution of summary judgment obtained to enforce an adjudicator's decision.

46. Both parties rely on the part of the judgment of HH Judge Peter Coulson QC in *Wimbledon Construction v Vago* in which he helpfully summarised the principles that apply when considering a stay of a judgment enforcing an adjudicator's award. He said this, at paragraph 26 (omitting his references to authorities):

> "(a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.
>
> (b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.
>
> (c) In an application to stay the execution of summary judgment arising out of an adjudicator's decision, the court must exercise its discretion under Order 47 with considerations (a) and (b) firmly in mind.
>
> (d) The probable inability of the claimant to repay the judgment sum (awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 Rule 1(1)(a) rendering it appropriate to grant a stay.

(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.

(f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to pay the judgment sum when it falls 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; 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."

47. In that particular case the judge concluded that the claimant's financial difficulties were due, at least in significant part, to the failure on the part of the defendant to pay the sums which the adjudicator found were due.

48. Miss Barwise referred me to two cases in which a stay had been refused on the grounds that the evidence did not show that the change in the claimant's financial position had been brought about, at least in significant part, by the defendant's failure to pay the sum awarded by the adjudicator. These were *JPA Design and Build Ltd v Sentosa (UK) Ltd* [2009] EWHC 2312 (TCC) and *Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC), both of which were decisions of Coulson J.

49. In *JPA Design and Build*, JPA had, in one set of adjudication proceedings, been awarded £300,000 by the adjudicator and, in a separate adjudication, been ordered to pay Sentosa £180,000. Coulson J noted that JPA owed a total of £700,000 to trade creditors, not including Sentosa. He then said, for reasons that I do not need to set out, that even if JPA were to receive the £300,000 from Sentosa, its indebtedness to creditors (including Sentosa) would remain at £700,000. Further, Mr Jonathan Selby, who appeared for PPL, pointed out that the sums owed by JPA were trade debts, they were not in respect of a director's loan to the company.

50. In *Pilon v Breyer*, the financial position was even more stark. Pilon had been awarded £207,000 plus interest by the adjudicator, but the total amount owed to its creditors exceeded £2.7 million. On that basis Coulson J observed that it was not possible on those figures for Pilon to demonstrate that its financial plight, and in particular its entry into a CVA, was caused in any way by Breyer's non-payment of the sum found due by the adjudicator. He noted also that at the time of the CVA, Pilon's principal creditor was HMRC, to whom it owed some £841,000 by way of unpaid income tax and a further £687,000 by way of unpaid VAT. He said that there was no evidence in the papers which could begin to suggest that these large debts were in any way connected to the non-payment of the £207,000.

51. It seems to me that I can derive relatively little assistance from either of these cases. This is an area which is particularly fact sensitive, and each case must be

considered in the light of its own particular facts and all the surrounding circumstances.

The basis of the application for a stay

52. Each party made a number of submissions based on a comparison of PPL's accounts for the years 2009/10 and 2002/03. But leaving the accounts on one side for the moment, I have already mentioned that PPL's working capital at the time when the contract was entered into was limited to £200,000. It was self-evident that with these limited resources PPL could not carry out building works with a value of £1.6 million unless it was paid promptly in accordance with the terms of the contract for the work that it had properly carried out and was not penalised for delays that it had not caused.

53. This did not happen. According to the decisions of the adjudicators, which are binding on the parties until overruled by a final decision of the court, PPL is entitled to an extension of time of over 60 weeks (if one includes the two week extension of time granted by the architect) and about £650,000 (excluding interest).

54. It seems to me self-evident that withholding such a significant sum was bound to create serious financial difficulties for PPL. Further, since PPL had been granted almost nothing by way of extension of time by the architect, it had little alternative but to seek appropriate extensions of time from an adjudicator. This caused it to incur irrecoverable costs and therefore to suffer some further deterioration of its financial position. However, I am not able to quantify this because, amongst other things, I do not know to what extent those advising or acting for PPL might have been doing so under some form of conditional fee arrangement.

55. On this basis alone I would be inclined to hold that PPL's present financial position has to a significant extent been brought about by the default of Corinthian in failing to pay the sums that the adjudicator has now found to be due.

56. However, I now turn to PPL's accounts. In relation to PPL's present position Miss Barwise points out that whilst its assets exceed its debts by a modest £3,327, those assets are overstated because they include an amount of about £1 million in respect of Henstridge Place, whereas the adjudicator has awarded only £850,000 odd. She submits that when the adjudicator's award is substituted for the stock and debtor's figures in the accounts, there is a deficit of some £570,000 odd. When the admitted legal fees of £200,000 incurred by PPL are added to this, the deficit increases to some £770,000 odd.

57. Miss Barwise acknowledges that even if the loan to an associated Antiguan company of £218,000 odd is repaid, PPL is still left with a deficit of well over £500,000. It is Corinthian's case, on the basis of the evidence of its accountant, Mr Beckwith, that PPL is insolvent. Miss Barwise submits that there is no realistic possibility of PPL's financial situation improving because the company has been dormant since mid-2006. Whilst Mr Lovatt has produced evidence that indicates that there may be other work in the pipeline, she submits that this

evidence is speculative and does little more than show that on one project PPL is currently a preferred tenderer.

58. Miss Barwise also submits that since PPL's debts exceed the amount of the adjudicator's award by over £500,000, it cannot really be said that its present insolvent condition has been brought about to any significant extent by default on the part of Corinthian. She submits that PPL has itself to blame for its present financial plight as a result of such matters as incurring high administrative expenses relative to its turnover (41% in 2003), making loans to associate companies (about £217,000), excessive entertainment expenses of about £96,000 and making *ultra vires* payments of dividends in 2003 and 2004 to the extent of almost £20,000. In addition, she says that Corinthian has legitimately deducted liquidated damages in the amount of £145,000.

59. Miss Barwise submits that these total some £835,000 and are attributable to mismanagement of the company.

60. In addition, Miss Barwise submits that PPL's financial position now is significantly worse than it was at the time when the contract was made. In this last submission I consider that she is correct.

61. Mr Selby submits that PPL is not currently insolvent. Whilst he accepts that it is in substantial debt, he submits that the bulk of this debt is owed to Mr Lovatt who has no intention of seeking repayment of his loan to PPL unless and until the company is in a position to repay it. The evidence of PPL's accountant, Mr Majithia, is that in his professional opinion PPL is not currently insolvent. Further, he says that if the money awarded by the adjudicator was paid to PPL it would leave it with a healthy balance in order to fund a recommencement of trading.

62. In relation to the criticism of PPL's high expenses, Mr Majithia says that high expenses for a new company with long-term goals are not unusual and that, contrary to Mr Beckwith's evidence, he says that he acts for a number of construction clients with expenses as a proportion of gross profit which are both higher and lower than PPL's.

63. As I have already indicated, Mr Lovatt has said that he only intends that PPL should repay his loan as and when it is able to do so in the future after generating profit from other work, save that he says he would need to withdraw about £150,000 which he requires in order to avoid the repossession of his family home. There is no doubt that Mr Lovatt has invested a very substantial sum by way of his own money in PPL. He has every interest in finding a way of obtaining a return on this investment, and in his witness statement he refers to two particular construction projects in the UK which he is reasonably confident of securing - one with an anticipated start date before the end of this year, and the other with an anticipated start date in March 2012. I do not consider that it is fair to write off either of these projects as speculative when each one is supported by a witness statement by a director of a company that is working with Mr Lovatt on each project: on the contrary, it seems to me that there is a realistic expectation that both will come to fruition.

64. Whilst I accept that PPL is dormant now, I do not accept that it would be unable to trade if it received the sum awarded by the adjudicator or, that if it did so, it would then be trading whilst insolvent.

65. Against this background, another way of looking at PPL's accounts for the year ended 31 December 2010 is to replace the figure of £1,404,631 in respect of current assets, much of which represents the value of the claims in relation to Henstridge Place, by the £850,000 awarded by the adjudicator and then to subtract from that the amount owed to creditors excluding the debt to Mr Lovatt. If one does this, which seems to me to be a fairly favourable exercise from Corinthian's point of view, one is left with a figure of about £550,000. If the £150,000 that Mr Lovatt says he needs to withdraw is deducted from that, the current assets (excluding the liability to Mr Lovatt) amount to about £400,000.

66. In terms of working capital, therefore, this is about twice the amount available to PPL at the time when it entered into the contract with Corinthian, assuming that Mr Lovatt does not demand the repayment of his loan beyond the £150,000 that I have mentioned.

67. In these circumstances, I find that the following facts are established on the balance of probability:

    (1) Mr Lovatt does not intend to withdraw his funding to PPL (beyond the £150,000) if he can avoid doing so.

    (2) If PPL is paid the sum awarded by the adjudicator it will have sufficient funds to enable it to continue to trade, and when doing so it will not be trading whilst insolvent.

    (3) PPL will probably enter into at least two profit-making contracts within the next four months or so.

    (4) PPL's present financial position has been brought about to a significant extent by Corinthian's failure to pay the sum that the adjudicator has found to be due.

    (5) Whilst it is possible that PPL might not be in a position to repay the whole of the £850,000 awarded by the adjudicator in, say, October or November 2012, I consider that it will probably be in a position to repay at least £500,000 if it were ordered to do so.

68. It follows from these conclusions that I accept that it is more likely than not that PPL would not be able to repay the whole of the £850,000 if ordered to do so in October/November 2012, but that it would be able to repay a major part of it.

The exercise of discretion

69. In my judgment, the fact that PPL would probably be unable to repay the full amount awarded by the adjudicator if ultimately ordered to do so is not decisive of this application. For a start, I have found that PPL's present position has been brought about to a significant extent by the default of Corinthian. That is a factor that militates strongly against ordering a stay.

70. Further, I consider that the court is entitled to take into account Corinthian's conduct generally. I have already indicated that, on the evidence put before the court by Corinthian, it appears that between 2003 and 2006 Corinthian was trading whilst insolvent. Since Corinthian is wholly controlled by Mr Conway, the only inference is that this was at his direction. I consider that the court is entitled to take this into account when exercising its discretion whether or not to grant a stay.

71. Having taken all the circumstances into account, I have reached the conclusion that execution of this judgment should not be stayed, either wholly or even in part. I am satisfied that PPL genuinely wishes to try and trade itself out of its present indebtedness if it can do so. It will only be able to do so if it receives payment of the sum awarded by the adjudicator.

72. I have not overlooked the fact that Corinthian claims to have a substantial counterclaim, which is pleaded in the sum of £670,000 odd. However, it was open to Corinthian to advance at least some elements of this counterclaim (but not those parts that were claimed by Corinthian as resulting from the termination of the contract) in the last adjudication (to the extent that it did not do so) and, given the policy of the courts in relation to the enforcement of adjudicator's awards, I do not place much weight on the existence of this alleged counterclaim.

Conclusion

73. PPL's application for summary judgment succeeds, and so I give judgment accordingly in the sum awarded by the adjudicator of £850,509.53, together with interest from the date of the Decision to be assessed if not agreed.

74. I refuse Corinthian's application for a stay of execution of that judgment, the amount of which I direct is to be paid within 28 days (subject to any submissions of the parties).

75. On the face of it, I would have thought that the costs of this application should follow the event. But if this is not agreed, I will hear submissions from counsel.