JUDGMENT : MR JUSTICE AKENHEAD: TCC. 25th October 2007

1. This is an application on the part of the Claimant under Part 24 of the Civil Procedure Rules to enforce what is said to be the decision of an adjudicator under a written contract. The Claimant, Treasure and Son Ltd ("Treasure"), was engaged by the Defendant, Martin Dawes ("Mr Dawes"), to carry out extensive works of refurbishment and restoration at Dinmore Manor, Herefordshire pursuant to a contract made in 2000 incorporating the JCT Standard Form of Prime Cost Contract (1998 Edition with Amendments 1 and 2). The Adjudicator was Mr Paul Greenwood, who sent out his decision under cover of his letter dated 21st August 2007 to the parties. The Adjudicator decided that Mr Dawes should pay to Treasure £1,018,821.12 plus VAT, plus interest and the Adjudicator's fee and expenses.

2. Mr Dawes seeks to defend the summary judgment application on a number of grounds, two of which may be of more particular legal interest, namely whether, if there was an oral variation of the written construction contract, that means that the Adjudicator has no jurisdiction, and, secondly, whether an adjudicator's decision has to be signed to be a valid decision.

The Contract

3. There is no issue between the parties that the original construction contract incorporating the JCT Prime Cost form was a written construction contract with all its terms being in writing. Attached to Mr McCartney's witness statement in support of Treasure's Part 24 application is a copy of that contract, albeit the exhibit does not contain a page where the parties have signed the contract.

4. Article 8 of the Contract states: *"If any dispute or difference arises under this Contract either Party may refer it to adjudication in accordance with clause 9A."*

5. Article 9A, materially states as follows:

"9A.1 Clause 9A applies where, pursuant to article 8, either Party refers any dispute or difference arising under this Contract to adjudication.

9A.2 The Adjudicator to decide the dispute or difference shall be either an individual agreed by the Parties or an individual to be nominated as the Adjudicator by the person named in the Appendix ('the nominator') …..

9A.5.3 The Adjudicator shall within 28 days of his receipt of the referral and its accompanying documentation under Clause 9A.4.1 and acting as an Adjudicator for the purposes of S.108 of the Housing Grants, Construction and Regeneration Act 1996 and not as an expert or an arbitrator reach his decision and forthwith send that decision in writing to the Parties. Provided that the Party who has made the referral may consent to allowing the Adjudicator to extend the period of 28 days by up to 14 days; and that by agreement between the Parties after the referral has been made a longer period than 28 days may be notified jointly by the Parties to the Adjudicator within which to reach his decision.

…..

9A.7.1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given.

9A.7.2 The Parties shall, without prejudice to their other rights under this Contract, comply with the decisions of the Adjudicator; and the Employer and the Contractor shall ensure decisions of the Adjudicator are given effect.

9A.7.3 If either Party does not comply with the decision of the Adjudicator the other Party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to Clause 9A.7.1."

6. The Parties' chosen method of final dispute resolution is arbitration.

7. In broad terms, Treasure was entitled to payment on a Prime Cost basis. This allowed to Treasure certain actual costs plus a percentage mark up thereon. Clause 4.2 made payment dependent upon the issue of certain Interim Certificates:

"4.2 The Architect/The Contract Administrator shall issue an Interim Certificate stating the amount due to the Contractor from the Employer specifying to what the amount relates and the basis on which the amount was calculated at the following times:

.1 from the Date of Possession up to one month after the day named in the Certificate of Practical Completion: at the dates stated in the Appendix;

.2 not earlier than one month after the day named in the Certificate of Practical Completion: as and when further amounts are ascertained as payable to the Contractor by the Employer provided always that the Architect/the Contract Administrator shall not be required to issue an Interim Certificate within one calendar month of having issued a previous Interim Certificate ….."

8. I was told by Mr Singer for Mr Dawes that the Interim Certificates prior to Practical Completion were to be issued every month; that was not challenged by Mr Taylor, Counsel for Treasure.

9. Under Clause 2.1, Treasure was to commence the Works on being given possession of the Site and to complete the same on or before the Completion Date. That date was to be subject to extensions of time in certain circumstances. Clauses 2.8 and 2.9 relate to Practical Completion of the Works:

"2.8.1 When in the opinion of the Architect/the Contract Administrator Practical Completion of the Works is achieved and the Contractor has complied sufficiently with Clause 5.22, he shall forthwith issue a certificate to that effect.

Practical Completion of the Works shall be deemed for all the purposes of this Contract to have taken place on the day named in such certificate.

…..

2.9.1 If at any time or times before the date of issue by the Architect/the Contract Administrator or the certificate of Practical Completion the Employer wishes to take possession of any part or parts of the Works and the consent of the Contractor (which consent shall not be unreasonably delayed or withheld) has been obtained, then, notwithstanding anything express or implied elsewhere in this Contract, the Employer may take possession thereof. The Architect/The Contract Administrator shall thereupon issue to the Contractor on behalf of the Employer a written statement identifying the part or parts of the Works taken into possession and giving the date when the Employer took possession (in clauses 2.9, 6.1.3, 6.3.3 and 6.3C.1 referred to as the 'relevant part' and the 'relevant date' respectively).

2.9.2 For the purposes of Clauses 2.10.1 and 4.7.1.2 Practical Completion of the relevant part shall be deemed to have occurred and the Defects Liability Period in respect of the relevant part shall be deemed to have commenced on the relevant date."

10. Following Practical Completion, provision was made during the Defects Liability Period for the Contractor to put right "defects, shrinkages or other faults" which appear up to 14 days after the expiry of that period

The Facts

11. Although Treasure had a number of contracts, apparently, with Mr Dawes relating to Dinmore Manor, the construction contract with which the adjudication was concerned was the primary contract and related to a number of buildings and areas of work. They are summarised at Paragraph 34 of the Adjudicator's decision document as comprising the Main House, Music School, Hay Store, Estate Office, Estate Services, Site Services and Landscaping.

12. It is clear that the works to be carried out pursuant to the construction contract with which the adjudication was concerned were very substantial. Indeed, Treasure's claims in the adjudication were predicated upon the basis that there was over £15m due overall to it. It identified that over £14m had already been paid.

13. Although I make no findings about this, it seems that the original Contractual Date for Completion was in November 2002. It also appears that the Practical Completion of the Works occurred at some time in December 2004. This appears from Paragraphs 120 to 125 of Treasure's Claim Documents. I should point out that there is some confusion about whether Practical Completion was certified in respect of the whole of the Works in December 2004. The Adjudicator referred in Paragraph 62 of his decision to the fact that Certificates of Practical Completion for three (only) of the elements of the Works which were the subject matter of this Contract were issued on or about 13th December 2004.

14. It is common ground that, following December 2004, Treasure remained at the site completing what it says was a substantial amount of outstanding works and putting right various alleged defects. Treasure assert (and it is unnecessary for me to find) that all the works were finally complete and defects put right by mid-2007.

15. Treasure submitted to Mr Dawes (or his advisers) a Claim Document dated 12th March 2007. In that claim, Treasure claimed a net sum of £1,619,669.04 or, alternatively, £1,732,107.24. A substantial element of the claim was for "Additional Overhead Costs": this was a claim for additional Head Office overheads to reflect the period of time between December 2004 and February 2007 to reflect the fact that Treasure (as it claimed) was on site completing some contractual work and extra works over that period. A comprehensive calculation of that sum (26 months – December 2004 to February 2007 at the rate of £24,398.49 a month) £634,360.74 is provided.

16. Other elements of the claim included VAT, additions to the Prime Costs, claim preparation and management costs.

17. There were, prior to the adjudication with which these proceedings are concerned, three abortive attempts on the part of Treasure to adjudicate the various claims. The first adjudication was initiated on 13th April 2007 with the service of an Adjudication Notice which was not pursued. A second Adjudication Notice was served on 23rd April 2007 by Treasure and Mr Skellorn appointed. For various reasons which are not relevant Mr Skellorn resigned on 28th April 2007.

18. On 1st May 2007 a third Notice of Adjudication was served by Treasure and Mr Bullock appointed as Adjudicator. Mr Bullock purported to issue a decision or award on 15th June 2007 but, following the institution of proceedings by Treasure, a consent order was agreed between the parties in July 2007 that this award or decision was not binding.

The Latest Adjudication

19. It is accepted that Mr Greenwood was properly appointed as the Adjudicator for this latest adjudication. It is also common ground that the dispute referred to him was that encompassed by the Referral Adjudication Document dated 26th June 2007, which is Exhibit 3 to Mr McCartney's first Witness Statement. By this stage the dispute had expanded somewhat from that encompassed by the 12th March 2007 Claim Document. Essentially the overall claim, which was the subject matter of this latest Referral, was for pre 12th March and post 12th March 2007 (alleged) entitlements. The total sum claimed was £1,482,155.46 (alternatively £1,594,981.91). It is accepted that within this claim, the claim for £634,460.74 for Head Office Overhead costs for the period after December 2004 was included.

20. Mr Greenwood was nominated to be the Adjudicator on 26th June 2007 and accepted the nomination in his letter to the parties of 27th June. A procedure was laid down for the service of a Response to the Referral and, ultimately, for the various exchanges thereafter. By reason of the hiatus arising from the referred adjudication and the associated proceedings, the parties agreed that the Adjudicator should have up to and including 22nd August 2007 in which to issue his decision.

21. Although some complaint is hinted at as to the fairness with which it is said that the Adjudicator conducted the proceedings (this being contained in the Witness Statement of Mr Jones of Mr Dawes's solicitors), no complaint has been pursued by Mr Dawes about this in these proceedings. Indeed, his Counsel unequivocally (and quite properly) accepted that there were no grounds upon which the decision or procedure of the Adjudicator could be challenged on that basis. By letter dated 21st August 2007, the Adjudicator wrote in these terms:

"Gentlemen

Adjudication Re: Treasure and Son Limited (Referring Party) v Martin Dawes Esq (Responding Party) – Adjudication No. 4

I enclose my Decision dated today.

It is my normal practice to send a VAT invoice upon payment of the balance of my fee, which amounts to £11,841.06 inclusive of VAT, as set out in paragraph 152 of my Decision.

As both representatives are aware I will be away from tomorrow until 29 August. If there are any matters which arise upon receipt of my Decision I will obviously not be able to respond until 30 August at the earliest."

This was followed by the words "Yours faithfully" and Mr Greenwood's signature; under his signature were the words "P. Greenwood Adjudicator".

22. That letter and the decision document were faxed on that day to both parties. However, it appears to be the case that the Adjudicator never actually signed the decision document. On the last page of the decision there appear these words *"Signed ……… Dated 21 August 2007"*, with the word *"Adjudicator"* underneath the space where the signature was supposed to go. There seems to be no reason other than oversight for the Adjudicator not to have signed the decision; however, it may be associated with the fact that he was clearly due to go away on holiday on 22nd August 2007. There is and can be no suggestion that the 26-page decision document was anything other than the Adjudicator's own document which he, at least, intended should be considered as his adjudication decision on the matters referred to him.

23. The decision document itself requires Mr Dawes to pay to Treasure £1,018,821.12 plus VAT (albeit that the figure for VAT was not quantified by him). The figure of £1,018,821.12 already included elements of interest but he ordered that interest would continue to accrue on any amounts outstanding beyond the 14 days after the date of the decision at the rate of 10.75% per annum. He ordered Mr Dawes to repay to Treasure the sum of £13,161.47 inclusive of VAT which the latter had already paid the Adjudicator in respect of fees and he also ordered Mr Dawes to pay the balance of his fees, namely, £11,841.06 inclusive of VAT.

These Proceedings

24. The sums which the Adjudicator had ordered Mr Dawes to pay not having been paid, Treasure through its claims consultants (Contract & Construction Consultants) issued Part 7 Claim proceedings on 31st August 2007 together with an application for summary judgment under CPR Part 24. That Application is ultimately supported by four witness statements from Mr McCartney of CCC whilst Mr Dawes relies upon the evidence of his solicitor, Mr Jones.

The Issues

25. The first issue, which I will call the "oral variation" issue relates to whether or not an oral variation of the terms of the original written construction contract leads to the Adjudicator appointed having no jurisdiction. The second issue, which I will call the "no signature" issue relates to whether or not the absence of a signature on the decision leads to the result that there was no enforceable decision by the Adjudicator. The third issue (the "inability to repay" issue) relates to whether or not, if the decision is otherwise enforceable, there should be a stay of execution in the light of the financial position or likely financial position of Treasure.

The Oral Variation Issue

26. This issue arises historically in this way:

(a) Both parties accept that the original construction contract was a written construction contract for the purposes of the HGCRA 1996.

(b) Both parties accept that the dispute referred to the Adjudicator in this case included all the sums which were the subject matter of his decision.

(c) Mr Dawes having served on 5th July 2007 his detailed Response to Treasure's Referral, Treasure served its Reply on 1st August 2007. That Response either was or was incorporated in or accompanied by a witness statement of Mr P Daniels dated 1st August 2007.

(d) Mr Daniels, the Director of Treasure who had been involved in the day-to-day running of the project of Dinmore Manor, stated at Paragraphs 50 to 54 as follows:

"50. In addition Treasure carried out a large amount of work after Practical Completion in December 2004 which it has claimed and has been paid for. Enclosed as Exhibit to Treasure's Response are the various Instructions to Treasure which were issued before Practical Completion in December 2004, but whether the work had to be completed after that date together with instructions issued after December 2004 [sic].

51. It is important to understand that, though Practical Completion occurred in December 2004, Treasure remained on site as if Practical Completion had not happened. On behalf of Treasure, I agreed with the Architect and the Quantity Surveyor that the Contract would continue to operate exactly as it had before. This meant that:

.1 The outstanding work would be completed;

.2 The Architect could continue to issue instructions and Treasure would accept them;

.3 Treasure would continue to make applications in exactly the same way as they had been before Practical Completion;

.4 The Architect would issue certificates in exactly the same way as they had been issued before Practical Completion; and

.5 Payment would be made in exactly the same way as it had been made previously.

52. This is exactly what happened.

53. Once Mr Dawes had taken possession of the Works in December 2004 and March 2005, there was still a very significant amount of work outstanding and we were also still getting instructions from the Architect. These instructions continued for a number of years.

54. Since work carried on, this explains why Treasure was on site for approximately two years after Practical Completion. We were still on site after Practical Completion, not because we were carrying out defects outside of the 12 month [Defects, Liability period] but simply because the Architect had continued to instruct further and new work after December 2004 and, further, after December 2005. Treasure ultimately finished all the work under this contract in March 2007."

(e) Mr Dawes's solicitors served on 10th August 2007 what they initially termed "Reply to Treasure's Response" but later renamed "Response to the Witness Statement of Paul Daniels For Adjudication". Materially this stated as follows:

"(2) This response is not intended to raise any new issues in this matter and deals only with matters raised in the witness statement of Mr Daniels served within it. Where it raises issues not in Mr Dawes' first response, it does so because these issues are new ones only just raised in Mr Daniels' statement. Mr Dawes's Response to those new and additional issues are made without prejudice to Mr Dawes's assertion that Treasure did not and has not made these new and additional points in its Claim Document and for that reason the Learned Adjudicator should not allow Treasure to make any additional claims and/or amend its first claim."

There is no specific comment on Paragraphs 50 to 53. At Paragraph 11 the Response states:

"In paragraph 54 Mr Daniels confirms that Treasure was on site for approximately two years after Practical Completion but claims that the works carried out during that period were not defect work. Paragraph 55 and 56 give examples of the work that was carried out, although it was never explained how these works can be considered as falling under 'the Contract' given that Practical Completion of the works under 'the Contract', by Treasures own case, occurred in December 2004."

(f) As indicated earlier in this judgment, the claim at least for Head Office Overhead costs related to the post December 2004 period.

(g) In his decision document, the Adjudicator referred expressly to Mr Daniels' statement at Paragraph 51, much of which is quoted verbatim at Paragraph 109 of the Decision. The Adjudicator allowed to Treasure the full amount of the Head Office Overhead claim, £634,368.74 at Paragraph 114 of the Decision. In doing so, he did not spell out that he was deciding the case by reason of the alleged oral variation.

(h) It is thus not clear that either Treasure, Mr Daniels, Mr Dawes (or his solicitors) or the Adjudicator were proceeding consciously on the basis that there had been any variation of the terms of the original Construction Contract. This does not seem obviously to have featured in the Adjudicator's reasoning.

27. The arguable relevance of this issue arises out of the Court of Appeal decision ***in RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd*** [2002] BLR 217. In that case, there was a contract between the parties relating to construction operations that was not itself in writing. Disputes had arisen between the parties which party referred to an adjudicator. Section 107 of the HGCRA 1996 provides as follows:

"(1) The provisions of this Part [of the Act] apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing. ….

(2) There is an agreement in writing—

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing."

28. The Court of Appeal in ***RJT*** decided that in effect there could not be a valid statutory adjudication where the agreement was not in writing as referred to in Section 107. The majority (Ward and Robert Walker LJJ) decided that all terms (including immaterial terms) had to be in or evidenced in writing as required by Section 107. The whole Court was satisfied that the terms of the agreement between the parties in that case were insufficiently recorded in writing in any event. Thus, the adjudicator's decision was not enforceable because it was made pursuant to a contract which was not and was not sufficiently in writing for the purposes of the Act.

29. Following the conclusion of the oral hearing, I invited counsel for both sides to submit further written submissions on a question which I posed them:
"Given it is, I understand, accepted that this is a contractual adjudication as opposed to a statutory adjudication (this being a residential development and excluded by Section 106 of the HGCRA 1996), does it matter that there is an oral variation to the contract, and if so, why? Does an oral variation to such a contract effect or undermine the adjudicator's jurisdiction?"

30. I received written submissions from counsel for each side on that question on the 12th and 15th October from Mr Taylor and on 15th October 2007 from Mr Singer. I have considered them carefully.

31. In my judgment, where there is a contractual agreement to adjudicate, as here, that adjudication process is not undermined, jurisdictionally or otherwise, by the fact (if it be the case) that the terms of the original contract (containing the adjudication clause) were orally varied. There could only be such undermining if it was an express term of the contract itself to the effect that oral variations of the terms were not to be considered valid unless recorded or evidenced in writing. Essentially the parties will have agreed in a binding contract that disputes will be referable to adjudication. If there is some oral variation to the terms of that contract, that does not itself undermine the contractual enforceability of the adjudication process. If the original agreement is binding and whether or not the oral variation is binding, there still remains a binding adjudication agreement of which either or both parties may make use from time to time.

32. There was no adjudication agreement in the ***RJT*** case: there was only a statutory right to adjudication if there was a construction contract in writing as defined by the HGCRA 1996. There is nothing in the written contract in this case which requires the adjudication agreement within it to be treated as other than a contractual agreement, even though the adjudication provisions might not have been in the standard form agreement at all but for the HGCRA 1996. The fact that the Notice of Adjudication and Referral was entitled on the front page "In the Matter of an Adjudication pursuant to the [HGCRA 1996] and the contract" does not mean that what was essentially a *"contractual*" adjudication became a *"statutory one*", particularly as both documents clearly identify the contractual arrangement. One therefore does need to distinguish between a construction contract that does expressly contain an adjudication agreement (the current and now common type of case) and one that does not (such as the ***RJT*** type). In the former, an oral variation of terms will not undermine the adjudication agreement.

33. Accordingly, even if the "agreement" described by Mr Daniels as having occurred in late 2004 was an oral variation of the terms of the existing construction contract between the parties, that would not affect the validity of the adjudication process and any decision properly reached as a result of that process being followed. There is some support for this view in ***Dean and Dyball Construction Ltd v Kenneth Grubb Associates*** [2003] EWHC 2465 (TCC).

34. I am in any event not in any way satisfied that there was an oral variation of the original construction contract at all. There was little or no evidence before this Court or indeed before the Adjudicator that there was any binding agreement made in late 2004 between the parties. The so-called "*agreement*" between Mr Daniels for Treasure and Mr Dawes' Architect and Quantity Surveyor is described by him as being "*that the Contract will continue to operate exactly as it had before"*. There would be no obvious consideration for such an agreement because the parties would be continuing to derive their rights and obligations under the contract after Practical Completion as they had been before. There was no indication that there was in some way a mutual intention that the original construction contract should be varied. Given that Mr Daniels appears not to have been a lawyer and that Treasure was not represented by lawyers but by claims consultants, the use of the word "*agreed"* does not give rise to some irrebuttable presumption that there was a binding agreement between the parties.

35. When Mr Daniels in his statement, having identified the "agreement", goes on to say what he believed this meant, I do not read that as saying, necessarily or at all, that the Contract was in fact or in law varied in every respect as he sets out. That may well simply reflect his expectation following the "agreement". It would not have been an unreasonable expectation that, if Treasure was to be required to work to a significant extent after Practical Completion in December 2004, it would be paid upon a regular basis. Indeed, Clause 4.2 (set out above) clearly envisages that payments will be made by certificates even after Practical Completion at intervals of no less than one month, as prior to Practical Completion those certificates would reflect the value of work properly executed in the preceding month or other period as the case may be.

36. It is clear from the JCT form of contract which was being used by the parties that a contractor who has not completed the Works in full by Practical Completion still remains under an obligation to complete the Works. Mr Jones is wrong where in Paragraph 41 of his Statement he says that the only work that the contract permitted to be performed was in connection with remedying recognised defects following Practical Completion. Article 1 of the Prime Cost Contract required Treasure to carry out "*and complete"* the Works. That obligation is reflected in other clauses in the Contract Conditions. There is no obvious time limitation on the Architect's or Contract Administrator's entitlement to issue instructions (including instructions requiring changes to or variations in the Works). Clause 3.3 of the Standard Clause does not suggest that the Contractor can do anything other than comply with instructions whenever they are issued. Clause 3.3 enables the Contractor to object to instructions which alter the nature and scope of the Works but it is not obliged to do so. Thus, unless reasonable objections were raised (which seems inapplicable here), Treasure was obliged to comply with the Architect's instructions to alter the Works (to the extent that it was instructed so to do) even if those instructions were issued after Practical Completion.

37. In circumstances as here where a party such as Mr Dawes seeks to persuade the Court that there is a material oral variation of the terms of the Construction Contract, the onus must be on such a party to establish that there was such an oral variation. I am not satisfied that Mr Dawes on the evidence before me has established that there was any such oral variation.

38. Mr Singer, however, seeks in the alternative to put his challenge under this topic in another way He says that the disputed claim referred to the Adjudicator was a claim simply based upon the original (unamended) construction contract; he says that the Adjudicator, however, decided a significantly different claim, namely a claim that was dependent upon there being an oral variation (as he says is evidenced by Mr Daniel's witness statement). He says that the parties cannot enlarge the Adjudicator's jurisdiction beyond that which is set out in the Notice of Adjudication and/or oral referral and he relies upon the decision of HHJ Humphrey Lloyd QC in this Court *in* ***KNS Industrial Services (Birmingham) Ltd v Sindall Ltd*** [2000] EWHC 75 (TCC).

39. In that case HHJ Lloyd QC does say that the documents which come into existence following the Notice of Adjudication "*do not cut down or, indeed enlarge, the dispute (unless they contain an agreement so to do)*". He goes on to say:

"The Adjudicator is appointed to decide the dispute which is the subject of the Notice and that Notice determines his jurisdiction. The Adjudicator's jurisdiction does not therefore derive from the further documents ….. although those documents are likely to help the Adjudicator to find out what needs to be decided in order to arrive at a conclusion on the dispute."

40. On analysis, Mr Singer's point in this regard, on analysis, is not sustainable. There is no doubt that the original dispute referred to the Adjudicator included the claim for overheads from December 2004 to February 2007. The essential basis of that claim (justified or not) was that Treasure had been required to carry out extensive work over that period which justified the award of additional overheads. That was in substance the referred claim in this regard. Thus, the Adjudicator certainly had jurisdiction to rule in favour of (or against) Treasure on that claim. That is what he did, albeit it was in favour of Treasure. Furthermore, I am not satisfied that, on the face of the decision, the Adjudicator based his decision upon the existence of some oral variation to the terms of the Contract. It was not a point which was adverted to as such by Treasure or which was expressly or obviously noticed or picked up on by Mr Dawes or his lawyers and other advisers in the adjudication proceedings. As a matter of contract, it was open to the Adjudicator to find as he did irrespective of whether there was an oral variation of the terms.

41. That disposes of the challenges made to the award on this "*oral variation*" issue. Thus the arguments of Mr Taylor for Treasure that there was some ad hoc agreement between the parties that the Adjudicator should have jurisdiction to resolve claims and/or issues arising out of the "oral variation" or that Mr Dawes in some way waived his right to enter any jurisdictional objection on this ground do not have to be resolved. Suffice it to say that, if I had had to resolve those issues, I would not have been satisfied that there was any ad hoc agreement in circumstances where there was no evidence either that Mr Daniels, Treasure, Mr Dawes (or his advisers) or the Adjudicator were in any way aware that what was being alleged was an oral variation of contractual terms. The same thinking would dispose of any allegation of waiver also. There is a further point, however, with regard to waiver which suggests that a sufficient reservation was made by the words in Paragraph 2 of the Response from Mr Dawes set out above.

42. Mr Taylor also argued that in the light of Section 107(5) of the HGCRA the lack of response to Mr Daniels' statement was sufficient to constitute an agreement in writing. Section 107(5) states:

"An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged."

43. Thus, it is argued by Mr Taylor, that Mr Daniels' written statement that there was an oral variation (if that is what it was) was or was part of a written submission within the meaning of Section 107(5) and, it not being denied by Mr Dawes, the oral restriction constitutes an agreement in writing. Against this, Mr Singer prays in aid HHJ Bowsher QC's judgment in ***Grovedeck Ltd v Capital Demolition Ltd [2000]*** EWHC 139 (TCC) where at Paragraph 29 he considers it permissible following ***Pepper v Hart*** [1993] AC 593 to consider Hansard and the debate in Parliament in which the words "in adjudication proceedings or" were ordered by way of amendment. He said:

"By adding [those] words, Parliament intended to add a reference to other preceding adjudication proceedings. There was no intention by Parliament to provide that submissions made by a party to an unauthorised adjudication should give to the supposed adjudicator a jurisdiction which he did not have when he was appointed."

44. Although it is unnecessary for me to decide the point, I disagree with HHJ Bowsher QC on it. The ***Pepper v Hart*** approach should primarily be adopted if there is some ambiguity. There is no ambiguity in the wording: it can apply to any adjudication proceedings before, after, concurrent with or the same as those under review by the court. I would thus accept Mr Taylor's argument in this respect. There was no denial of the so-called oral variation and thus the exchange of submission and response constitutes for the purposes of the HGCRA an agreement in writing.

The No Signature Issue

45. There are no express words in this Contract which make it clear that the Adjudicator must sign his decision. The wording of Clause 9A.5.3 makes it clear that the Adjudicator within the requisite time shall "*reach his decision and*

forthwith send that decision in writing to the Parties". There is some legal authority as to the timing of, firstly, the reaching of the decision and, secondly, the dispatch of the decision. For instance in ***Barnes & Elliott Ltd v Taylor Woodrow Holdings Ltd and Another*** [2004] BLR 111, HHJ Lloyd QC decided that the decision had to be reached within the requisite period and then the decision had to be sent to the parties. He formed the view in that case that the decision was reached within the 28 days but a delay in dispatching of one or possibly two days was not fatal to its enforceability as a valid decision.

46. As a matter simply of contractual interpretation, it is clear that the decision of the Adjudicator does not as such have to be signed by him. All that the Contract calls for is that the Adjudicator "reaches his decision" and sends that decision to the parties. There is no issue here that the decision document contained the Adjudicator's (as opposed to anyone else's) decision on the matters referred to him. It was his decision.

47. Mr Singer frankly accepted that the need for signature of the decision could only arise as a matter of contractual implication. However, applying the normal principles relating to the implication of terms, it is neither reasonable nor necessary for there to be a term that the decision is actually signed. Whilst it is the case that a decision signed by the Adjudicator will clearly demonstrate as a matter of evidence that it is his decision, the contract provisions in this regard are still operable if it can be demonstrated as a matter of evidence that a decision was the decision of the particular Adjudicator.

48. Mr Singer says that by analogy to a case of HHJ Toulmin CMG QC in the TCC, ***Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd*** [2000] BLR 314, one could imply such a term. In the ***Bloor*** case, the learned judge decided that, by analogy with the Arbitration Act 1996, one could infer a term that an adjudicator could amend a decision on a slip rule or accidental slip or omission basis. That is because Section 57(1) of the 1996 Arbitration Act permits an arbitral tribunal to correct an award in respect of such a slip or omission. Mr Singer thus says that, because arbitral awards must be signed by the arbitrator(s), one should infer that that is what must have been intended by the parties to this particular construction contract. HHJ Toulmin's reasoning is in summary along the lines that the parties must have intended that accidental slips or omissions in or from a decision could be corrected by an adjudicator within a short period of time because it would be absurd if this could not happen. However, in the current case it is simply not necessary on any commercial or practicable basis to infer that a decision which clearly is that of the particular adjudicator must be signed. It is generally desirable for the avoidance of any doubt that decisions are signed. Indeed the vast majority of decisions which have been the subject of court proceedings have been signed. That does not however detract from there being no need to infer that the parties must have intended that decisions must be signed before they can be considered to be a valid adjudication decision.

49. Accordingly, I reject Mr. Dawes' arguments on this issue.

The Inability to Repay Issue

50. If all else fails (as it has done so far as Mr Dawes is concerned), he seeks to argue that, even if there is to be judgment against him, there should be a stay of execution given the current financial position of Treasure and its likely position in the future. Mr Dawes' fear is that, if he is required to pay over £1m to Treasure, he will or may never see that money again if (and he would say when) he persuades an arbitrator that the Adjudicator was substantially wrong. An arbitration has been instituted and it is likely that in those proceedings Treasure will claim an additional sum over and above the sum allowed by the Adjudicator whilst Mr Dawes will seek repayment of a substantial part of the amount allowed by the Adjudicator.

51. In this regard he has commissioned an expert Quantity Surveyor, Mr Stephen Davis of Trett Consulting, to provide a preliminary opinion about whether the amounts awarded in the most recent adjudication might ultimately be recovered by Mr Dawes. Although he emphasises that he has had little time to consider this, he has formed the preliminary view that Mr Dawes ought to recover approximately £664,312 in a subsequent arbitration together with any VAT. That represents a little more than half of the sum which is the subject matter of the adjudication.

52. Mr Dawes has also commissioned a report from accountants, Chadwick, apparently prepared by Mr D Garvey, a Forensic Accountant with that firm. He has examined Treasure's last three years' financial accounts. It is made clear that it is a "limited review". Mr Garvey records that because the latest Treasure financial accounts have not yet been lodged this is a limitation on his review. He summarises his *"key findings"* as follows:

"... Turnover reduced from £5,679k in 2003 to £4,133k in 2005

- *Unexplained jump in gross margin from 22% in 2004 to 30% in 2005*
- *Company was profitable for 2003, 2004 and 2005. Profit pre tax reduced from £276k to £151k in the years 2003 to 2005.*
- *Consistent growth in net assets, showing that profits are retained in the currency of the company*
- *Directors' remuneration does not appear excessive*
- *Historically financial statements have been filed within the statutory time period of nine months after the year end*
- *31 December 2004 and 2005 financial statements were filed in July the following year*
- *31 December 2006 financial statements had not been filed as at 13 September 2007*
- *Treasure had a positive current ratio of 1.80 as at 31 December 2005*
- *Highly dependent on a limited number of clients at any one time – represents significant business risk*

- *Distributable reserves were in excess of £1 million as at 31 December 2005. This could be extracted from the Company by payment of a dividend*
- *Theoretically Treasure could apply for voluntary liquidation*

Recommendations

- *Wait to review the 31 December 2006 financial statements*
- *Seek court approval to delay payment of the £1.2m or hold in escrow subject to a review of more recent financial information".*

53. The relevant principles to be applied by this Court in considering whether or not to grant a stay are summarised by HHJ Peter Coulson QC in ***Wimbledon Construction Co 2000 Ltd v Derek Vago*** [2005] BLR 374. At paragraph 26:

"….. it does seem to me that there are a number of clear principles which should always govern the exercise of the court's discretion when it is considering a stay of execution in adjudication enforcement proceedings. Those principles can be set out as follows:

(a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.

(b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.

*(c) In an application to stay the execution of summary judgment arising out of an Adjudicator's decision, the Court must exercise its discretion under Order 47 with considerations (a) and (b) firmly in mind (see **AWG**).*

*(d) The probable inability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see **Herschell**).*

*(e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see **Bouygues** and **Rainford House**).*

(f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

*(i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see **Herschell**); or*

*(ii) The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see **Absolute Rentals**)."*

54. With those principles in mind, I am wholly satisfied that there can be no stay of execution. My reasons are as follows:

(a) Treasure is certainly not in insolvent or other liquidation;

(b) Treasure is a very long-established company (over 200 years) and has clearly been trading successfully over many years as a builder;

(c) Treasure's last three filed financial accounts show a reasonably substantial turnover and a reasonably comfortably gross profit margin;

(d) Its Balance Sheets over the years 2003, 2004 and 2005 show net assets of £843,000, £1,148,000 and £1,273,000 respectively. Although it is not a very large company, it is certainly not insubstantial;

(e) The evidence in Mr. Davis's report is the product of an understandably "brief review". It confirms in effect both on his limited research to date that a significant element of the sum which is the subject matter of the adjudication decision is or is likely to be owed to Treasure. A sum of something less than £500,000 of the £1,018,821.12 ordered by the Adjudicator to be paid will on his brief analysis effectively remain with Treasure;

(f) I do not find Mr Davis' evidence convincing although, given his brief involvement, I attach no criticism at all of the efforts which he has made;

(g) I do not consider that Chadwick's report, limited as it is, gets anywhere near establishing that there will be an inability on the part of Treasure to repay all or some £600,000 of the sum to be paid to Treasure pursuant to the Adjudicator's decision. His thesis is predicated upon the basis that, lawfully, the directors of Treasure could distribute company reserves and/or pay substantial dividends out so that what is left in the company would be insufficient to repay all or any significant part of the sum ordered to be paid by the Adjudicator;

(h) This risk or possibility does not begin to give rise to some probable inability to repay. There is no evidence of any sort from which it would be proper to infer that the Directors would go down this route. Chadwicks cannot point to anything in the filed financial accounts which demonstrates that there is a past history of the Directors doing any such thing. Secondly, it might well be difficult for the Directors to divest the company of substantial sums lawfully, certainly, if the primary intent was to evade any liability to repay. Thirdly, based on the most recently filed company accounts, there is no reason to suppose that there is any probability that Treasure would not be in a position to repay such sums as an arbitrator might order them to repay to Mr Dawes. Fourthly, the filed company accounts do not take into account the sums that may have been payable by Mr Dawes in 2005 but which were not paid. As Mr Davis infers some £500,000 was payable at least for the

period 2005 to early 2007 which Mr. Dawes has not paid. If one takes that into account, and it is legitimate to do so, one finds a better financial position than the most recent accounts indicate.

55. For all these reasons, I am not satisfied that the facts and evidence as presented by Mr Dawes in support of the stay allow me to stay the judgment which will be given in favour of Treasure to enforce the Adjudicator's decision.

Conclusion

56. Accordingly, I give summary judgment against Mr Dawes in the total sum of £1,222,818.05. This is made up as follows: £1,018,821.12 (being the Adjudicator's substantive decision) plus VAT which he also ordered in the sum of £168,192.11 (this sum is not in issue). There will be interest pursuant to the Adjudicator's decision from 4th September 2007 at £10,802.29 up to 11th October. I will hear the parties as to the question of interest after 11th October. In addition, within the overall sum there is a sum of £25,002.53 in respect of the Adjudicator's fees which have now all been paid by the Claimant and which he ordered should be paid by Mr Dawes.

Michael Taylor (instructed by Contract and Construction Consultants (Southern) Ltd) for the Claimant
Andrew Singer (instructed by George Davies LLP) for the Defendant