JUDGMENT : HIS HONOUR JUDGE PETER COULSON QC: TCC. 4th July 2007

A: Introduction

1. This application raises a short but important point of principle in connection with the law relating to adjudication. In what circumstances, if any, should a temporary stay be granted to restrain court proceedings until an adjudication of the underlying dispute has taken place? Rather to my surprise, it does not appear that there is any reported case directly on this issue although, as we shall see, there are a number of authorities that indicate clearly the proper approach that a court should adopt on such an application.

2. Pursuant to a subcontract dated the 14th February 2006, the defendant, Cubitt Building and Interiors Limited ("Cubitt") engaged DGT Steel and Cladding Limited ("DGT") to carry out external cladding works at Telephone House, 69 to 77 Paul Street, London EC2, a site where Cubitt were themselves engaged as main contractors. The subcontract contained an adjudication provision.

3. Pursuant to that provision of the subcontract, on 12th February 2007 DGT referred to adjudication a claim that Cubitt owed to DGT the sum of £193,815 plus VAT. The claim was resisted by Cubitt. By decision dated 12th March 2007 the adjudicator found in Cubitt's favour and rejected the entirety of DGT's claim.

4. On 20th April 2007 DGT commenced proceedings in the TCC seeking £242,547 plus VAT and interest. There is a major dispute between the parties as to the degree of overlap between the unsuccessful claim in the adjudication and the claim now brought by DGT in these proceedings. Cubitt say that the claim in the proceedings is very different to the claim in the adjudication and that, as a result of the binding adjudication agreement in the contract, the litigation should be stayed until the new claim has been the subject of adjudication. DGT argue that there was no mandatory adjudication provision and, even if there was, there was no breach of that agreement and that there therefore should be no stay. They submit that the new claim is essentially the same as that which has already been adjudicated. If they are wrong about that, they say that the court should exercise its discretion against granting a stay in any event.

B: Principles of Law

(a) The Court's Jurisdiction To Grant A Stay

5. If the parties have agreed on a particular method by which their disputes are to be resolved, then the court has an inherent jurisdiction to stay proceedings brought in breach of that agreement. In **Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.** [1993] AC 334 court proceedings had been commenced, despite a term of the contract which provided for the initial reference of disputes to a panel of experts, and which also stipulated that any remaining disputes would be the subject of arbitration in Brussels. The House of Lords held that the court had an inherent, albeit discretionary power to stay proceedings brought before it in breach of an agreement to decide disputes by an alternative method. Lord Mustill, who gave the leading speech, said at pages 352B-C and 353A-D:

   "Nevertheless I am satisfied that this is the correct route and that the court not only possesses a discretion to grant a stay in cases such as the present but also that this is a remedy which ought to be exercised in the present case. ….

   This is not the case of a jurisdiction clause purporting to exclude an ordinary citizen from his access to a court and featuring inconspicuously in a standard printed form of contract. The parties here were large commercial enterprises, negotiating at arms length in the light of a long experience of construction contracts, of the types of disputes which typically arise under them, and of the various means which can be adopted to resolve such disputes. It is plain that clause 67 was carefully drafted and equally plain that all concerned must have recognised the potential weaknesses of the two-stage procedure and concluded that, despite them, there was a balance of practical advantage over the alternative of proceedings before the national courts of England and France. Having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reason for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose is to my way of thinking quite beside the point."

6. That principle was applied in ***Cott UK Ltd. v. FE Barber Ltd.*** [1997] 3 All ER 540. In that case, the contract contained an agreement that any dispute should be referred to an expert for determination. The judge concluded that it was therefore open to him to grant a stay of the court proceedings. He referred to ***Channel Tunnel Group*** and said:

   "It seems quite plain that in such cases Lord Mustill took the view that generally the courts would require the parties to pursue the alternative dispute resolution to which they had bound themselves by the terms of their contract. That is, I think, the explanation of his use of the word 'presumption' ….

   *I take the view, therefore, that even where there is no arbitration clause, in the light of the observations of Lord Mustill in the **Channel Tunnel Group** case and in the light of the changing attitudes of our legal system, the court plainly has a jurisdiction to stay under its inherent jurisdiction, where the parties have chosen some alternative means of dispute resolution.*

   I also take the view that where there is some such clause which is contractually binding, there is a burden on the person opposing the stay to show grounds for opposing it. It seems to me that, insofar as the word 'presumption' used by

Lord Mustill has any application to cases such as the present, it should reflect simply the burden of persuasion in the way in which I have just stated that burden."

Although, having reviewed the contract in ***Cott***, the judge declined to order a stay, that was because he concluded that the expert determination procedure provided for in the contract was so unclear as to be unenforceable. It is plain from the judgment that, but for that particular difficulty, a stay would have been granted.

7. There are two cases on this topic where the underlying agreement was the adjudication of any dispute that might arise under the contract. In ***Cape Durasteel Ltd. v. Rosser and Russell Building Services Ltd.*** [1995] 46 Con LR 75, a case decided before the **Housing Grants, Construction and Regeneration Act 1996**, His Honour Judge Lloyd QC was concerned with a contractual agreement to adjudicate. He concluded that, as a matter of construction of the contract, there was a binding agreement to adjudicate any disputes that arose, and that having regard to all the circumstances, it was appropriate to order that the action be stayed pending adjudication.

8. The other reported case concerning adjudication, which has at least some relevance to the issue before me, is ***Herschel Engineering Ltd. v. Breen Property Ltd.*** [2000] BLR 272, in which Dyson J (as he then was) refused the defendant's application for an injunction restraining an adjudication which had been commenced at a time when court proceeding in respect of the same dispute were already on foot. He said at paragraph 19 of his judgment: *"If Parliament had intended that a party should not be able to refer a dispute to adjudication once litigation or arbitration proceedings had been commenced, I would have expected this to be expressly stated. The relationship between adjudication on the one hand and litigation and arbitration on the other, was what informed the content of section 108(3) of the Act. The aggrieved claimant should not have to wait many months, if not years, before his dispute passed through the various hoops of a full blown action or arbitration."*

Dyson J was not concerned in that case with the specific question that I have to decide, as to whether the court proceedings should be the subject of a temporary stay until after the adjudication.

9. It should be noted that the courts have exercised their inherent jurisdiction to grant a stay of ongoing proceedings even where the term of the contract, of which the claiming party is said to be in breach, is a general agreement to refer disputes to alternative dispute resolution. In ***Cable & Wireless PLC v. IBM United Kingdom Ltd.*** [2002] EWHC 2059 (Comm); [2002] 2 All England (Comm) 1041 the relevant clause of the contract provided that, if disputes or claims arising out of the contract were not resolved by negotiations, the parties would attempt in good faith to resolve the dispute through ADR. Colman J held that the ADR procedure envisaged by the contract was of sufficient certainty to be enforceable. A stay was therefore granted in respect of the court proceedings that had been started in breach of the ADR agreement.

(b) Does The Court Have A Discretion And, If So, How Is It To Be Exercised?

10. It is clear from the speech of Lord Mustill in ***Channel Tunnel*** that the court's inherent jurisdiction is discretionary. How then should that discretion be exercised? Should it, on the one hand, involve a detailed consideration of the sorts of matters that used to be relevant under section 4 of the **Arbitration Act 1950** (before section 9 of the **Arbitration Act 1996** made the granting of a stay for arbitration compulsory whenever there was an arbitration agreement), or should there be a presumption in favour of the parties' agreement to adjudicate, putting the persuasive burden on the party resisting the stay to show good reasons for their stance?

11. The judge in ***Cott*** was in no doubt that the answer to that question was the latter of the two options set out above, and that it was for the party resisting the stay to demonstrate why the stay should not be granted. I respectfully agree with that approach. It seems to me that it is an approach that is in keeping with the court's general policy of seeking to enforce the terms of the agreement made by the parties themselves, a policy which lies behind both the **Housing Grants, Construction and Regeneration Act 1996** and the **Arbitration Act 1996.**

(c) Summary On The Law

12. I derive from the authorities noted above the following three principles which seem to me to be relevant and applicable to contracts containing a binding adjudication agreement:

    (a) The court will not grant an injunction to prevent one party from commencing and pursuing adjudication proceedings, even if there is already court or arbitration proceedings in respect of the same dispute: see ***Herschel v. Breen.***

    (b) The court has an inherent jurisdiction to stay court proceedings issued in breach of an agreement to adjudicate (see ***Cape Durasteel***), just as it has with any other enforceable agreement for ADR; see ***Channel Tunnel Group***, ***Cott*** and ***Cable & Wireless***.

    (c) The court's discretion as to whether or not to grant a stay should be exercised in accordance with the principles noted above. If a binding adjudication agreement has been identified then the persuasive burden is on the party seeking to resist the stay to justify that stance; see ***Cott*** and ***Cable & Wireless***.

C The Issues

13. With those principles in mind, it seems to me that in the present case the following issues arise:

    (a) Issue 1: Was there a binding agreement to adjudicate? If so, the court has an inherent jurisdiction to stay any proceeding brought in breach of that agreement.

(b) Issue 2: Are these proceedings brought in breach of a binding agreement to adjudicate? In this case, this issue will turn on whether the dispute that is the subject of the court proceedings was substantially the same as, or substantially different from, the dispute that was the subject of the previous submission to adjudication.

(c) Issue 3: If these proceedings are brought in breach of the agreement to adjudicate, is there a good reason why the stay should not be granted? For the reasons set out above, the persuasive burden is on DGT to demonstrate that there is a good reason why any adjudication agreement should not be enforced by way of a temporary stay of the court proceedings.

D Issue 1: Was There A Binding Adjudication Agreement?

14. Clause 19.1 of Cubitt's Standard Terms and Conditions was in the following form: *"Any dispute, question or difference arising under or in connection with the subcontract shall, in the first instance, be submitted to adjudication in accordance with the Association of Independent Construction Adjudicators (AICA) Adjudication Rules and thereafter to the exclusive jurisdiction of the English Courts. If the parties fail to agree on the indemnity [identity?] of the adjudicator within two days of the dispute, question or difference arising, the adjudicator shall be appointed by the AICA."*

15. On behalf of DGT, Mr. Webb's first submission was that, on the true construction of that clause, the parties had the right to refer a dispute to adjudication in the first instance, but that it was not a mandatory obligation. This led him to argue that, if there was no compulsory agreement to adjudicate, a stay of court proceedings should not be contemplated. I return below to his distinction between rights and obligations, but I should say at once that I reject the submission that, as a matter of construction, there was no compulsory agreement to adjudicate in this case. In my judgment the clause makes mandatory (by the use of the word "*shall*") the submission of any dispute to adjudication "*in the first instance*". It is therefore both a right and an obligation. It is not discretionary; it is not simply an option open to the parties. If it were, not only would different words have been used (including "*may*" rather than "*shall*"), but it would also mean that the latter part of the clause, giving the Courts "thereafter" exclusive jurisdiction, would be of no effect because such exclusive jurisdiction would, on Mr. Webb's submission, be simply optional. I consider that the words plainly make adjudication in the first instance compulsory.

16. Mr. Webb made three more detailed points as to why clause 19.1 was not mandatory. I deal with them in ascending order of importance. First he submitted that the clause was unworkable because, if it was imposing mandatory obligations, it seemed to impose an obligation to adjudicate and then an obligation to litigate thereafter, regardless of whether the parties wanted to go to court or not. I do not consider that that is a fair reading of the clause. There is a mandatory obligation to adjudicate. If, following that adjudication, there still remains a dispute between the parties, then there is a mandatory obligation to commence court proceedings to resolve any residual dispute. That seems to me to be entirely sensible and workable; it is also in accordance with the 1996 Act.

17. Secondly, Mr. Webb argued that rule 1 of the ACIA Adjudication Rules suggested that adjudication would be optional in this case because it uses the word "*may*"; there was, he said, at the very least a discrepancy between clause 19.1 of the subcontract and the ACIA rules which meant that, in turn, the contract should be construed contra proferentum and thus against Cubitt. Again, I do not accept that submission. Clause 19.1 is clear. The parties must, in the first instance, submit their disputes to adjudication. Having submitted the dispute to adjudication, that adjudication would then be organised and run in accordance with the AICA Rules. There is therefore no discrepancy. In any event, even if I was wrong about that and there was a discrepancy, I would conclude that clause 19.1 itself must take precedence over the rules, which are contained in a document that was simply referred to in (and was not provided with) the subcontract conditions.

18. The final point arising from Mr. Webb's submissions on this part of the case is, on one view, the most important. He said that I should conclude that clause 19.1 gave rise to adjudication as an option, rather than as a mandatory process, because that was what was provided for in section 108 of the 1996 Act. He argued that section 108 merely provided a party with a right *("a party to a construction contract has the right to refer a dispute ….")*, not an obligation to go to adjudication. He therefore said that I should take account of this point as part of the factual matrix; that because parties to a construction contract expect to have the right (but not the obligation) to refer disputes to adjudication, it would be wrong to construe this subcontract in a different way.

19. My instinctive reaction to that argument was to echo the submission of Mr. Sawyer who argued, on behalf of Cubitt, that clause 19 of the contract was clearly mandatory as a matter of construction and that, as a result, the provisions in the 1996 Act were ultimately irrelevant. That seems to me to be an unanswerable submission. However, let us assume that I was wrong about the construction of clause 19.1, so that the agreement to adjudicate was simply a right, not an obligation. In those circumstances, it was Mr. Webb's submission that, just as with any construction contract to which the 1996 Act applied, adjudication was an optional dispute resolution mechanism and that disputes did not have to be adjudicated first if the claiming party did not choose that particular forum. He accepted that there was no authority for that proposition.

20. It seems to me that that submission misses what I regard as the critical point; namely that, under section 108, the right is conferred not just upon the claiming party, as Mr. Webb submitted, but to both the parties to the contract. That is because the words of the Act make clear that each party to the contract has a right to refer any dispute to adjudication. The Act confers the right, not in respect of the reference to adjudication of one party's claim, but the reference of the dispute, and to have a dispute there needs to be two parties. Therefore, under the Act, I consider that each party has the right to have any particular dispute referred to adjudication. Thus, if X, the

claiming party, does not refer a dispute to adjudication but starts court proceedings instead, the responding party, Y, may well be entitled to seek a stay of the court proceedings, on the ground that its right to have the dispute adjudicated has been denied. That is essentially what happened in ***Cape Durasteel***, which was decided even before the Act was drafted. In the alternative, party Y could start its own adjudication seeking a declaration that X's claim is misconceived, and there would then be two sets of proceedings on foot at the same time. In those circumstances, as a matter of simple case management, the court would be likely temporarily to stay the court proceedings until after the adjudication had been decided.

21. Accordingly, even if I was wrong in my construction of clause 19, and it was not a mandatory adjudication provision, Cubitt would still be entitled to assert their right to have any dispute referred, in the first instance, to adjudication. Because there was a binding adjudication agreement, they would still be entitled at least to ask the court for a temporary stay of the court proceedings. It would then be a matter of discretion as to whether or not the stay was granted. Therefore, after all this, it seems to me that perhaps the only substantive difference between the two potential situations (a mandatory agreement to adjudicate or one that is merely optional) is that if, as I have found, the adjudication provisions were mandatory, the court is likely to be even more willing to exercise its discretion in favour of a stay than would be the case if there was a simple right to adjudication.

22. For all the reasons noted above, I conclude that there was a binding adjudication agreement in the present case which required any dispute to be submitted first to adjudication, and only thereafter could it be the subject of court proceedings. Even if it was no more than a simple agreement, in respect of which adjudication was an option rather than a mandatory obligation, it was binding on both parties and Cubitt are still entitled at least to ask the court for a stay. The next issue is whether, in breach of the agreement to adjudicate, the dispute that is the subject of these proceedings was substantially the same as, or substantially different from, the previous dispute that was referred to adjudication in February 2007. If it was substantially different and had not therefore been previously referred to adjudication, then DGT are in breach of the adjudication agreement by referring it to court first.

E Issue 2: Are The Court Proceedings A Breach Of The Agreement To Adjudicate?

(a) The Claim In The Adjudication

23. Pursuant to clause 8 of the subcontract, DGT were obliged to submit a fully detailed application for each interim payment. Within 14 days of receipt of the application, Cubitt had to assess the total value of work executed by DGT and issue an interim payment certificate stating the amount due. DGT, on receipt of that certificate, then had to issue a proper VAT invoice in the sum certified. Payment was then due from Cubitt on the day of their receipt of the invoice and the final date for any such payment was 14 days after receipt of the invoice. Any withholding notice from Cubitt to DGT had to be issued not later than three days before that final date for payment.

24. In their referral notice in the adjudication, DGT sought £193,814.55. This was not referable to a single interim payment application but was instead a sum sought in connection with DGT's interim payment applications numbered 3 to 10. At paragraph 4.1 of the referral notice it was alleged that Cubitt had failed to issue valid interim payment certificates and/or proper withholding notices and that as a result of this default DGT were entitled to the £193,814.55 claimed.

25. It is clear that, on any fair reading of the referral notice, DGT's claim was based on the alleged failure by Cubitt to operate the contractual mechanism correctly or at all. That failure, so it was said, allowed DGT to recover the full sum that they had claimed and which they had not been paid. It was not a claim which was based upon, or required a detailed evaluation of, the work done and materials supplied by DGT over the course of the subcontract.

26. That the issue in the first adjudication did not involve a consideration of the detailed merits of DGT's underlying claim was confirmed by the events following the provision of Cubitt's response to the referral notice. That response took the point that applications 3 to 9, and the question of whether they had issued valid certificates and/or withholding notices, were irrelevant, because the most recent application was number 10 and that application had been the subject of Interim Payment Certificate 10 issued by Cubitt and which, on their case, also functioned as a valid withholding notice.

27. Mr Simper, the adjudicator, accepted Cubitt's case. His decision set out his careful conclusion that Cubitt's notice, in respect of DGT's application 10, was a valid interim payment certificate and a valid withholding notice. He decided that the sum which DGT had applied for was <u>not</u> the sum due under the contract, and instead concluded that the sum due was the amount shown in Cubitt's subsequent notice. He therefore decided that there had been no underpayment to DGT. It was inherent in his conclusions that Cubitt were not in default and that therefore the claim, which was based solely upon Cubitt's alleged default, must fail.

28. In addition, at paragraph 37 of the adjudicator's decision he made it clear that the dispute which had been referred to him did not require any consideration of the underlying merits of DGT's claim and/or Cubitt's deductions. The adjudicator said: *"I have found above that Cubitt's notice of 5th December 2006 fulfilled the requirements of clauses 8.1 and 8.3 of the subcontract and therefore, for the purpose of this adjudication, I am unable to find any other sum than that assessed by Cubitt. The validity of Cubitt's deductions have not been referred to me."*

29. Accordingly, the dispute in the adjudication concerned what might fairly be described as the parties' respective technical points as to the proper operation of the subcontract and, in particular, the validity of the notice of 5th December 2006 given by Cubitt in respect of interim application 10. The notice was found to be valid, so the claim failed. There was no issue referred to the adjudicator about the underlying merits of DGT's valuations and/or Cubitt's deductions therefrom.

(b) These Proceedings

30. In these proceedings, DGT seek £242,547.01 plus VAT (being the difference between the gross sum claimed by DGT of £1,900,565.78 and the sum so far paid by Cubitt of £1,658,018.77). The gross sum due was said by DGT to represent "the total value of work properly executed and the total value of materials reasonably delivered to site". The claim is, therefore, a full-blown valuation dispute dealing with the correctness or otherwise of DGT's valuation of the subcontract works.

31. It is right to note that, in addition to the dispute about the value of DGT's works, the particulars of claim also raise the same issues about the interim payment certificates and the withholding notices that were in play in the adjudication. However, as became apparent during counsel's submissions, those issues do not add very much to the court proceedings, because even if DGT were successful in respect of them, it would still be necessary for the court to consider the underlying merits of DGT's valuations and Cubitt's deductions. The technical points are not therefore a short cut through this litigation. Nor could it be said that they lie at the heart of the substantive matters that the court may ultimately need to decide.

32. Cubitt have made plain that they defend the claim on its merits and that they also have a cross-claim for delay. Paragraph 4 of Mr. Smith's statement outlines the points in these terms:

"(i) DGT is claiming sums for alleged variations where no variation has occurred or where the work in question was included within DGT's original contractual obligations.

(ii) DGT is claiming for work which it has not completed and which Cubitt is now obliged to have completed by others. Cubitt is entitled to set off this cost against DGT's claim.

(iii) The contract works were due to be completed on 2nd October 2006 but were not in fact completed until 24th May 2007. The reason for the delay is culpability by DGT. Cubitt is entitled to deduct liquidated damages of £510,000."

(c) Analysis

33. On the basis of this information I find that:

(a) The dispute that was the subject of the adjudication in February/March 2007 was a technical dispute about the operation of the contract terms.

(b) The dispute in the current court proceedings principally concerns the validity of DGT's valuation of the entirety of their subcontract works and the deductions that Cubitt made along the way.

(c) The disputes are therefore, on any view, substantially different.

34. Should it be necessary, I shall also say that I am confirmed in my view that the disputes are substantially different by the fact that these proceedings include claims for half the retention, in the sum of £48,732, a claim which was not advanced in the previous adjudication and, as I understand it, has never been advanced by DGT before. Clause 9.4 of the contract allows Cubitt to set off any cross-claim against a claim for the retention moneies. So DGT's new claim will bring with it a new set-off, which has again not been tested in adjudication.

35. In reality, I consider that the position here is very similar to those cases where one party in an adjudication has lost because of a technical fault in its claim or defence (the absence of a crystallised dispute in advance of the notice of adjudication, say, or the absence of a proper withholding notice). Once the technical fault has been rectified, that party has commenced a second adjudication on the amended and full basis, and recovered the sum originally sought or been able to deduct the sum originally withheld. Thus, in ***Mivan Ltd. v. Lighting Technology Projects Ltd.*** [2001] ADJCS 0409, LTP won the first adjudication because there had been no withholding notice. Following payment by Mivan of the sum awarded by the adjudicator, and the production of a subsequent withholding notice, Mivan then recovered the sums that had been paid in a second adjudication. The court ruled that the second adjudicator had the necessary jurisdiction to reach the decision he did because the dispute in the second adjudication was different to that in the first. Similar results can be found in ***Holt Insulation Ltd. v. Colt Contractors Ltd.*** (unreported) 23.07.01, a decision of His Honour Judge Mackay QC sitting in the TCC in Liverpool, and ***Skansa Construction UK Ltd. v. EDRC Group Ltd.*** [2003] SCLR 296. In all three cases, following the first adjudication, the claims were reformulated so that a different dispute arose thereafter, and a second adjudication could then take place on that different dispute. It was the correct approach in those cases and I consider it to be the correct approach here. Do any of Mr. Webb's submissions cause me to alter that view?

36. His principal contention on this part of the application was that, because DGT's underlying financial claim was the same as that which had been made in the adjudication, therefore the dispute was also the same. He accepted that this submission equated 'dispute' with 'claim'. I do not consider that that is a legitimate equation to make[1]. A dispute will normally arise only where there has been the assertion of a claim which has not been accepted, possibly for long and complex reasons, by the other side (see ***Halki Shipping Corporation v. Sopex Oils Ltd.*** [1998] 1WLR 726). The determination of a dispute by an adjudicator will obviously involve a consideration of the

[1] Just as HHJ Seymour QC found that they were very different things in the adjudication enforcement case of ***Edmund Nuttall Limited v RG Carter Limited [***2002] B.L.R. 312.

claim that was made, but only as part of a wider investigation into the dispute: why the claim is denied and whether that denial is well-founded. Thus, as His Honour Judge Thornton QC said in ***Fast Track Contractors Ltd. v. Morrison Construction Ltd.*** [2000] BLR 168: "*During the course of a construction contract, many claims, heads of claim, issues, contentions and causes of action will arise. Many of these will be, collectively or individually, disputed. When a dispute arises it may cover one, several or many of one, some or all of these matters. At any particular moment in time it will be a question of fact what is in dispute. Thus the dispute which may be referred to adjudication is all or part of whatever is in dispute at the moment that the referring party first intimates an adjudication reference.*"

37. The essential difference between a claim and a dispute can be illustrated by a simple example. The contractor might make a claim for £100,000 delay costs pursuant to particular contractual provisions which, he says, operate to entitle him to that figure without further argument. The dispute will turn on whether or not, on their true construction, the contract terms have that effect. That narrow dispute may be decided by the first adjudicator against the contractor. The contractor may then assert the same financial claim, by reference to entirely new facts which are said to amount to breaches by the employer of other terms of the contract. That claim is disputed on the facts, and that dispute is then referred to a second adjudicator. That dispute may well turn on a lengthy investigation into those facts. If that dispute was resolved in the contractor's favour, it would then be entitled to recover the £100,000, because the dispute in the first adjudication was different to the dispute in the second.

38. For all these reasons, therefore, it seems to me that the dispute in the court proceedings here is not one that has been referred to adjudication, and is substantially different from the dispute that was previously referred to adjudication. As a result, I conclude that these proceedings constitute a breach of the adjudication agreement. Prima facie, therefore, I consider that Cubitt are entitled to a stay in accordance with the inherent jurisdiction of the court. That conclusion is subject, however, to there being any good reason advanced by DGT as to why no such stay should be imposed.

F Issue 3: Is There A Good Reason Why The Stay Should Not Be Granted?

F1 Factors In Favour Of A Stay

39. In my judgment there are two important factors which make a stay of the court proceedings the only appropriate course for me to take. Each is identified briefly below.

(a) Failure To Comply With The TCC Pre-Action Protocol.

40. DGT have not complied with the TCC pre-action protocol. Amongst other things, therefore, there has been no face-to-face without prejudice meeting between the parties, an essential requisite of that particular protocol. Because, as I have found, the principal dispute in the court proceedings is entirely new, it seems to me that compliance with the protocol is necessary before the action proceeds further. Therefore, even if there had been no adjudication agreement, I would still have ordered a stay of these proceedings whilst the pre-action protocol was complied with. Ordering a stay for adjudication will therefore have exactly the same effect, and fulfil precisely the same purpose. In my view, a stay to allow compliance with the protocol is entirely in accordance with CPR 3.1(4).

41. This point also addresses another of Mr. Webb's arguments, which was to the effect that the court could only stay that part of the court proceedings which it considered was new – the valuation dispute – leaving the claims in respect of the certificates and withholding notices to continue. He said that that would be most unsatisfactory, and I agree. But if I stay the entirety of the court proceedings, including those parts of the claim which had been considered by the adjudicator in February/March, in order to allow the TCC pre-action protocol to be complied with (and to allow the principal valuation dispute to be determined in adjudication) then all remaining disputes, if any, can be the subject of one set of court proceedings thereafter, once the stay is lifted. That seems to me to be the most appropriate course to take in accordance with good case management and the wider principles of the CPR.

(b) Suitability of Tribunal

42. This is a final account dispute. Although it was suggested that there may be issues of fact, it seems to me on the limited information available that the majority of the disputes would be particular matters of valuation. A construction professional, in particular an experienced quantity surveyor like Mr Simper, must be a better tribunal for such a dispute, at least in the first instance, than a judge. Indeed, I would venture to suggest that an experienced adjudicator with that sort of background would be an ideal tribunal for the resolution of a dispute of this sort.

43. It was suggested that this dispute would be too complex for an adjudicator. I am bound to say that I reject that submission completely. There is nothing in the papers to support it. On the contrary, it seems to me that this was a relatively common type of construction dispute which an adjudicator would have no difficulty in grasping and deciding.

F2 The Factors Relied On By DGT

44. DGT relied on a number of factors to support their contention that I should refuse the stay: some I have already touched on; others are dealt with briefly below.

(a) Costs

45. Mr. Webb argued that it would be much cheaper to litigate than to adjudicate. As I pointed out to him in argument, that was not a view shared by those who promoted the 1996 Bill so enthusiastically. His argument

was that adjudication involved a considerable degree of up-front costs, whilst in litigation the costs could be spread over a longer period so that, if a settlement was achieved early on, the costs of the court proceedings up to the point of settlement might well be less than the costs of an adjudication.

46. That argument was therefore entirely dependent on there being an early settlement of the litigation. There was nothing here to suggest that, simply because the case is in court rather than in adjudication, a settlement would be more likely. Further, it was implicit in DGT's submission that, if the litigation did not settle at an early stage, it would cost the same (if not more) than an adjudication. In fact, it seems to me that, because an adjudication will only take 28 days, adjudication must be cheaper and certainly no more expensive, than litigation.

(b) Debarred From Court

47. On a number of occasions during his submissions, Mr. Webb suggested that a stay would have the effect of debarring DGT from pursuing their claim in court and that such a stay would fundamentally undermine DGT's rights. I do not accept that submission. A temporary stay of these court proceedings simply halts them for a few weeks, until after the adjudication. The stay would be for a stated period. Indeed, it is difficult to see why it would be for very much more than the 28 days provided for by the 1996 Act. If, following the outcome of the adjudication, there is still a residual dispute, the court proceedings can easily be reactivated. There is therefore no question of debarring DGT from access to the court.

(c) Freedom of Contract

48. Mr. Webb argued that, because there was a letter of intent first, with the contract conditions (including clause 19) only being provided by Cubitt some time later after work had started on site, this was somehow a point which reflected badly on Cubitt, or at least infringed DGT's freedom of contract. As a result he said that this should lead to a refusal of the application to stay. Again, I do not accept that submission. The letter of intent made clear that contract terms were to be expected. What is more, DGT themselves relied on those very same terms when launching their own unsuccessful adjudication in February.

(d) Cubitt's Attitude

49. Finally, at paragraph 15 of his statement, Mr. Heyne said that the court should exercise its discretion against the stay because *"the claim has been brought about by Cubitt's failure to operate the interim payment provisions in the manner set out in the contract"*. As part of the same point, he suggests that Cubitt are somehow acting reprehensibly by relying on clause 19 *"hidden at the end of its own standard conditions to prevent DGT from doing something which it would otherwise have a perfect right to do"*.

50. It seems to me that this submission fails at every level. The adjudication clause was part of the express terms of the contract, to which DGT agreed. Even if it had not been, the Scheme for Construction Contracts would have been implied (by operation of the 1996 Act) to provide for adjudication. As to the allegations about Cubitt's conduct, I cannot say whether they are right or not. All I do know is that they were apparently rejected by the adjudicator in the first adjudication. They are ultimately of no relevance to the issue before me.

F3 Summary on discretion

51. There is no good reason for the court not to exercise its inherent jurisdiction to stay these proceedings for adjudication. Indeed, on the contrary, all of the matters relevant to the exercise of my discretion indicate strongly that the parties would be better off if this detailed valuation dispute was determined in adjudication. In addition, a stay would support the adjudication process in accordance with the general purpose of the 1996 Act; it would keep the parties to their bargain; and it would comply with CPR 1.4 and 3.1. Therefore in my view there is an overwhelming case for a stay.

G Conclusion

52. For all these reasons, therefore, I make the order sought by Cubitt staying these proceedings pursuant to the inherent jurisdiction of the court. I am very grateful to both counsel for the excellence of their written and oral submissions.

MR. EDWARD SAWYER (instructed by Messrs. Fenwick Elliott) for the Applicant/Defendant
MR. WILLIAM WEBB (instructed by Messrs. Birketts LLP) for the Respondent/Claimant