Neutral Citation Number: [2019] EWHC 2170 (TCC)

Case No: HT-2019-000073

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

7 Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 7th August 2019

Before :

MR ADAM CONSTABLE QC

- -

Between :

COREBUILD LIMITED	**Claimant**
- and -	
MR TOM CLEAVER AND ANOTHER	**Defendants**

- -
- -

Hearing date: 25 July 2019

- -

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.

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MR ADAM CONSTABLE QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

MR ADAM CONSTABLE QC :

Introduction

1. This is an application for summary judgment by the Claimant, Corebuild Limited, to enforce an adjudication award dated 12 November 2018 in which the Defendants, Mr Tom Cleaver and Ms Hanna Osmolska, were ordered to pay £80,023.82, it having been determined that the Defendants had sought wrongly to terminate the contract, and were thereby in repudiatory breach. All of the sums awarded depended upon the finding of repudiation. As well as resisting the claim for summary judgment, the Defendants contend in the alternative that the financial position of the Claimant is such that there is a compelling reason not to give summary judgment, or that a stay of execution should be ordered.

2. Mr Hennesy represented himself at the hearing of the application, and Mr Cleaver represented the Defendants. Whilst it is irrelevant to the substance of the application, it is noted that Mr Cleaver is a practising barrister and, as Mr Hennesy courteously acknowledged, the efficiency of the application has been assisted by the Defendants' preparation of bundles containing all the relevant materials and authorities in a sensible format.

3. The proceedings were commenced on 5th March 2019. By Order of Mr Justice Fraser on 13 March 2019, the Claimant was required, as is usual, to serve as soon as practicable upon the Defendants the Claim Form, a response pack and any statement relied upon. The Defendants were required to provide evidence on 15 April 2019, and any further evidence by the Claimant was to be served on 22 April. There was to be a hearing on 7 May 2019. A copy of the Claim Form, Response Pack and statement was not served on the Defendants until 25 March 2019, and a sealed copy was not served on the Defendants until 15 April 2019, the date upon which the responsive evidence was to be served. On 1 and 15 April 2019, the Defendants suggested a variation to the timetable, but on 16 April 2019, Mr Hennesy served a short witness statement saying that the time for filing evidence had expired and the matter should proceed to hearing in the absence of such evidence on 7 May. An application was made by the Defendants to extend the timetable on 25 April 2019; this application was heard on 7 May 2019 when, without prior notice or explanation to the Defendants or the Court, Mr Hennesy did not appear at all. On that date, the dates for the service of evidence from the Defendants and responsive evidence from the Claimant were varied to 27 May and 4 June respectively, and the latter was extended again until 12 July 2019. Mr Cleaver served evidence raising numerous specific concerns about the Claimant's financial viability. However, no further evidence was served by the Claimant in answer to Mr Cleaver's evidence. On 22 July 2019, Mr Hennesy informed the Court by email that he would not be able to attend the hearing listed for 25 July 2019, as he was due to be at a wedding. Mr Cleaver's skeleton argument was then predicated on the basis that Mr Hennesy would not be attending the hearing. On the eve of the hearing, Mr Hennesy did then provide a written response to the skeleton argument submitted by Mr Cleaver, and indeed attended the application hearing and represented himself in person. Notwithstanding the potential difficulties with proceeding in these circumstances which were foreshadowed by Mr Cleaver's skeleton, neither party objected to proceeding to hear the application substantively on 25 July 2019.

Background

4. The parties entered into a contract on 7 August 2018 to design and construct a single story rear extension, internal modifications and internal and external refurbishment works to a residential property in London, SE4 ('the Contract'). The Contract was in the form of a JCT Intermediate Form with Contractor's Design 2016. On 22nd June 2018, the Architect and Contract Administrator, Mr Griffies, sent a letter advising that he considered the Claimant to be in default under Clause 8.4.2 for failing to proceed regularly and diligently with the Works, and that if the Claimant were to continue with that default for 14 days from the date of the letter then the Defendants may exercise their right to terminate the Claimant's employment. Mr Griffies said that he would monitor the progress on site over the following 14 days against various specified items to assess whether or not the default continued. Mr Hennesy responded on 3 July 2018, and this letter was in turn responded to on 5 July. On 11 July, Mr Griffies indicated by email that the previous specified default previously notified had continued over a 14 day period, and on 13 July the Defendants terminated the contract.

5. A Notice of Adjudication was served on 5 September 2018, and Mr Paul Jensen appointed as Adjudicator. The Referral was accompanied by a witness statement from Mr Hennesy. A lengthy response, running to over 117 pages, together with witness statements from Mr Griffies and the Employer's QS, was served by the Defendants. This Response was accompanied by 1500 pages of exhibited correspondence and documentation. The Claimant's Reply was accompanied by a witness statement from Mr Hennesy running to over 70 pages, and a Rejoinder and Surrejoinder followed.

The Defendants' Grounds

6. The grounds upon which the Defendants seek to resist summary judgment are:

   i) the Adjudicator answered the wrong question in relation to contractual termination, with the result that he failed to address the Defendant's actual case;

   ii) the Adjudicator then had no regard at all to any of the evidence going to the progress of the works;

   iii) the Adjudicator rejected the Defendants' submission as to whether wrongful termination was repudiatory on the basis of a point which was unargued and which the Defendants had no opportunity to address;

   iv) the Adjudicator proceeded to determine an extremely complicated quantum case notwithstanding the huge amount of new material required to be dealt with, so that the Adjudicator was considering a dispute which had not crystallised and/or one which the Defendants did not have a fair opportunity to deal with.

Grounds 1 and 2

The Law

7. It is now well established that an adjudicator can make an inadvertent error when answering a question put to him, and that mistake will not ordinarily affect the enforcement of his decision (Bouygues (UK) Ltd v Dahl Jensen (UK) Ltd (1999) 70 Con LR). Where, however, an adjudicator takes an erroneously restrictive view of his own jurisdiction, with the result that he decides not to consider an important element of the dispute that has been referred to him, this failure may be regarded as a breach of natural justice. In Pilon Ltd v Breyer Group plc [2010] 130 Con LR 90, Coulson J, as he then was, summarised the law on this category of natural justice challenges, as follows:

> "22.1 The adjudicator must attempt to answer the question referred to him. The question may consist of a number of separate sub-issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question then, whether right or wrong, his decision is enforceable […]
>
> 22.2 If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice. […]
>
> 22.3 However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable: see Bouygues and Amec v TWUL. […]
>
> 22.4 It goes without saying that any such failure must also be material. […] In other words, the error must be shown to have had a potentially significant effect on the overall result of the adjudication: see Keir Regional Ltd v City and General (Holborn) Ltd [2006] EWHC 848 (TCC).
>
> 22.5 A factor which may be relevant to the court's consideration of this topic in any given case is whether or not the claiming party has brought about the adjudicator's error by a misguided attempt to seek a tactical advantage. […]"

8. In that case, the Court then added that under section 68 of the Arbitration Act 1996, a party alleging serious irregularity because an arbitrator failed to have regard to a particular issue has an '*uphill task*' and that the argument cannot be any easier in the context of adjudication.

Analysis

9. At the heart of the adjudication was (i) the liability question of whether the Defendants were in repudiatory breach of contract when terminating the Contract; and (ii) to the extent that the Claimant established liability, what loss flowed. There is no doubt that, put this broadly, the Adjudicator attempted to answer these questions, albeit he did so, in the Defendant's submission, wrongly. The liability question then obviously breaks down into sub-issues:

    i) Did the Defendants terminate lawfully by letter dated 13 July 2018?

    ii) If not, was that wrongful termination repudiatory?

10. The Adjudicator also addressed his mind to these sub-issues. The manner in which he addressed sub-issue (1) is the subject of Grounds 1 and 2; the manner in which he addressed sub-issue (2) is the subject of Ground 3. Sub-issue (1) then has two key components: whether the Claimant had a common law right of repudiation, and/or whether the Claimant had a right under Clause 8.4.2. Again, the Adjudicator identified and attempted to determine these issues.

11. Although obviously disagreeing with the Adjudicator's determination of the common law repudiation question, Mr Cleaver does not suggest that the manner in which he did so gives rise to any jurisdictional challenge. Mr Cleaver's argument focussed on the second question. In essence, Mr Cleaver argues under Ground 1 that, in the adjudication, the basis of defence was that the Claimant had not been proceeding regularly and diligently as at the date Mr Griffies sent the relevant letter notifying the Claimant, and that in the following 14 days, that default was not rectified so that the termination was contractually justified. The Adjudicator, it is argued, determined the matter by focussing restrictively upon the exchange of letters between Mr Griffies and the Claimant, and ignored the broader question of regular and diligent progress leading up to that exchange, and therefore misunderstood how the items which were the subject of monitoring in the 14 days, about which the correspondence was in part concerned, should be viewed in that light.

12. The relevant part of the Award ran for 19 pages, the first 14 of which set out essentially the correspondence from Mr Griffies. The Award then included a section stating, '*My Findings as to the Specific Items Showing Lack of Progress as the Architect's Letter of 22 June 2018*'. Within this section the Adjudicator considered each of the specific items which the Contract Administrator had stated that he was monitoring over the 14 day period, and formed a judgment on whether each had been completing in the time, or were delayed for reasons for which the Claimant was not responsible or were items awaiting the normal progress of the works. He concluded that '*insofar as any of the items were a fault on the part of the Claimant on 22 June 2018, none of those defaults have been continued by the expiry of the 14 days monitoring period*.'

13. In so concluding, Mr Cleaver complains that when asking whether the items were awaiting the normal progress of the works, the Adjudicator has in effect asked the wrong question, because the items had to be judged in light of the evidence and submissions about the preceding failure to have progressed the works diligently and regularly in the period prior to 22 June 2018.

14. In order to answer the issue before him, the Adjudicator needed broadly to put his mind to whether there had been a failure to regularly progress work as at 22nd June 2018 (thus justifying the first notice) and whether there had been a failure to rectify that default (thus justifying the termination). Although I have some sympathy for a criticism of the brevity with which the Adjudicator has expressed his conclusions which, even in the context of adjudication, seem scant, I am not persuaded on balance that there has been a breach of natural justice. It is right that the Defendants' submissions and evidence about the delays and complaints about resourcing throughout the project were not expressly referred to by the Adjudicator, who appears to have focussed solely on the matters in debate between the Claimant and Mr Griffies which had been the subject of monitoring during the 14 days after 22nd June 2018. There may well be justification in the criticism that the Adjudicator was wrong to do so, but if so then that was an error by the adjudicator whilst generally endeavouring generally to address the right sub-issues in order to answer the correct overriding questions. To delve any more deeply into what evidence was or was not in the adjudicator's mind when endeavouring to answer these questions does not form part of the exercise to be carried out by the Court on enforcement.

15. As to ground 2, Mr Cleaver complains that the Adjudicator has made no reference to any of the submissions or evidence about what the Defendants, as opposed to Mr Griffries, considered the position to be, in looking at the items of complaint. The Adjudicator, at paragraph 7, indicated that he had confined his explanations to the essentials but had nevertheless carefully considered all the evidence and submissions although not specifically referred to in this Decision. In the context of adjudication enforcement, it is not enough to identify parts of the evidence which, it appears, were disregarded; it is necessary to demonstrate that the approach was the result of a deliberate decision to exclude parts of the case based upon a wrongly restrictive view of the scope of the adjudication. As set out above, the adjudicator was generally endeavouring to address the right sub-issues in order to answer the correct overriding question. If there has been a failure to consider properly those issues raised by the Claimant in addition to relying upon the views expressed by the Contract Administrator in the context of termination, that failure was an inadvertent failure which will not render the decision unenforceable. The complaint goes to whether the Adjudicator simply got it wrong; it was not a breach of natural justice.

Ground 3

The Law

16. Ground 3 gives rise to a complaint of a different nature to grounds 1 and 2. The nature of the complaint is that, in relation to a key part of the case, the Defendants were not given the opportunity to address the adjudicator, because the adjudicator's decision was based upon a point not argued by the Claimant and not canvassed by the Adjudicator. The relevant principles to apply are set out in *Cantillon Limited v Urvasco Limited* [2008] EWHC 282, by Akenhead J. These are as follows:

> "(a) It must first be established that the Adjudicator failed to apply the rules of natural justice;

> (b) Any breach of the rules must be more than peripheral; they must be material breaches;
>
> (c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.
>
> (d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this.
>
> (e) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of Balfour Beatty Construction Company Ltd -v- The Camden Borough of Lambeth was concerned comes into play . It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto."

Analysis

17. The Defendants, in the adjudication, argued that even if the termination had been wrongful, this was not repudiatory. They relied upon the decision of the House of Lords in Woodar Investment Development Ltd v Wimpey Construction UK Ltd [1980] 1 WLR 277 and argued (as summarised at paragraphs 11.8, 37-39 and 216-219 of the Response) that a party who terminates in good faith in the belief that he is entitled to do so, but who turns out to be wrong, does not thereby repudiate the contract himself.

18. At paragraph 11.8, the Response stated:

> '…we were acting in accordance with what we had been told by a professional architect and Contract Administrator who as far as we could see was discharging his obligations in accordance with the Contract. As in [Woodar], even if we were mistaken in doing so, that mistake would not have constituted a repudiation because it would not have indicated an intention not to comply with the Contract; we reasonably believed in reliance on Mr Griffies' expert judgment that we were acting wholly consistently with what the Contract required.'

19. At paragraphs 24 to 26 of the Reply, the Claimant dealt with this point:

> "24. Paragraph 11.8 is denied. The Employer misconstrues the Woodar case as providing an effective 'get out of jail free card' in all circumstances where a party terminates a contract in bona fide belief in the legality of his actions, including where he has relied on the advice of a professional, in this case the CA, RSA. However, the essential part of the judgment has been overlooked in assessing whether a repudiatory breach was committed, namely the effect of the termination of the innocent party. By reference to Woodar the effect on Corebuild is to deny it the opportunity to complete the Works and be paid significant amounts of money whilst depriving it of its legitimate expectation of making a profit."

20. Paragraph 25 of the Reply then set out a quote for *Keating on Construction Contracts* relating to 'Erroneous expression of view', which noted the approach in *Woodar* but then concludes, '*It is thought that, if either party to a construction contract operates contractual determination machinery upon a mistaken, albeit bona fide, view of the facts or its legal rights, that will normally be repudiation.'*

21. Paragraph 26 then summarised the Claimant's position:

> "26. It follows that if the adjudicator finds that the termination was unlawful then the mere fact of the Employer relying on the advice of the CA will be of no relevance and a finding of repudiatory breach is the only reasonable conclusion."

22. Therefore, there was no dispute between the parties factually that (a) the Defendants had relied upon the expertise of the Contract Administrator and (b) its decision to terminate was *bona fides* based upon that reliance. The only issue was the relevance of these facts to the question of whether a wrongful termination in the context of a construction contract would be repudiatory irrespective of *bona fides* and reliance.

23. The Adjudicator found as follows:

> "51. The expected effect of a wrongful termination under the terms of the Contract or at common law is that it acts as a wrongful repudiation of the Contract, but the Respondents have submitted that, even if, as I found, they were mistaken as to their rights that alone should not be treated as a wrongful repudiation for reason they say that they relied on the Architect's expert view that the Claimant was in default and that the Claimant's explanation as to why it was not in default was manifestly defective. I do not accept that the Respondents relied on the Architect's expert view because, as explained above, both of the Respondents were very much involved in the administration of the Contract, and in those circumstances it can be expected that the Architect did not send his default notice of 22nd June 2018 in the absence of a suggestion from or at least without the approval of the Respondents, and consequently I find that the termination

> of the Claimant's employment under the Contract was a wrongful repudiation of the Contract."

24. It is clear that:

    i) the question of whether, notwithstanding wrongful termination, the Defendants repudiated the Contract was a central part of the matters in dispute;

    ii) the Adjudicator determined that question against the Defendants upon the factual basis that the there was no actual reliance by the Defendants upon the decision of the Contract Administrator, because '*it can be expected that*' the Defendants either suggested or approved the course of action themselves;

    iii) the case determined by the Adjudicator had formed no part of the case advanced by the Claimants, who had not questioned or disputed the Defendants' assertion of factual *bona fides* reliance, but had simply argued that any such reliance was irrelevant to the analysis;

    iv) the Adjudicator appears to have formed the view that factual reliance was, however, a (or the) relevant factor; and then determined the question of repudiation decisively against the Defendants, not on the basis advanced by the Claimants, but on the basis of a factual finding which had not been argued for, which there was no evidence or submission in support of, and upon which the Defendants had had no opportunity to comment or adduce evidence.

    v) This was a clear breach of natural justice in relation to a determinative point.

25. Could it, nevertheless, be said that the Adjudicator would have been correct to adopt the view, as argued by the Claimant, that *bona fide* reliance was irrelevant, so that in reality the question upon which the Defendants were deprived an opportunity of engaging was not a material one?

26. Mr Cleaver relied on ABB Limited v BAM Nuttall Limited [2013] EWHC 1983 (TCC), another decision of Akenhead J, in which the Court emphasised that the Court should be slow to speculate upon what an adjudicator would, should, or could have done or decided if he had not gone on the particular frolic of which complaint is made. In that case, the Adjudicator determined important parts of the dispute by reference to a particular clause which had not featured in submissions or in exchanges between the parties and the adjudicator. At the summary judgment application, the party seeking to enforce the decision argued that, on the merits of the relevant point, the adjudicator's decision was substantively correct as a matter of construction. Akenhead J considered that '*it is not really for the Court to rule on this as it should have been for the adjudicator, having raised it (which he did not before his decision) and heard argument on it to decide this type of point. I am satisfied that there is at least a respectable and probably convincing argument that [the clause does not apply]*.' There may be circumstances in which it is possible to demonstrate on summary judgment that the answer the adjudicator arrived at was so obviously correct, that the failure to have allowed the point to be properly ventilated is not material: permitting a party to make submissions could not have changed the outcome. However, generally, it is sufficient for a party to show that the substance of the point with which they were deprived of the opportunity to engage with was properly arguable i.e. it had reasonable prospects of

success. Beyond that, the Court should not determine the merits of the point itself on the summary judgment application.

27. It follows that I accept that, under ground 3, the decision is unenforceable by reason of a material breach of the rules of natural justice.

Ground 4

28. Ground 4 was not pressed by Mr Cleaver with particular enthusiasm, recognising the difficulty of persuading a Court either that a dispute had not crystallised in relation to sums which had been claimed, and not paid; or that the task of engaging with the quantity of material deployed within the timescales of adjudication was so onerous that itself was a breach of natural justice. I do not see that in relation to either way of putting this ground, the Defendants' arguments are sustainable.

Stay of Execution

29. Given my finding at paragraph 27 above, it is not necessary to consider whether the judgment should be stayed.

30. However, if I were to be wrong about the enforceability of the decision, I would in any event have stayed the judgment under the applicable principles in Wimbledon Construction Company 2000 Limited v Derek Vago [2005] EWHC 1086. Although some of the submissions contained with the Defendants' witness statements alluded to a concern of dissipation of assets, Mr Cleaver made it clear that he was not pursing an argument arising from the supplemental principle added to *Vago* by Mr Justice Fraser at first instance and approved by the Court of Appeal in Gosvenor London Ltd v Aygun Aluminium UK Ltd [2018] EWCA Civ 2695.

31. In the second witness statement of Mr Cleaver, numerous questions were raised relating to the financial viability of the Claimant.

32. On 18 February 2019, a winding up petition was presented by HMRC against the Claimant. The Defendants repeatedly sought information from the Claimant about the underlying debt, the progress of the proceedings and any communications between the Claimant and HMRC. No information was provided in advance of the hearing, whether by way of responsive witness statement. At the hearing, Mr Hennesy provided an oral account of the position, albeit providing no written substantiation by way of correspondence or the like. Mr Hennesy confirmed that HMRC sought approximately £200,000 although, he said, approximately £30,000 related to interest which was disputed. Mr Cleaver stated in his witness evidence and skeleton that the Claimant's accounting periods, with a year-end to 31 August, suggest that the debt must have been due since at least 1 June 2018, on the basis that the only liability which preceded the February 2019 winding up petition would have been the tax due on the statutory date for paying corporation tax relating to the income earned from 1 September 2016 to 31 August 2017. This point was not responded to in advance of the hearing itself, and, although I accept he was generally seeking to be candid before the Court, Mr Hennesy's

oral submissions were at best vague as to when the tax liabilities arose, and his assertions were unsubstantiated by the written communications with HMRC which are likely to exist (or have existed).

33. Orally, Mr Hennesy explained that he had around £85,000 of other creditors (as to which no further detail was provided, orally or in writing). He also asserted that he had, in addition to the £84,025.01 (plus Court fee of c.£4,201.25) sought in the present proceedings, a number of other sums owing. Taking them at their highest, he identified:

    i) approximately £37,000 in retentions;

    ii) approximately £55,000 owed in relation to a construction project at Clay Corner, which had also been terminated;

    iii) approximately £51,000 owed in relation to a project called Thameside;

    iv) approximately £38,000 relating to a project called the Old Power Station.

34. This amounts to approximately £181,000.

35. Mr Hennesy said the Claimant had no other assets. Even taking these figures at their (absolute) highest, Mr Hennesy accepted in terms that the Claimant was insolvent: it was presently unable to pay its obligations as they fell due; and its debts were larger than its assets. Although, arithmetically, this is so on the figures provided by Mr Hennesy by a relatively small margin, there is very considerable doubt about whether the sum of £181,000 is in any way a realistic estimation of the sums that the Claimant is likely to receive at any point in the future, let alone the near future. Mr Hennesy accepted that each of the sums (save for retentions) were to a greater or lesser extent disputed, but provided no proper evidence of what that extent may be.

36. Given that it was not disputed by Mr Hennesy the Claimant is presently insolvent, greater clarity or evidence relating to these figures may not have assisted the Claimant. However, the general reluctance to have provided transparency as to the financial position of Corebuild in advance of the hearing only adds to the concerns which the Defendants, rightly, have voiced. Whilst Mr Hennesy argued that he did not want to provide further evidence when he learnt that Mr Cleaver had been in touch with another customer (the allegation is disputed and I do not need to resolve it), it is extremely unhelpful to fail to provide witness and/or documentary evidence in response to clear and detailed allegations of financial difficulty in accordance with the timetable ordered by the Court in advance of the hearing.

37. Mr Hennesy submitted orally that if he were to succeed in enforcing the Award, he anticipated being able to settle with HMRC, to enter a CVA, and to trade back into business whilst pursuing the other sums outstanding. I have no doubt that this might be Mr Hennesy's intention, but there is no proper basis upon which I could find that it is a remotely realistic prospect at present. None of the figures put before me are substantiated by any documentation, none of the communications with HMRC have been provided, and no detail of a proposed CVA has been advanced.

38. Turning to the relevant authority, principle (e) from *Vago* states:

> "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."

39. There is no dispute on the evidence that the claimant is insolvent. I have not been persuaded that there are any particular circumstances to justify a departure from the usual position. If anything, the general approach to providing financial information in advance of the application gives significant cause for concern and is a factor in determining that the ordinary course is the appropriate one.

40. Even if, on the figures, I had been persuaded that the Claimant was not insolvent, or was borderline insolvent, I consider that the criteria in principle (f) are also fulfilled in any event. These are:

> "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; 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."

41. I am in no doubt that the Claimant would be unable to repay the judgment sum when it fell due, were it to be required to be repaid. As to the sub-criteria:

    i) it is Mr Hennesy's own position that the Claimant's financial position is materially worse than it was in 2017, at the date of entering the Contract with the Defendants. This is obviously correct: the Claimant's published accounts for 2016 and 2017 show a small trading profit, on a turnover in excess of £1m; the situation now is much worse.

    ii) it cannot be said that the claimant's financial position is due wholly, or in significant part, to the failure to pay the sums awarded by the Adjudicator. The fundamental cause of the Claimant's financial difficulties arose from large sums owed to HMRC, which debt was unrelated in any way to the construction project with the Defendants. The sums in dispute in relation to the present matter make up only around 30% of the sums said to be owed to the Claimant. In other words, the financial position the Claimant finds itself is, largely, unrelated to the instant project.

42. In these circumstances, it is clear that even if I had concluded that the decision was to be enforced, I have no doubt that the appropriate course would be to stay the execution of the judgment.

43. The application is dismissed.