

JUDGMENT : MR DKR OLIVER QC (Sitting as a Deputy Judge of the High Court) 9th November 2000

1. This is an appeal against a decision of Mr Registrar Buckley dated 4th May, 2000 whereby he refused the applicant Canary Riverside Development (Private) Ltd, which I shall refer to as, "CRD" leave pursuant to s.11(3) of the Insolvency Act, 1986 to commence adjudication proceedings against the respondent, then called Timtec International Ltd., but now apparently called simply "TI 2000". I shall refer in this judgment to the respondent as "Timtec".
2. In the latter part of last year and the early part of this, CRD was and indeed I suspect probably still is, in the process of carrying out a mixed hotel and residential development at Riverside, Canary Wharf in London Docklands. The whole of that development, save for the hotel, is being procured under a construction management contract with a company called Bovis Leher McGovern International Ltd., whom I shall refer to as BMLI
3. Within that framework CRD have direct contracts with various trade contractors, managed by BMLI -- Timtec was one of those contractors. Relations between CRD and Timtec were governed by the terms of a trade contract dated 21st June, 1999. It is common ground between the parties that this was a construction contract within the meaning of s.104 of the Housing Grants Construction and Regeneration Act, 1996, which I shall refer to as the Housing Grants Act.
4. Under it, of course, Timtec undertakes to do certain works. I should, however, refer specifically to certain of its other provisions. Clause 12. of the contract deals with payment. I should refer specifically to subclauses 2 and 3 of clause 12 which reads as follows:

"2. On or before a date in each month agreed between the employer and trade contractor [defined as the agreed date] the trade contractor shall submit to the employer a signed site progress certificate. This certificate will record the percentage of completion of each element of work separately identified in the trade payment breakdown incorporated herein, or agreed pursuant to clause 12(1) as such percentage was agreed between the employer and the trade contractor during the site progress review immediately prior to the agreed date.

"3. Provided that the trade contractor shall have submitted on application for payment in accordance with the provisions of clause 12(2) and, subject always to any deductions, abatements or set-offs which the employer is entitled to make, the date when the invoice in respect of such application becomes due it shall be on the expiry of 30 days from the date of receipt of such invoice by the employer, and the final date for payment in relation to any sum which becomes due in respect of such invoice in the expiry of one day from the date when that sum becomes due."
5. Clause 12 (4) then continues so far as material: *"The amount due pursuant to on application for payment under clause 12(3) shall be the total value calculated on the basis of the percentage of completion of each element of the work separately identified in trade payment. breakdown approved by the employer or incorporated herein, of the work properly executed up to and including the date of the site progress review immediately prior to the agreed date, less any amount which may be deducted by the employer in accordance with the provisions of the trade contract and less any amounts previously paid under the trade contract. The employer shall not be obliged to make any payment for any materials until such materials are fully, finally and properly incorporated in the works, although he may, in his sole discretion and subject to such conditions as he may stipulate, agree to do so."*
6. Clause 14, under the heading 'Indemnities' provides in subclause 2 that: *"Nothing in this trade contract shall limit, Or otherwise prejudice, any common law or equitable rights of set-off which the parties may have provided that the relevant party shall give written notice to the other at least five days before the final date for payment, stating the amount to be withheld and the ground for withholding payment where the same is attributable to more than one ground, each ground and the amount attributable to it."*
7. Provisions for termination of the contract by CRD are contained in clause 21. Clause 21(l) provides for termination in certain circumstances of failure by the trade contractor to which I do not need specifically to refer. Clause 23(2) contains the customary provision, for termination where insolvency looms, and is in the following terms: *"In the event of the trade contractor becoming bankrupt or making a composition or arrangement with his creditors, or having a proposal in respect of his company for a voluntary arrangement, for a composition of debts, or scheme or arrangement approved in accordance with the Insolvency Act, 1986, or having an application made under the Insolvency Act, 1986 in respect of his company to the court for the appointment of an administrator or having a winding-up order made, or except for the purposes Of*

amalgamation or reconstruction, a resolution for voluntary winding-up passed or a provisional liquidator, receiver or manager of his business or undertaking duly appointed, or having an administrative receiver as defined in the Insolvency Act, 1986 appointed, or possession taken by or on behalf of the holders of any debentures secured by a floating charge of any property comprised in or subject to the floating charge then the employer may, by notice, forthwith determine the employment of the trade contractor under this trade contract.

8. That is as far as I think I need read. Finally I should refer to subclauses 4 and 5 of clause 26 of the contract which are in the following terms:

"26(4) (a) Save as provided in subclause 26(4) (b) if there arises any dispute or difference under, or in connection with the trade contract, or the execution of the works between the employer, the construction manager on the employer's behalf, and the trade contractor, either party may give written notice at any time of his intention to refer such dispute to adjudication, and such dispute will, in the first instance, be referred to and settled by the adjudicator named in section 3 part a, and the proceedings before such adjudicator shall be conducted in accordance with the ORSA Adjudication Rules, save that if the Adjudicator considers that any application to him is frivolous, vexatious or oppressive he shall have the power to make the party making such an application pay and make a contribution to the costs of the other party and paragraph 21(5) of the ORSA Adjudication Rules should be amended accordingly.

"Without prejudice to the generality of such rules:

"1. The adjudicator shall, save in respect of those matters set out in clause 26(4) (b), have power to open up, review and revise any certificate, opinion, decision, requirement, or notice, and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certification, opinion, decision, requirement or notice had been given.

"2. The adjudicator shall not be acting as an arbitrator.

"3. The decision of the adjudicator shall be binding on the parties until the dispute is finally determined by legal proceedings, arbitration, or by agreement between the parties and the parties shall comply with the adjudicator's decision until such determination or agreement.

"4. The parties agree that the adjudicator may adjudicate at the same time on one or more disputes under the trade contract.

"5. The parties agree that where the period in which the adjudicator is required to reach a decision has been extended in accordance with section 182 (c) of the Housing Grants Construction and Regeneration Act, 1996 and/or the ORSA rules, the adjudicator may adjudicate at the same time on related disputes between the employer and design consultant or any other trade contractor. The adjudicator shall have power to make such directions and all necessary awards as if the procedure in the High Court of England and Wales is joining one or more defendants, or joining co-defendants if third parties were available.

"6. The adjudicator shall act fairly between the parties."

If the adjudicator is unable, or is unwilling, or ceases to act as adjudicator an alternative should be appointed in accordance with such rules provided that

"(a) the adjudicator shall have been qualified in respect of the general subject matter of the dispute or difference for not less than ten years and who shall be a specialist in relation to the subject matter of the same.

"(b) subclause A hereof shall not apply to disputes or differences regarding rectification of the trade contract. Any allegation of misrepresentation or fraud, or which concerns the repudiation of the trade contract.

"6. The parties will continue to perform their respective obligations in accordance with the trade contract, notwithstanding any dispute or difference and shall forthwith give effect to any decision of the adjudicator whether or not either party requires the dispute or difference, or the decision of the adjudicator pursuant to clause 4 hereof to be referred to the courts".

9. The subclauses of clause 26 which I have read reflect the provisions of section 108 of the Housing Grants Act which I should also read in full. Subsection 1 provides that:

"(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose "dispute" includes any difference.

"(2) The contract shall

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

- (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
- (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
- (d) allow the adjudicator to extend the period of 28 days by up to 14 days with the consent of the party by whom the dispute was referred, -
- (e) impose a duty on the adjudicator to act impartially; and
- (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

“(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

“(4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith and that any employee or agent of the adjudicator is similarly protected from liability

“(5) If the contract does not comply with the requirements of subsections 1) to (4) the adjudication provisions of the scheme for construction contracts apply.

“(6) For England and Wales, the Scheme may apply the provisions of the Arbitration Act, 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate.

For Scotland the scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator’s decision.”

10. I should add that the reference to the adjudication provisions of the scheme for construction contracts in subsection 5 is a reference to a scheme which the Minister is required to introduce by regulations made for the purpose under section 114 of the Act.
11. It is pertinent here to point out that, pursuant to the contract, Timtec's obligations were backed by a performance bond entered into with Norwich Union Insurance Ltd.
12. Following Christmas of 1999 and the consequential New Year, the site reopened on 5th January, 2000. On that day CRD received from Timtec two applications for payment dated 23rd December, 1999 for sums totalling £285,300.44p in respect of moneys alleged by Timtec to be due to it under the contract. The invoices were date stamped by CRD as being received on 5th January, 2000. In accordance with clause 12(3) of the contract payment would be due 30 days later, subject to any deductions, abatements or set-offs.
13. However, some of Timtec's subcontractors did not return to work that day and little or no progress was made under their contract thereafter. I observe that the Registrar was told on 4th May, erroneously, that CRD had received the invoices on 23rd December.
14. On 14th January, unbeknown to CRD, Timtec went into administration. On 17th January, a cheque in respect of the invoices was prepared and signed. It appears also that it must have been sent because it was presented for special clearance on 18th January.
15. Before the Registrar it was alleged that Timtec had obtained the cheque through some unparticularised misrepresentation, but that allegation was withdrawn before me. On 19th January, BLMI here given confirmation that Timtec was in administration and CRD stopped the cheque.
16. On 20th January, CRD and BLMI met with the administrators who stated that the intention was for Timtec to complete the works. However, on 24th January, Timtec withdrew all labour from the site, and on 25th January, the administrators informed CRD that Timtec would not complete the works. Accordingly, on 26th January CRD gave notice of termination of the contract, pursuant to clause 21(2) of the contract, and called on the performance bond in the sum of £62,600 which to date has not been paid.
17. Also on 26th January, CRD issued notices of withholding in accordance with the Housing Grants Act of all sums otherwise due under the contract, if any, upon the grounds of delays and failure by Timtec upon, the basis that CRD was not liable to make any further payment to Timtec until after practical completion of the development.

18. Thereafter, CRD was not liable to make any further payment to Timtec until after practical completion of the development. Thereafter CRD and BLMI arranged the completion of Timtec's works by a third party which involved the payment of £97,000 to the administrators for the delivery of certain materials at Timtec's depot which were essential to completion of works.
19. On 17th March, Timtec's solicitors, wrote to CRD demanding that the cheque be honoured and threatening proceedings in the absence of an assurance to that effect. They also challenged the validity of the notices of withholding upon the basis that section 111 of the Housing Grants Act required any such notices to be given within the 30 day period for payment, and upon the apparently erroneous assumption that the invoices had been received by CRD no later than 27th December.
20. On 14th April, CRD issued an application for leave pursuant to s.11 (3)(d) and/or s.130(2) of the Insolvency Act, 1986 (which I shall refer to as "the Insolvency Act" to commence adjudication proceedings under clause 26 of the contract: and/or s.108 of the Housing Grants Act. At a first hearing on 17th April, the matter was adjourned until 4th May. In the meantime Timtec's solicitors issued proceedings claiming payment of £286,300.44p on the cheque,.
21. On 3rd May, immediately before the date of the adjourned. hearing before the Registrar, Timtec's solicitors notified CRD's solicitors that Timtec would not consent to adjudication and served Timtec's proceedings. CRD's solicitors' inquiry as to the reasons for the refusal of consent met with no response. On 4th May, after hearing argument, the Registrar refused leave. In the short note of his judgment that I have seen the Registrar is recorded as saying that since Timtec had already commenced proceedings against CRD, CRD could deal with their claims by way of defence and counterclaim in those proceedings, and is recorded as having expressed the view that it would not be productive have a non-binding adjudication at the same time as legal proceedings.
22. Section 11(3) of the Insolvency Act provides as follows:
"During the period for which an administration order is in force:
 - (a) *no resolution may be passed or order made for the winding up of the company;*
 - (b) *no administrative receiver of the company may be appointed;*
 - (c) *no other steps may be taken to enforce any security over the company's property, or to repossess goods in the company's possession under any hire purchase agreement, except with the consent of the administrator, or the leave of the court and, subject to where the court gives leave, to such terms as the court may impose;*
 - (d) *no other proceedings and no execution or other legal process may be commenced or continued and no distress may be levied against the company or its property except with the consent of the administrator or the leave of the court, and- subject: to where the court gives leave to such terms as aforesaid. "*
23. It is clear law that a proceeding for adjudication under s.108 of the Housing Grants Act, is a proceeding within the meaning of s.11(3) (d) of the Insolvency Act see **A. Straum (UK) Ltd v Bradlaw Developments Ltd** (sic) decided in the Leeds District Registry by His Honour Judge Behrens on 7th April, 1999.
24. I was referred in connection with the principles to apply to an application for the grant of leave under s.11 to the decision of the Court of Appeal in **Re: Atlantic Computers Systems PLC** [1992] 2CH 545 where Nicholls LJ, as he then was, giving the Judgment of the court reluctantly set out some general observations upon application for leave under s.11 in cases where leave is thought to exercise existing proprietary rights against a company in administration.
25. In the course of so doing, he observed at page 542 that:
"1. It is in every case for the person who seeks leave to make out a case for him to be given leave. "
2 The prohibition on s.11(3) (c) and (d) is intended to assist the company under the management of the administrator, to achieve the purpose for which the administration order was made. "
26. Those observations appear to me to have equal force in cases of applications for leave not involving the exercise of proprietary rights such as the present defence.
27. I should make certain observations upon clause 26 of the contract in issue in the present case and upon. s.108 of the Housing Grants Act.

28. The clause in question and s.,108 introduced a summary process for the adjudication of disputes arising in the course of running contracts which was designed as far as possible to facilitate the continued operation. of those contracts, pending the final resolution of such a dispute.
29. The process of adjudication which is provided for under s.108 is, so far as I am aware, unique at present in English law and leads to a result that, whilst it is not binding upon the parties, can have consequences in terms of summary enforcement in the sense that it is clear that an application for summary judgment on the basis of the outcome of an adjudication under the procedure envisaged under s.108 needs to meet a rather lower test for the purposes of summary judgment than would otherwise be the case.
30. So much is clear from the judgment of Dyson J in **Hirschell Engineering v Bream Property Ltd** [2000] BLR 272 (sic) and from other authorities to which I was referred, including the same Judge's decision on **Macob Civil Engineering Ltd v Morris Construction Ltd** [1999] QB Technology & Construction Court 93. (sic)
31. The issue that I have to decide is precisely how on an application for leave under s.11 of the Insolvency Act, one takes account of the provisions in s.108 or in any construction. contract to which the Housing Grants Act applies of the existence of this summary process.
32. At the hearing before the Registrar there were two material factors which are no longer in quite the same state when the matter comes before me. First, there was an allegation before the Registrar that the delivery of the cheque to Timtec had been procured by misrepresentation.
33. That is an allegation. that is no longer persisted in but as one has seen from the terms of clause 26 it was an allegation that could not have been resolved under the provisions for adjudication.
34. Secondly, before the Registrar, there appears to have been an assertion on the part of all parties that the invoices dated 23rd December, 1999 were, in fact, delivered on 23rd December, 1999 whereas before me it was, I think, common ground that they were not in fact received by CRD until 5th January, 2000.
35. That has a material impact upon the efficacy of the notices of withholding sent by CRD on 26th January because it would have been arguable, and indeed I think was argued by the Registrar, that had the invoices been delivered on 23rd December those notices were out of time. Whereas, if the invoices were only delivered on 5.1. 2000 the notices of withholding were not out of time. It appears, therefore, that the decision of the Registrar was reached upon a version of the facts which was materially different from the version of the facts with which I was confronted on this appeal.
36. On the other hand it is apparent from the decisions of Harman J in **re: Gilmartin**, the reference to which I shall have to supply. There is an appeal from the Registrar on an application for leave under s.11 is a true appeal, in other words that I should only allow the appeal in circumstances where I am satisfied that the Registrar has exercised his discretion upon wrong principles.
37. In **re: Atlantic Computer Systems PLC** to which I have already referred, Nicholls LJ at page 541 said this: *"There is one final matter to which we now turn. In the course of argument we were invited to give, guidance on the principles to be applied on applications for grant of leave under section 11. It is an invitation to which we are reluctant to accede, for several reasons: first, Parliament has left at large the discretion given to the court, and it is not for us to cut down that discretion or, as it was put in argument, confine it within a straight jacket. However much we emphasise that any observations are only guidelines, there is a danger that they may be treated as something more"*.
38. Secondly, section 11 (3) (c) and (d) applies to a very wide, range of steps and proceedings, and the circumstances in which leave is sought will vary almost infinitely.
39. Thirdly, It is the Judges who sit in the Companies Court who have practical experiences of the difficulties arising in the working out of this new jurisdiction, not the members of this court. He nonetheless went on to make the observations that I have indicated in. relation to cases involving the exercise of existing proprietary rights.

40. It is, right to say, however. that cases of applications for leave under s.11 are liable to turn very substantially upon` their own unique facts. I am very far from saying that the mere fact that the process for adjudication under s.108 of the Housing Grants Act gives rise to a change in the test for the grant of summary judgment, upon the basis for such adjudication, should in all cases be ground for a refusal of leave.
41. On the other hand, on the facts of the present case it seems to me that, where there is no ongoing contract between Timtec and CRD, a large part of the justification for the adoption of such a summary procedure as is envisaged by s.108 has gone and, bearing in mind that the outcome of an adjudication under s.108 or under clause 26 of the contract is not binding and can, still be the subject of subsequent litigation, in my view where litigation between the parties is already on foot and the claims that are currently being made by CRD against Timtec are perfectly capable of being resolved in that litigation by way of defences and counterclaim, I find it difficult to say that the decision of Mr Registrar Buckley was flawed. In those circumstances it seems to me that I have no alternative but to dismiss the appeal and I will hear the parties on the suitable form of order.

Mr J Mort appeared on behalf of the Complainant

Mr J Wilson appeared am behalf of the Defendant