Neutral Citation Number: [2020] EWHC 1965 (TCC)

Case No: HT-2020-000184

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

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 23/07/2020

Before :

RECORDER ANDREW SINGER QC
(sitting as a Judge of the Technology and Construction Court)

- -

Between :

WRW CONSTRUCTION LIMITED	**Claimant**
- and -	
DATBLYGAU DAVIES DEVELOPMENTS LIMITED	**Defendant**

- -
- -

Mr Crispin Winser (instructed by **DJM Law Ltd. Solicitors**) for the **Claimant**
Mr Simon Hargreaves QC (instructed by **Morgan La Roche Solicitors**) for the **Defendant**

Hearing dates: 14th July 2020

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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.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 23 July 2020 at 10:00 am.

RECORDER ANDREW SINGER QC :

Introduction

1. This is an application for summary enforcement of an Adjudicator's revised Decision dated 8th May 2020 (revised on 13th May 2020). The Claimant who was the Responding Party to the adjudication seeks payment from the Defendant of £568,597.32 which it says is due either as awarded by the Adjudicator or as a necessary consequence of the award. The Defendant defends the Part 24 application and if judgment is granted, seeks a stay of execution. There is also an application by the Defendant relating to the Court fee paid by the Claimant.

2. Mr Winser appeared for the Claimant and Mr Hargreaves QC for the Defendant. I am grateful to them both for their helpful and comprehensive written and oral submissions. I have taken all of them into account in reaching my decision. The hearing was held remotely due to the COVID-19 restrictions, it was nevertheless a public hearing.

3. I remind myself that for the Part 24 application to succeed it must be demonstrated to the Court's satisfaction that there is no reasonably arguable defence to the claim i.e. a defence with a real as opposed to a fanciful prospect of success. The burden of proving the lack of a reasonably arguable defence is, of course, on the Claimant.

The Facts

4. The parties entered into an undated Contract incorporating the JCT 2011 Design and Build Conditions for the Claimant to design and build nine dwellings on a site behind 84 Whitton Road, Twickenham, London for a contract sum of £2.2 million.

5. This action and the application for Part 24 judgment arise out of the third adjudication between these parties. The second adjudication decision was dated 7th December 2018 and has not been the subject of challenge or further proceedings and so remains binding on the parties. That adjudication decided that the contract was validly terminated by the Defendant in mid-2018.

6. The instant adjudication was commenced by the Defendant seeking a valuation of the post-termination final account. The Notice of Adjudication was dated 7th February 2020. Under the heading "Claim and Relief" at Paragraphs 19 to 21 the following was stated:

> "19. DDD [the Defendant] is entitled to and claims payment from WRW [the Claimant] of the sum of £3,345,790.40 (or such other sum as the Adjudicator shall determined is owed by WRW to DDD) pursuant to Clause 8.7 and/or as damages for breach of contract.
>
> 20. DDD invites the Adjudicator to determine the sums due and payable by WRW to DDD and to order payment of such sum by WRW to DDD within 7 days of his/her decision (or such other period as he/she shall determine).
>
> 21. DDD invites the Adjudicator to determine that his/her fees shall be payable by WRW."

7. The exercise under Clause 8.7 of the Contract involves the carrying out of a valuation exercise pursuant to Clauses 8.7.4 and 8.7.5 of the Contract. Those clauses provide as follows:

> "8.7.4. Following the completion of the Works and the making good of defects in them (or instructions otherwise as referred to in Clause 2.35), an account of the following shall within 3 months thereafter be set out in a statement prepared by the Employer:
>
> 8.7.5.1. The amount of expenses properly incurred by the Employer, including those incurred pursuant to Clause 8.7.1 and, where applicable, Clause 8.5.3.3, and of any direct loss and/or damage caused to the Employer and for which the Contractor is liable whether arising as a result of determination or otherwise;
>
> 8.7.4.2. The amount of payments made to the Contractor; and
>
> 8.7.4.3. The total amount which would have been payable for the Works in accordance with this Contract;
>
> 8.7.5. If the sum of the amount stated under Clauses 8.7.4.1. and 8.7.4.2 exceeds the amount stated under Clause 8.7.4.3, the difference shall be a debt payable by the Contractor to the Employer or, if that sum is less, by the Employer to the Contractor."

8. In its Response at Paragraph 33 the Claimant made the following submission to the Adjudicator:

> "The proper valuation of the post-determination final account in accordance with Clause 8.7.4 of the Contract leads to a position in which DDD is indebted to WRW. Whilst WRW accept that the Adjudicator has no jurisdiction to order payment to be made to WRW, the Adjudicator has been asked by DDD to value the post-terminational final account. It is respectfully submitted that the Adjudicator should find that the proper value of the post-termination final account is as set out above. Put another way, the Adjudicator should conclude that the sum due and payable by WRW to DDD is -£695,035.63."

9. On its clear construction, it was in my judgment clearly accepted by the Claimant during the adjudication that the Adjudicator did not have jurisdiction to order a payment of money from the Defendant to it. It is equally clear that the Claimant was seeking a decision that sums were due to it from the Defendant on the basis and as a result of the valuation of the account for which it contended.

10. The Adjudicator's revised Award includes under the heading "Final Assessment of the Claim" a table at Paragraph 389 and the following at Paragraph 390:

> "I DECIDE AND FIND that my assessment of the total value of the account due to Clause 4.7.4.1 is an amount due as a debt from DDD to WRW as is permitted by Clause 8.7.5 in the sum of £568,597.32."

That finding is in accordance with the contract's clear effect i.e. that whatever sum is found due to either the Contractor or Employer is due to that party as a debt. The adjudicator's finding is then mirrored in Section K of the Award under the heading "DECISIONS ON THE REMEDIES SOUGHT". At Remedy B the Adjudicator stated:

> "I decide that WRW shall pay to DDD the sum of -£568,597.32 (negative) within 7 days of the date of my Decision."

11. Although that sentence even as revised is expressed in somewhat opaque language, nevertheless it is clear, in my judgment, that the Adjudicator was seeking to award a payment to the Claimant from the Defendant of the sum sought in these proceedings, having decided the balance of account between the parties.

12. The Claimant's Particulars of Claim include the following relief sought at Paragraph 29.1:

> "An order that DDD pay to WRW £568,597.32 (plus the applicable VAT) in accordance with the Decision or the revised Decision or as a debt; alternatively judgment for damages in the same sum."

13. At Paragraph 34 of his written Skeleton Argument Mr Winser notes that it is now agreed that the Adjudicator had jurisdiction to value the post-termination final account. That agreement was confirmed during the hearing before me. Therefore the narrow issues in dispute at the hearing were whether the Adjudicator had jurisdiction to order a payment to the Claimant and/or whether payment is due to the Claimant as a result of the valuation exercise which temporarily binds the parties. Mr Winser now accepts that Paragraph 20(b) of the Scheme does not give rise to a stand alone right to order payment. As the hearing proceeded, the issue as to enforcement narrowed further because Mr Winser accepted that he was not making a positive submission that the Adjudicator did have jurisdiction to order payment of a sum of money. The parties agreed that the sole issue which the Court now has to determine on the enforcement application is whether in the light of a binding valuation exercise by the Adjudicator, the Claimant is also entitled to be paid the sums claimed in accordance with that valuation.

Legal Principles and Submissions

14. Mr Hargreaves QC for the Defendant argues that the Court cannot make an order for payment on the basis of the Award because, he says, that is impermissible without a valid order for payment from an Adjudicator and he says that absent the same, such an order for payment now would involve the Court making a final determination on the merits of the post-termination valuation account which would bar any attempt to reclaim overpayments in subsequent litigation. He prays in aid of those submissions the decisions of the Supreme Court in ***Aspect Contracts v. Higgins Construction*** **[2015] UKSC 38** and ***Bresco Electrical Services v. Michael J Lonsdale (Electrical)*** **[2020] UKSC 25**, the decision of the Court of Appeal in ***Clark v. In Focus Asset Management and Tax Solutions Ltd*** **[2014] EWCA Civ 118** and of the High Court in ***P C Harrington Contractors v. Multiplex Construction (UK)*** **[2007] EWHC 2833 (TCC)**, a decision of Christopher Clarke J (as he then was).

15. Both parties referred me to Paragraph 14 of the judgment of Lord Mance JSC in ***Aspect***. In that paragraph the learned Justice states:

> "By providing that the decision of an adjudicator is binding and that the parties shall 'comply with it', Paragraph 23(2) of the Scheme makes the decision enforceable for the time being. It is enforceable by action founded on the contractual obligation to comply with the decision combined, in a normal case, with an application for summary judgment. The limitation period for enforcement will be 6 years from the adjudicator's decision. But the decision is only binding and the obligation to comply with it only lasts 'until the dispute is finally determined' in one of the ways identified …"

The reference to limitation periods in Mance JSC's judgment is because the issue before the Supreme Court in ***Aspect*** concerned the limitation period for claims for repayment of sums which had been paid pursuant to adjudication awards and when time began to run for those claims. ***Aspect*** is not, of course, a decision which considers the specific points which have been argued before me, but the general points made by Mance JSC as quoted above are of general effect.

16. Both parties stress the contractual nature of the enforcement proceedings and the "contractual obligation to comply with the decision."

17. Mr Hargreaves QC says that before a Court can order payment of a money sum due to the Claimant there needs to be a fourth adjudication between the parties which will proceed on the basis of the valid and binding valuation of the post-termination final account reached in the third adjudication. He relies upon ***Bresco*** at Paragraphs 44, 46 and 47 and ***Harrington*** at Paragraphs 40 and 41. In ***Bresco*** at Paragraph 44 the Court stated:

> "However narrowly the referring party chooses to confine the reference, a claim submitted to adjudication will nonetheless confer jurisdiction to determine everything which may be advanced against it by way of defence, and this will necessarily include every cross-claim which amounts to (or is pleaded as) a set-off. This much was common ground but it is supported by authority …"

Reference is then made to the ***Harrington*** decision and the paragraphs which were cited before me.

18. I accept on the basis of the authorities quoted above (and the Claimant does not argue otherwise) that the Adjudicator did not have jurisdiction to award a monetary sum to the Claimant as the responding party to the adjudication. However that, in my judgment, is not the relevant issue, nor was it an issue which arose for determination in ***Harrington*** or ***Bresco***. The issue before me is whether on the basis of a valid, binding valuation of the post-termination account a court's enforcement of that valid award can include an order for payment of the sum due as a consequence of the binding valuation, or not.

19. In my judgment, there is no bar on the basis of the authorities cited to me to the Court enforcing a temporarily binding valuation in an adjudication award by making an order for payment of the monies due as a result of that valuation. Indeed, in my judgment it would be contrary to principle and established authority for the Court to effectively force a party who has the benefit of an award in its favour as far as a balance being due to it, thereafter to have to commence a further adjudication (to which there is no defence) for the purpose of obtaining an order for payment from the Adjudicator before returning to the Court if necessary, for further enforcement proceedings.

20. In my judgment, the submission that a further adjudication award is required is not supported by the authorities put forward by Mr Hargreaves QC. They address different issues entirely and as stated above there is no authority which relates directly to the issue of the enforcement of a valuation in favour of the responding party to an adjudication final account valuation exercise and perhaps more importantly no authority for the proposition argued before me.

21. Mr Hargreaves QC's other line of defence to the enforcement sought is based on the doctrine of merger as explained in ***Clark*** at Paragraphs 5, 7, 11 and 12. At Paragraph 5 the Court stated:

> "Merger explains what happens to a cause of action when a court or tribunal gives judgment. If a court or tribunal gives judgment on a cause of action it is extinguished. The claimant if successful is enabled to enforce the judgment but only the judgment. The effect of merger is that a claimant cannot bring a second set of proceedings to enforce his cause of action even if the first tribunal awarded him less than he was entitled to …"

22. However, as Mr Winser rightly submitted, in my judgment, the flaw with any reliance on ***Clark*** is that it concerns the issue of whether an Ombudsman's award is a judicial decision leading to the doctrine of res judicata rather than dealing with the doctrine of merger. An Adjudicator's award is certainly not a judicial decision. Further, in my judgment, the analysis by Mr Hargreaves QC, attractively put though it was, fails to take account of the temporary nature of an Adjudicator's award and the fact that if a Court makes an order by way of enforcement of that award, the only cause of action which could possibly "merge" is that cause of action by way of a contractual obligation on both parties to comply with the Adjudicator's award - as to which see ***Aspect*** cited above. When a defendant wishes to reclaim monies paid out as a result of the award being enforced, it will be relying on a different cause of action. As the decision in ***Clark*** itself makes clear (at Paragraph 81 letter h) , res judicata will not arise in respect of different causes of action based on different facts. So here the cause of action which the Defendant will have to seek repayment of overpaid sums will not merge in the cause of action the Claimant has to be paid sums which are due to it based on a temporarily binding valuation by the Adjudicator. It follows that I am not persuaded that any order for payment of the sums which follow from the Adjudicator's valuation would cause the doctrine of merger to apply and/or would amount to a final determination by the Court of the value of the post-termination account. Since the valuation by the Adjudicator is of temporarily binding effect only, any sums paid on foot of that valuation can only be paid on a similarly temporary binding basis so as to preserve cash flow as is the main purpose of construction adjudication.

Decision

23. It follows from the above that there is no reasonably arguable defence to the claim for payment of the sum of £568,597.32 due pursuant to Clause 8.7.5 of the Contract as a result of the Adjudicator's valid and temporarily binding decision as to the value of the post-termination account and the Claimant's application for summary judgment in that sum succeeds.

Stay of Execution

24. The Defendant seeks a stay of execution, although it was realistically effectively accepted during the hearing that any stay would, if granted, be subject to conditions requiring payment into Court of the judgment sum.

25. The relevant guidelines for the discretionary grant of a stay of execution are, of course, contained in the judgment of HHJ Coulson QC (as he then was) in ***Wimbledon Construction Co (2000) v. Vago*** **[2005] EWHC 1086** at Paragraph 26 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 a 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 v. 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 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*)."

26. In addition, in *Broseley London v. Prime Asset Management* [2020] EWHC 944 (TCC) at Paragraphs 23 to 26 Mr Roger Ter Haar QC stated:

> "23. Further principles have been stated in the authorities including that: 'The burden is clearly upon the party seeking to stay to adduce evidence of a very real risk of future non-payment' (*Total M&E Services v. ABB Building Technologies Ltd* [2002] 87 Con LR 154).
>
> 24. With further regard to the burden of proof, Ramsey J in *Farrelly (M&E) Building Services Ltd v. Byrne Bros (Formwork) Ltd* [2013] Bus LR 143 said at Paragraph [91] that:
>
> > 'There is no general obligation on a party when seeking enforcement to disclose to the other party confidential information of its financial and business position so that the other party can consider whether there are grounds for applying for any stay of judgment.'
>
> …
>
> 26. When carrying out the balancing exercise, O'Farrell J has held that 'Where the arguments are finely balanced … the court should lean in favour of enforcement of the judgment' (*Kersfield Developments (Bridge Road) Ltd v. Bray & Slaughter Ltd* [2017] 170 Con LR 40 at Paragraph 110)."

27. It is clear from the above authorities that the burden of proving the existence of the factors listed in ***Wimbledon*** in favour of a grant of a stay is firmly on the Defendant.

28. In support of the Defendant's application, two expert reports have been served from an independent accountancy expert, Mr James Hamilton. Although there was no permission granted for the second of Mr Hamilton's reports, no objection was taken to it being relied upon.

29. It is, in my view, important to see precisely what Mr Hamilton's reports themselves can support by way of evidence that there is a real risk of future inability to repay if and when proceedings are commenced by the Defendant.

30. The first of Mr Hamilton's reports is dated 15th June 2020. At Paragraph 3.4.1 and following Mr Hamilton states:

> "3.4.1. WRW was not Balance Sheet Test insolvent as at 31 December 2018. I have not seen any subsequent balance sheets.
>
> 3.4.2. However, there are strong indications that WRW might fail the Cash Flow Insolvency Test. For the year ended 31 December 2018, WRW had net negative cash outflows of £1.7 million, and had negative net cash and cash equivalents of £415,000 at the year end. I do not know whether this trend of cash outflows from trading has continued. I would need additional information (up to date accounts) to conclude further. However, the evidence of the issue of winding-up petitions and the witness statement evidence of Mr Davies suggesting delayed payment to suppliers would constitute strong indications that WRW is finding it difficult to pay its liabilities as they fall due.

> 3.4.3. I also note that it is likely that the recent restrictions on operations as a result of Covid-19 will have put pressure on the cash flows of companies in the construction industry."

31. Paragraph 4.1.3. of his first report states:

> "WRW's net current assets and net total asset position were both larger at 31 December 2018 than 31 December 2016 having increased from circa £167,000 to circa £2 million and circa £2.1 million to circa £3.3 million respectively."

32. At Paragraph 4.2.2. Mr Hamilton records that:

> "I have been instructed that the amount due to be paid by DDD has not yet fallen due (on the basis that DDD alleges that the Adjudicator did not have jurisdiction to order payment). On this basis, the absence of the payment cannot have impacted the current financial position of WRW."

33. Mr Hamilton continues at his Paragraph 4.2.3:

> "Alternatively I am instructed that if the amount due by DDD had fallen due (which is denied by DDD) it would be no earlier than the date of the Adjudicator's original decision being 22nd May 2020."

34. I do not accept that the contents of Paragraphs 4.2.2 and 4.2.3 are based on a correct understanding of the position. The Contract was terminated in August 2018 and it follows that sums found to have been due to the Claimant by the Adjudicator ought to have been paid well before mid-2020.

35. Mr Hamilton's second report is dated 6th July 2020, just over a week before the hearing. The report was prompted by receipt of a statement from Mr Williams, the Managing Director of the Claimant, which enclosed accounts and other financial information and which I will refer to in greater detail below.

36. Paragraphs 2.2.1 to 2.2.3 of the second report state as follows:

> "2.2.1. As set out in Appendix 2 WRW have net current assets of £8.2 million and net assets of £4.6 million as at 31 December 2019.
>
> 2.2.2. I am not aware of any contingent or respective liabilities not considered within WRW's financial statements.
>
> 2.2.3. As at 31 December 2019 WRW did not fail the Balance Sheet Test for Insolvency."

37. At Section 2.3 Mr Hamilton considers the Cash Flow Solvency Test and his conclusions are at Paragraph 2.3.12 as follows:

> "To properly assess the current solvency of WRW, given (a) the significant cash outflow and trading incurred in 2018 and 2019 and (b) the disruption to activities likely to have been caused by

> Covid-19 it is necessary to have up to date management accounts."

38. Mr Hargreaves QC made a sustained attack on the lack of management accounts for the period January to June 2020. That management accounts should be provided by the Claimant was first the subject of a "request" through Mr Hamilton on 6th July 2020 and is, as Mr Winser rightly points out, a further request having had the information requested in his first report. I do not regard the lack of management accounts from the Claimant as attracting any sort of criticism or meaning that the Court should infer that the Claimant's finances are in any way less strong than their own evidence and accounts show. A good deal of relevant financial information has been provided by the Claimant and the lack of more is not in my judgment a proper criticism of the Claimant.

39. There is, in my judgment, no evidence to demonstrate that the Claimant is in other than a relatively healthy financial position and more importantly there is no evidence to demonstrate that there is any real risk that monies would not be repaid if and when a Court so orders. I am wholly unpersuaded by the anecdotal evidence obtained by the Defendant's Director, Mr Davies. It demonstrates to me a determination to find reasons to delay payment to the Claimant rather than real concerns with the Claimant's financial standing. In particular, the figures which Mr Davies claims are due to other parties from the Claimant are, in my judgment, wholly speculative and the Claimant has produced evidence which I prefer showing that the figures are wholly exaggerated. In contrast to Mr Hamilton's opinion, Mr John Williams' evidence at Paragraph 32 and following states as follows:

> "32. The result of the above is a situation where WRW's balance sheet and cash equivalent position are both the same or better than at the dates Mr Hamilton has used in his assessment. Our projected position as at the end of June 2020 shows:
>
> 32.1. Our balance sheet position is in excess of £3 million;
>
> 32.2 Our cash equivalent position as of the end of June is £3,076,584.00;
>
> 33. It may also be helpful to record some other relevant facts to assist the court in determining this topic:
>
> 33.1. In terms of current projects WRW is currently working on £46,100,000 worth of projects with a further £36,200,000 under contract;
>
> 33.2. For the 11 month period July 2020 to June 2021 WRW has £82,200,000 of work already under contract with a further £9,200,000 of work at preferred bidder status totalling £91,400,000. Of the contract work:
>
> 33.2.1. £39,500,000 is 'public' work such as local authority, housing association, FE and HE facilities or not for profit utilities;
>
> 33.2.2. £42,700,000 is contracted private.
>
> 33.3. For the 12 month period July 2021 to June 2022 WRW has £100,500,000 of projected work of which over £34,000,000 is under contract and £69,300,000 at preferred bidder status.

> The work is split broadly 50/50 between public work and private work.
>
> 33.4. Turnover on matters already under contract is projected to return a net profit significantly in excess of the £568,597.32 DDD accepts is the final account determination which is binding on it. This does not include further work awarded to WRW beyond the date of this statement."

40. Mr Williams also attaches a cash flow projection from July 2020 which I am satisfied is a realistic estimate of WRW's likely financial position up to and including December 2021.

41. I prefer that evidence to Mr Hamilton's opinion based on what can in truth be no more than informed (in the sense that Mr Hamilton is an expert) speculation and undoubtedly coloured by the anecdotal witness evidence given by Mr Davies.

42. As noted above, Mr Hamilton does not in reality provide any conclusive opinion as to the inability of the Claimant to repay monies to the Defendant at all.

43. I accept Mr Williams' evidence in its entirety. No reliable and persuasive factual evidence to the contrary has been put before me. It follows that it has not been demonstrated by the Defendant that there is a very real risk that the Claimant will be unable to repay the sum of £568,597.32 at the end of a trial and the application for a stay fails in that regard. I should, however, make clear that even if my view as to that issue was incorrect I would still not have exercised my discretion in favour of granting a stay. The Defendant has not yet commenced any proceedings to re-open the valuation carried out by the Adjudicator and although Mr Hargreaves QC told me, and I accept of course, that he was instructed that such proceedings were very much intended by the Defendant, I see no good reason why such proceedings could and should not have commenced some time ago. The lack of such proceedings would on its own have been fatal to the application for a stay if the other factors had been in the Defendant's favour (contrary to my views above). The application for a stay of execution is therefore dismissed.

Court Fee

44. As both parties accepted during the hearing, this is a matter for the Court and any question of a stay of the hearing has been overtaken by events. The fee paid is that which the system electronically generates for a claim to enforce an Adjudicator's award. I have enforced the award and the fee paid is the correct one. This application is therefore dismissed.

45. I will hear Counsel on consequential matters if those cannot be agreed before this Judgment is handed down.