Case No: HT-2019-000142

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
[2020] EWHC 3511 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 December 2020

Before :

His Honour Judge Bird sitting as a Judge of this Court

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Between :

AQUA LEISURE INTERNATIONAL LIMITED **Claimant**

- and –

BENCHMARK LEISURE LIMITED **Defendant**

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- -

Mr Harry Smith (instructed by **Helix Law**) for the **Claimant**
Mr James Bowling (instructed by **The Endeavour Partnership**) for the **Defendant**

Hearing dates: 1 December 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 18th December 2020 at 10:30am"**

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HIS HONOUR JUDGE BIRD SITTING AS A JUDGE OF THE COURT

His Honour Judge Bird :

1. This is an application to enforce the decision of an adjudicator dated 24 July 2017 by way of summary judgment. The adjudicator ordered the defendant to pay the claimant sums totalling £200,537.35 within 7 days (in the sums set out below at paragraph 8). Payments of £94,139 have been made. The outstanding balance (subject to final calculation) is £119,288.25. The defendant contends that the relevant dispute has been determined "by agreement" for the purposes of section 108(3) of the HGCRA so that the adjudication is no longer binding and that the adjudicator lacked jurisdiction to award costs.

2. The application is supported by evidence from Mr Roger Currie, a director of the claimant and Jonathan Waters (the claimant's solicitor: he supplies the formal requirement of stating that the defendant has no real prospect of successfully defending the claim). Responsive evidence comes from Mr Alexander Smith (the defendant's solicitor) and Roland Duce, a director of the defendant. I was invited (see paragraph 5 of the claimant's skeleton argument) not to read Mr Smith's evidence or the exhibits to it, some of which were said to be privileged.

3. CPR 24 permits judgment to be entered if the court considers that the defendant "has no real prospect of successfully defending the claim" and there is no other compelling reason why the case should be disposed of at trial. Here the application for summary judgment relates to enforcement, not to the merits of the adjudicator's decision.

4. The proper approach to a summary judgment application is well established. I was, nevertheless, referred to a number of authorities. The only contentious issue concerns the extent to which it is appropriate to refuse summary judgment on the basis that "something might turn up". The defendant relies on ***Royal Brompton v Hamond (no.5)*** [2001] EWCA Civ 550 and makes the points at paragraphs 24, 29 and 30 of its skeleton, noting:

> "*it is perfectly obvious that the evidence before the Court now is unlikely to be the end of matters….[t]here are almost certainly bound to be further witnesses, documents and conversations in relation to those events that go to whether or not the STC rubric was waived by conduct. The court should have regard to the likelihood of such evidence becoming available before trial*".

5. *Royal Brompton* in my view does not assist the defendant. At paragraphs 19 and 20 of the Court of Appeal's judgment it is clear that the judge was made aware (at least in general terms) that there would be further potentially helpful expert evidence adduced and that therefore:

> "*the judge knew that the totality of the evidence that the parties would wish to bring before the court was unlikely to be contained in the witness statements. Thus he knew that he was deciding what Mr Bartlett termed a "no case to answer submission" without deciding whether any further agreement between the experts would be forthcoming and, if so, whether it would be admitted and if so, whether*

> *it would support Brompton's case*".

6. In the present case my attention was not drawn to any specific or general evidence that might in due course assist the court to determine if the "subject to contract" rubric had been waived. It is difficult to have "regard to the likelihood" of evidence being available without knowing the first thing about what the evidence might say or from whom it might come. When one considers that the main protagonists (Mr Currie and Mr Duce) have already provided evidence and made no mention of the possibility of further enlightenment, the difficult task becomes both impossible and undesirable.

7. In my view, ***Royal Brompton*** represents the application of well-established principles. If the respondent wishes to rely on the likelihood that further evidence will be available at trial (see ***Korea v Allianz*** [2007] EWCA Civ 1066 at paragraph 14).

> "*it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up*"

Background

8. Alpamare is a waterpark in Scarborough. The defendant was the site developer. It instructed the claimant pursuant to a standard form JCT Design and Build contract entered into on 13 July 2015. The project reached practical completion on 18 August 2016 and on 7 September 2016 the claimant made a final interim application for payment of £160,077.80 plus VAT (£192,093.36). No notice to pay less was served and only £20,000 of the application was paid. On 19 June 2017 the claimant's solicitor served notice of adjudication and on 23 June 2017 Mr Wright was appointed as Adjudicator. He issued his decision on 24 July 2017 requiring the defendant to pay:

   i) £143,411.13 plus VAT[1] in respect of the principal claim

   ii) interest on that sum at the contractual rate in the total sum of £5,374.18 (with an accruing daily rate of £22.04)

   iii) £12,500 in respect of legal costs under section 5A of the Late Payment of Commercial Debts (Interest) Act 1998 and the fixed fee of £100 under the Act and

   iv) his fees of £10,470.

9. The sums awarded by the Adjudicator did not represent the full amount due to the claimant; there was a retention payment of around £47,811.38 plus VAT to deal with

[1] The claim was for £160,077.80 net of VAT. Credit was given for £16,666.67 (the payment of £20,000 net of VAT). This leaves a balance due of £143,411.13 net of VAT.

following completion of warranty works. The parties met on 23 August 2017 to discuss settlement of the entirety of their dealings. The claimant's main representative was Roger Currie and the defendant's Roland Duce. The claimant's position was that it was owed £217,998 plus VAT representing the Adjudicator's award plus the second retention payment which would fall due once the final warranty work was completed (thought to be by November 2017 at the latest) and subject to a possible reduction in respect of work done by third parties. The defendant's recorded offer was to pay £198,448 plus VAT including a "*fixed and final*" payment of £120,000 plus VAT on or before 22 August 2018 "*underwritten by a guarantee given by Abbey Commercial Investments, to wording written by [the claimant's] advisers*".

10. The parties spoke over the telephone in the course of the morning of 31 August 2017. That afternoon Mr Currie sent an email to Mr Duce recording a "payment resolution" in the total sum of £217,998 plus VAT but over the longer period for payment suggested by the defendant. The "*fixed and final*" sum to be underwritten by Abbey Commercial Investments Limited ("Abbey") "*to wording written by [the claimant's] advisers*" was to be £110,000. The "*payment resolution*" was expressed to be "*without prejudice and subject to contract*". The email ended with the words "please confirm your agreement to this settlement by return". On 1 September 2017, Mr Duce confirmed the defendant's agreement with the single word: "agreed". Later the same day Mr Currie replied ending his email with the words "*meantime we will contact our lawyer to draft the settlement and guarantee wording…which Keith will forward to you as the binding agreement once signed by all the parties*".

11. Under the relevant terms:

    i) £49,067.50 plus VAT was to be paid on 4 September 2017. This sum was paid on 9 September 2017.

    ii) £29,381.96 plus VAT was to be paid on or before 15 October 2017, but before warranty works commenced. That sum was paid in 2 instalments by 22 November 2017. On receipt warranty works were commenced.

    iii) £29,548.55 plus VAT was to be paid on completion of the warranty works. An invoice was issued in that sum on 1 April 2018. That sum was paid in 3 instalments, the last payment was made on 29 August 2018.

    iv) £110,000 plus VAT was to be paid on or before 22 August 2018 to be underwritten by Abbey. This sum has not been paid.

12. On 13 December 2017 Mr Currie sent a "*deed of settlement and payment guarantee*" to Mr Duce for "review and completion". The parties to the deed were the claimant and defendant and Abbey. The deed contained recitals the third of which set out the following: "*The parties have settled their differences and have agreed terms for the full and final settlement of the Dispute [defined at the first recital] and wish to record the terms of settlement in this deed*". By then the sum of £78,449.46 plus VAT had been paid under the terms of the payment resolution agreement, leaving £139,548.55 plus VAT due. The deed provided for Abbey to be jointly and severally liable not only for the £110,000 plus VAT payment envisaged in the 1 September agreement, but also for the payment of £29,548.55 plus VAT.

13. Between December 2017 and May 2018, the claimant chased the defendant asking it to sign the written agreement on no fewer than 6 occasions. On 9 May 2018 Mr Currie emailed Mr Duce asking for "expedition". On 11 May 2018 Mr Duce wrote to Mr Currie in answer to the plea. He explained that there would be no Abbey guarantee.

14. The sums due under the Adjudication have not been paid in full and neither have the sums set out in the "payment resolution". The "resolution" itself was never committed to writing and no guarantee was ever signed. On 26 April 2019, the claimant issued proceedings seeking to enforce the adjudication award. The defendant defends on the basis that the adjudication award has been superseded by agreement.

15. No defence has been filed. I deal below at paragraph 33 onwards with the claim to enforce those sums awarded pursuant to the 1998 Act. I deal first with the remaining sums.

The Claim for all sums save those awarded under the 1998 Act

The arguments

16. The arguments can be summarised in this way. The claimant says the compromise arrangement made by the parties was expressly made in the context that it would not become binding until it was reduced to writing ("subject to contract"). It was not reduced to writing and so it was never binding. It does not matter that payments were made under the non-binding arrangement or that works were done. In the alternative, if the arrangement was not "subject to contract" it was in any event at best conditionally binding, the condition being the provision of a guarantee. As no guarantee was ever given the condition has not been fulfilled. The defendant says that the "subject to contract" proviso was waived. It is also submits that it would not be safe to grant summary judgment in the claim.

The Law

17. It seems to me that there was little real dispute about the law.

18. My consideration of the law might usefully begin with a consideration of the general principles of waiver. I was referred to ***Bresco v Lonsdale*** [2019] EWCA Civ 27 which deals with waiver of the right to challenge an adjudicator's award for want of jurisdiction. In the absence of an appropriate reservation of position, participation in the adjudication process is very likely to give rise to a waiver so that the right to take the jurisdiction points becomes lost. The Court of Appeal in that case was not dealing the general principles of waiver.

19. On one view, paragraphs 47 and 56 of the Supreme Court's decision in ***RTS v Molkerei*** [2010] 1 WLR 753 provides all the answers needed.

    i) Paragraph 47:

    > *"…in a case where a contract is being negotiated subject to contract and work begins before the formal contract is executed, it cannot be said that there will always or even usually be a contract on the terms that were agreed subject to contract. That would be too simplistic and dogmatic an approach. The court*

> *should not impose binding contracts on the parties which they have not reached. All will depend upon the circumstances."*

ii) Paragraph 56 (having set out at para.55 that a contact negotiated subject to contract may become a binding contract "*if the parties later agree to waive that condition*"):

> "*Whether [in a without prejudice subject to contract case] the parties agreed to enter into a binding contract, waiving reliance on the "subject to [written] contract" term or understanding will again depend upon all the circumstances of the case, although the cases show that the court will not lightly so hold*."

20. RTS then makes it clear that question for me focusses not on waiver, but on whether the parties have agreed to enter into a binding contract (a new contract) without the need for all terms to be reduced to writing.

Discussion

21. The parties reached an agreement (in the sense that there was meeting of minds) after a meeting on 23 August and an email summarising each party's position on 24 August, during a telephone conversation on the morning of 31 August 2017. The email of 31 August summarised the agreement and the summary was accepted on 1 September 2017. In the normal course of events the agreement would have been treated as binding (in effect as a compromise agreement) as soon as it was reached during the morning of 31 August. Here, the emails of 24 August and 31 August were both expressly written on a "without prejudice and subject to contract" basis. There is no positive suggestion that the oral agreement reached on the morning of 31 August was reached on any different basis and confirmations of the terms of the 31 August email makes it plain in my view that the agreement was made on the basis of a common understanding between the parties that the agreement would not be binding until reduced into writing and signed as a contract. Until that time the communications between the parties were to be treated as "without prejudice".

22. Authority for the proposition that the agreement would not be binding until such time as it was reduced into writing can be found in ***Generator Developments v Lidl*** [2018] EWCA Civ 396. An agreement made subject to contract means:

> *"that (a) neither party intends to be bound either in law or in equity unless and until a formal contract is made; and (b) that each party reserves the right to withdraw until such time as a binding contract is made. It follows, therefore, that in negotiating on that basis both [parties] took the commercial risk that one or other of them might back out of the proposed transaction…. In short, a "subject to contract" agreement is no agreement at all."*

23. The question I have to decide is whether there is a reasonable prospect of establishing at trial that the parties agreed to enter into a binding contract (a new contract) without the need for all terms to be reduced to writing.

24. The defendant argues that the "subject to contract" rubric is "shallowly rooted" and identifies conduct said to be sufficient to at least raise an argument that the parties had waived the condition and entered into a new contract. The defendant summarises its position at paragraph 28 of its skeleton argument in this way: "*Both parties obviously considered themselves bound by the [payment resolution] Agreement and conducted themselves in reliance on that common understanding being that the Decision was no longer "in play"*". The following instances of obvious reliance on the "payment resolution" are cited:

    i) Both parties saw the reduction to writing of an agreement as a mere formality and always intended that the payment resolution agreement would be acted upon

    ii) The claimant gave the defendant credit for payments made under the agreement when the deed of settlement was prepared so that such payments were "unambiguously banked"

    iii) Even when the deed was not signed the claimant demanded compliance with the agreement, making express reference to it as an agreement. This was only consistent with the agreement being binding. This is in reference to the payment of £9,548 plus VAT as the final instalment of the payment of £29,548.55 plus VAT agreed to be paid by 1 April 2018 but in fact not paid until August 2018.

    iv) Performance of the warranty works itself is good evidence that the agreement was seen as binding.

25. In my judgment, considering all the circumstances of the case there is nothing in the points advanced by the defendant that allows me to reach the conclusion that a new contract was made (or that it is arguable that a new contract was made). I reach that conclusion for the following reasons:

    i) The agreement expressed to be "subject to contract" and "without prejudice" was intended to represent a compromise of issues that had arisen in the execution of the 2015 contract.

    ii) In the absence of a compromise, sums were still due under the 2015 contract and under the terms of the binding adjudication award. It is impossible to conclude that the payment and acceptance of sums of money already due under those primary obligations points to the existence of a new contract of compromise.

    iii) The fact that works were carried out is in my judgment equally incapable of supporting the argument that a new contract was arrived at.

    iv) The fact that monies were paid and "banked" is not evidence that there was a new contract. It is simply evidence that the parties were working together to try to settle debts that had arisen under the primary obligations, get work done and move forward.

    v) Again, the fact that money was paid after it became clear that there would be no reduction of terms into writing does not indicate a new contract was entered into. The timing of the payment or payments is not in my view of central relevance.

vi) All indicators (not least demands for the agreement to be signed after a draft had been provided) strongly point to the conclusion that the claimant wanted the original compromise agreement (albeit on slightly different terms) to be finalised. The impartial observer would conclude without reservation that the claimant had no desire to enter into a new contract.

vii) This case is a paradigm example of why the court "will not lightly hold" that a condition that negotiations and agreements are "subject to contract" has been superseded. The parties set their own rules of engagement. They agreed that there would be no binding contract until the terms were reduced to writing and signed off. They clearly envisaged that an agreement would be reached but that it would not be enforceable until the formalities had been observed. The presence of an agreement that was acted on, is not therefore without more enough to indicate that the parties intended to be bound. It was obvious that the agreement would be acted upon before it became binding. Payments would be made and work would be done. Once "banked" those sums would on any view need to be accounted for regardless of whether there was a binding contract. Everything that happened during the course of the parties' dealings with one another happened at a time when the ground rules applied.

26. For all those reasons, judgment will be entered for the claimant on the adjudication sums (not including the award under the 1998 Act which I consider below). There was no agreement which bars the right to enforcement.

27. If I am wrong in that conclusion, the claimant has an alternative argument, that the agreement reached was conditional on Abbey, underwriting, or providing a guarantee in the sum of, £110,000. As no such arrangement was realised the pre-condition that must be met before the contractual obligation comes into existence is not met and so there is no contractual obligation.

28. The claimant's position is that for the agreement to be binding, Abbey would have needed to agree to its terms and there is no evidence of that (see ***Azov v Baltic*** [1999] 2 Lloyds Rep 159 and Chitty para.2-118: "*Where one of the negotiating parties had refused to accept one of the terms of the proposed contract, no multilateral contract would arise between that party and any of the others, unless the others agreed to be bound to that party on terms excluding the one rejected by him*").

29. In the present case the putative contract anticipated that Abbey would provide a guarantee. The precise terms of the guarantee were to be decided, but the nature of the obligation was clear.

30. Abbey is the parent company of the defendant. The public record shows that Roland Duce is a director of Abbey and a director of the defendant. In his evidence in opposition to summary judgment, Mr Duce says at para.13(d), dealing with the September 2017 agreement: "*If required, Benchmark's holding company would give security for this payment…*". At paragraph 7 of his statement in reply, Mr Currie accepts that he and Mr Duce "*reached a broad agreement along the lines he indicates in paragraphs 13(a) – (f)*". The evidence then is that Abbey was prepared to provide "security".

31. I note also that on 11 May 2018, having seen the demand for a larger guarantee from Abbey, Mr Duce wrote: "*I do not now have authority to provide an Abbey guarantee*…." (emphasis added).

32. On balance there is in my judgment a reasonable prospect of establishing at trial that Abbey did agree to the terms of the agreement (in other words, that Mr Duce agreed on Abbey's behalf). If I had decided the September agreement was otherwise binding I would have refused to grant summary judgment on the issue of whether Abbey had agreed to be bound by the terms of the agreement. The fact that Abbey subsequently refused to give a guarantee is in my view not relevant – they may well have been entitled to refuse as the guarantee they were invited to enter into was substantially larger than that agreed to.

Sums awarded under the 1998 Act

33. I now turn to the question of adjudication costs awarded by the adjudicator under the Late Payment of Commercial Debts (Interest) Act 1998.

34. The claim for costs was determined by the adjudicator having been set out in the referral notice (and adjudication notice) and answered at length by the defendant.

35. It is accepted by both parties that the adjudicator had no power (jurisdiction) to award these costs (see ***Enviroflow v Redhill*** [2017] EWHC 2159 (TCC) a decision of O'Farrell J at para.54).

36. In ***Enviroflow***, O'Farrell J pointed out that the power to award costs (and the indeed the power to award the "fixed sum") under the 1998 Act arose as an implied term of the contract which creates the debt. Section 108A(1) and (2) Housing Grants Construction and Regeneration Act 1996 render any implied term "ineffective". The same provisions require that any contractual provision dealing with the costs of the adjudication process must (a) be made in writing, contained in the construction contract and confer power on the adjudicator to allocate its fees and expenses as between the parties or (b) made in writing after the giving of notice of intention to refer the dispute to adjudication.

37. In the present case (as in ***Enviroflow***) there was no agreement that complies with section 108A(1) and (2) in respect of the costs of adjudication or the award of the fixed sum. In my judgment it follows from the statutory language that the parties were barred from relying on the provisions of the 1998 Act dealing with costs and fixed payments.

38. The defendant submits that the adjudicator was therefore wrong in law to award costs and invites me to make a declaration that the costs are not payable. ***Caledonian v Mar*** [2015] EWHC 1855 TCC is cited as authority for my power to make the declaration.

39. The claimant concentrates its submission on "jurisdiction" pointing out that the costs issue was referred to the adjudicator by the claimant, the defendant engaged with it and the adjudication dealt with it. In the absence of any reservation of position (general or specific) the claimant says the defendant has waived its right to raise any jurisdictional issue.

40. The general and accepted rule is that a judge dealing with enforcement of the adjudication award may not deal with an issue which the adjudicator has decided (see

Bouygues v Dahl Jensen [2000] BLR 522 and *Caledonian*). As Coulson J (as he then was) pointed out in the *Caledonian* case, there is an exception where the issue is a short self-contained point and can be dealt with without oral evidence and by short oral submissions. In cases of the *Caledonian* type, a part 8 claim form is generally required if the declaration is to be made.

41. Further guidance on the exception was provided by Coulson J (as he then was) in *Hutton* (see below). It arises rarely and concerns those few cases where the court is prepared to look at the merits of the decision (the points adjudicated on) and has no application to questions of jurisdiction or natural justice. The latter questions do not require part 8 proceedings or a declaration; they go to enforcement of the adjudication and not the adjudication itself. A common example of a case where the *Caledonian* approach may be followed arises where the issue concerns the proper timing, categorisation or description of the relevant application for payment, payment notice or payless notice (see Hutton at paragraphs 5 and the examples given at paragraph 9 and also see Coulson on Adjudication at para.8.30).

42. In my judgment this is not a case where the *Caledonian v Mar* type of procedure (with the general need for Part 8 proceedings as explained in ***Hutton v Wilson*** 2017 EWHC 517 [TCC]) must be followed before the substance of the point can be considered.

43. In my view the question here is one of jurisdiction in the most fundamental sense. He had no jurisdiction to make the award at all because the statute under which he purported to act had no application.

44. I accept that there was no general reservation of rights or specific reservation of the right to raise any objection to jurisdiction. That is not surprising. The parties and the adjudicator applied what had no doubt been a common approach until *Enviroflow* was decided. *Enviroflow* did not change the law, it explained what had always been position. In that sense it is wrong to say that the law "has moved on" since *Enviroflow*. Although a party might be taken to have waived a right about which he should have known but did not know (see *Aedifice* below and reference to "capable of being discovered") it seems to me it would be unreal not to take account of the fact that the common practice and understanding at the time of the decision was to proceed on the basis that there was jurisdiction.

45. For that reason I have come to the view that it would be wrong to hold that the defendant had waived any right to raise this fundamental point of jurisdiction. To conclude otherwise might well lead to parties to adjudication expressing general reservations in respect of developing law. That would be undesirable.

46. If I am wrong in my analysis of waiver and this is a *Caledonian* type of case, then I would conclude that the point can be determined without the need for a Part 8 claim to be issued. The argument has been crisp, there are no factual issues to resolve and the true position is that it would be a waste of time to simply refuse summary judgment in respect of the costs element of the claim. The outcome of any trial on the issue is clear. The point can be dealt with at this stage and it is fair and appropriate to do so.

47. Further, for reasons which I set out below, I am not persuaded that a fundamental point of jurisdiction such as the one in play here is capable of being waived. There was no argument on this point, but the issue is worth considering.

48. In ***Aedifice Partnership v Shah*** [2010] EWHC 2106 (TCC) (cited at paragraph 88 of *Bresco v Lonsdale*) Akenhead J said at paragraph 21(e):

> *"A waiver can be said to arise where a party, who knows or should have known of grounds for a jurisdictional objection, participates in the adjudication without any reservation of any sort; its conduct will be such as to demonstrate that its non-objection on jurisdictional grounds and its active participation was intended to be and was relied upon by the other party (and indeed the adjudicator) in proceeding with the adjudication. It would be difficult to say that there was a waiver if the grounds for objection on a jurisdictional basis were not known of or capable of being discovered by that party."(emphasis added)*

49. Participation in an adjudication can amount to a waiver of the issue that would give rise to a "jurisdictional" challenge. Such a waiver is said often to confer an "*ad-hoc jurisdiction*" (see ***GPS Marine v Ringway*** [2010] EWHC 283 cited at paragraphs 86 and 87 of *Bresco*).

50. For the following reasons, in my judgment, the right to raise the *Enviroflow* point was not capable of being waived:

i) The absence of jurisdiction in the present case (the term "power" is equally apt: see paragraphs 44 and 54 of *Enviroflow*) does not arise out of a mere procedural failure (which could be waived) but rather out of an express statutory provision removing the right to rely on the 1998 Act (as explained in *Enviroflow*).

ii) Where statute prevents reliance on the 1998 Act the parties cannot simply override the effect of the statute by agreement or still less by conduct.

iii) The statutory removal of the right to rely on the 1998 Act in these circumstances means that the claimant cannot reasonably be taken to have relied on the defendant's failure to raise the point as a waiver of the right ever to do so.

iv) Waiver in the sense used here is a type of estoppel, where the conduct of one party sends a clear and unambiguous signal to the other that he intends to act in a certain way and it would be unconscionable for him then to act contrary to that signal. Although the point was not argued, it seems to me to be clear that as a matter of law, an estoppel (and so the waiver) cannot operate.

v) I take comfort from the fact that the question of waiver was not raised in *Enviroflow* itself either by the parties or by the Judge. There (see paragraph 42) the right to costs under the 1998 Act was raised in the Notice of Adjudication and disputed.

51. For all of the reasons set out in this judgment I have come to the conclusion that, save in respect of the award of costs under the 1998 Act, summary judgment will be entered so that the claimant may proceed to enforcement.