**JUDGMENT : HIS HONOUR JUDGE COULSON QC:** TCC. 16th January 2006.

1. This is an application for summary judgment to enforce an adjudicator's decision dated 19th May 2005, together with interest and costs. In addition, there is a separate application by the Claimant for the costs of its bankruptcy proceedings, issued against the Defendant in the Bradford County Court, and subsequently withdrawn.

2. The Defendant does not appear and is not represented. Her solicitors have sent the court a letter which indicates that they have no instructions to defend the summary judgment application. The letter says nothing about the second application in relation to the costs of the bankruptcy proceedings.

3. The background to these applications is relatively straightforward. By a contract dated 27th May 2004, incorporating the JCT Minor Works Form, the Claimant agreed to carry out building works at the Defendant's properties 5, 7 and 9 Arksey Place, Armley, in Leeds. A dispute arose between the parties which was referred to an adjudicator in accordance with the express terms of the contract. The adjudicator was Mr. Allan Wood.

4. The adjudicator's decision of 19th May 2005 awarded the claimant £90,194.53 including interest up to that date. That sum has not been paid and is the basis for the application for summary judgment.

5. Initially, as I have indicated, the Claimant sought to enforce the adjudicator's decision, not by commencing enforcement proceedings in the TCC, but by issuing a statutory demand on 24th June 2005, and pursuing bankruptcy proceedings in the Bradford County Court.

6. The Defendant applied to set aside that statutory demand on 1st August 2005. There was then a delay, because the application was made by the Defendant out of time, but an extension of time was eventually granted to her. The Defendant then produced a lengthy affidavit in support of her application which was dated 16th September 2005. Eventually, on 1st December 2005, the statutory demand was set aside by consent and the parties agreed that: *"The issue of liability for costs [would be] reserved to a Judge at the Technology and Construction Court"*.

7. The reference to the TCC is explained by the fact that, two days earlier, on 29th November 2005, the Claimant issued enforcement proceedings in the TCC. On 8th December 2005 I made an order in the standard terms, setting out a swift timetable to lead to today's hearing. But for the vacation at Christmas and the New Year, this matter would have come on about two weeks ago.

8. It appears from the affidavit sworn by the Defendant in the bankruptcy proceedings that she has three points arising out of the adjudicator's decision. They are:
   (a) That the Claimant's work is defective and there is therefore a counterclaim in her favour;
   (b) That the adjudication proceedings were in some way unfair, partly because the proceedings were so quick;
   (c) That there is a risk that the Claimant will be unable to repay any sums that may eventually be found to be due to the Defendant.

9. I am in no doubt at all that these three points cannot possibly amount to a defence to the summary judgment application. Dealing with each briefly in turn:

   **(a) <u>Defective work</u>**

   This was a matter that could have been, and up to a point was, raised in the adjudication proceedings. In any event the Defendant is not entitled to set up such matters by way of a defence of set off to a claim based on an existing adjudicator's decision: see, amongst many other cases on this topic, **VHE Construction v RBSTB Trust Company** [2000] BLR 107.

   **(b) <u>Unfair</u>**

   The Defendant's complaint appears to focus on the speed with which the adjudication was conducted. That simply misses the point altogether. Adjudication is supposed to be quick; that is its main feature. The only question for the court, when points of fairness are raised by the unsuccessful party in an enforcement application, is to consider whether or not the adjudicator failed to allow the Defendant to raise or answer points made by the Claimant, or in some other way ignored the submissions made by the Defendant. On the material that I have, there is nothing to suggest that the adjudicator conducted

this adjudication in anything other than an entirely fair and appropriate way. The Defendant was allowed to make all the points that she wished to make during the adjudication, and there was no question of any breach of the rules of natural justice.

**(c) Risk that the claimant would be unable to repay**

The risk that the Claimant might be unable to repay any sums awarded is not of course a defence to an application for summary judgment in any event. At best it might be a reason to stay any judgment that I give. The principles governing a stay in these circumstances are summarised in **Wimbledon Construction v Vago** [2005] BLR 374. There is no evidence here on which I could find that the Claimant might be unable to repay any of the sums ordered by the adjudicator, or that there are any other factual matters which should lead me to exercise my discretion in favour of a stay.

10. For these reasons there can be no doubt that the Claimant is entitled to summary judgment in the sum of £90,194.53. In addition, the Claimant is entitled to interest on that sum at the rate awarded by the adjudicator. That produces an additional amount of £4,830.32. That makes a total of **£95,024.85**. I therefore give judgment in favour of the Claimant in that amount.

11. In accordance with the Defendant's request, the Claimant has agreed that this sum will be paid in 28 days rather than the usual 14. Therefore, the amount of £95,024.85 will be paid no later than 13th February 2006.

12. The Claimant is obviously entitled to the costs of these enforcement proceedings. There was no defence to the claim, as the Defendant's solicitors must have eventually realised. In my judgment, it was quite unreasonable for the Defendant to force the Claimant to incur the costs of these enforcement proceedings in circumstances where the Defendant had, and must have known that she had, no defence to this claim. Thus, in accordance with the principles set out by May LJ in **Reid Minty v Taylor** [2002] 1 WLR 2800 it seems to me that it is only appropriate that I award the Claimant its costs to be assessed on an indemnity basis.

13. I am asked to make a summary assessment of the costs incurred by the Claimant. A summary assessment is plainly appropriate since this is an application which has taken less – actually considerably less - than half a day. The draft bill is in the sum of £9,668.67. It seems to me that this sum is generally both proportionate and reasonable. The only slight doubt I have is that I consider the hours claimed to be slightly on the high side. Notwithstanding my order for indemnity costs, this should be reflected in the amount assessed. Therefore, I summarily assess the Claimant's costs in accordance with that basis in the sum of £9,000. In accordance with CPR 44.7 and 44.8 I order that this sum should be paid by the Defendant to the Claimant within the 28 day period referred to above. Accordingly, by no later than 13th February 2006, and in addition to the judgment sum, the Defendant must pay the sum of **£9,000** to the Claimant.

14. The remaining point concerns the cost of the bankruptcy proceedings in the Bradford County Court. It seems to me that there are two difficulties with the Claimant's application for these costs.

15. First, it is never easy for a court to deal with a dispute about liability for costs when it has not dealt with the underlying issues. In such circumstances, it can sometimes be hard to say what "the event" is that the costs must follow. Indeed it has been said that, in some circumstances, it is not appropriate even to ask a court to deal with costs alone: see **R v Holderness Borough Council** Times Law Report 22nd December 1992. In this case the statutory demand was set aside by consent. On one view, therefore, that makes the Defendant the successful party in the bankruptcy proceedings. However, since the principal product of the bankruptcy proceedings was the Defendant's affidavit which set out the alleged grounds for her defence to this claim, all of which I have rejected, it seems to me that it would be wrong to suggest that the Defendant was in some way the successful party in the bankruptcy proceedings. For that reason alone, a possibility suggests itself that the right answer would be to make no order as to the costs of the bankruptcy proceedings.

16. Secondly, it is not easy for me to understand why the bankruptcy proceedings were issued. In my judgment the appropriate way of enforcing the adjudicator's decision was to issue enforcement proceedings in the TCC. If the proceedings had been issued in June, the Claimant would have had his

money in July, and a good deal of time and costs would therefore have been saved. Of course I quite accept what Mr. Mort says, that the issue of a bankruptcy petition was not of itself the wrong way of enforcing these proceedings. On the other hand, given that there is a procedure expressly tailored by the TCC to allow the prompt and efficient enforcement of adjudicators' decisions, the court has to consider very carefully an application for the costs of other proceedings, commenced in addition to the enforcement claim, particularly in circumstances where, in the end, it was the enforcement route that has proved to be the right course for the Claimant to take. Again, therefore, it might be said that, in consequence, what suggests itself as the appropriate order in accordance with the over-riding objective at CPR 1.1 is an order that both sides pay their own costs of the bankruptcy proceedings.

17. Mr. Mort, in the course of his very clear submissions relating to the bankruptcy application, in which he was not involved, makes the point that at least some of the costs incurred in those proceedings would have been incurred in dealing with the points raised by the Defendant in her affidavit, the validity of which I have rejected. I accept, as he says, that some of the costs would have been incurred in this way, but, by the same token, a considerable amount of those costs have been incurred simply because bankruptcy proceedings were issued, which subsequently turned out to be redundant. Further, some costs were incurred before the affidavit was produced by the Defendant.

18. The second edition of the TCC Guide, published in October 2005, makes it clear that the TCC will deal with all applications to enforce the decisions of adjudicators, regardless of the value of the decision, and will do so quickly and efficiently in accordance with a procedure worked out in consultation with the construction industry and the users of the court. Although I accept Mr Mort's point that, in this case, no specific criticism could attach to his instructing solicitors for ignoring the Guide, because the bankruptcy proceedings predated the second edition, the Guide was simply reflecting the existing practice of the TCC. It is important that all parties to adjudication realise that, save in exceptional circumstances, the most efficient way of enforcing the adjudicator's decision is by enforcement proceedings in the TCC. Other ways of enforcing such decisions (such as, for instance, bankruptcy proceedings) are something of a blunt instrument and raise potential issues which have little or nothing to do with the decision which is at the heart of any enforcement application. Ordinarily, therefore, the issue of a statutory demand will not be the appropriate means of enforcing an adjudicator's decision.

19. Taking all these points into account, it seems to me that the right course for me to take, in accordance with the over-riding objective at CPR 1.1, is to order that both sides should pay their own costs of the bankruptcy proceedings in the Bradford County Court. In other words I make no order in relation to the costs of those bankruptcy proceedings.

MR. JUSTIN MORT (instructed by Cobbetts, Manchester) appeared on behalf of the Claimant.

THE DEFENDANT did not appear and was not represented.