Neutral Citation Number: [2019] EWHC 1205 (TCC)

Case No: HT-2019-000026

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2019

Before :

SIR ANTONY EDWARDS-STUART

- -

Between :

INDIGO PROJECTS LONDON LIMITED	**Claimant**
- and -	
RAZIN and another	**Defendant**

- -
- -

Mr Arthur Graham-Dixon (instructed by **Candey**) for the **Claimant**
Ms Emma Healiss (instructed by **Crumplins**) for the **Defendant**

Hearing date: 8th May 2019

- -

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.

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SIR ANTONY EDWARDS-STUART

Sir Antony Edwards-Stuart :

Introduction

1. This is an application for summary judgment to enforce an adjudicator's decision. It is resisted because, since both the date of the decision and the application to enforce it, the Claimant ("Indigo") entered into a Company Voluntary Arrangement ("the CVA") and the Defendants contend that enforcement of the decision would undermine the proper operation of the CVA.

2. The adjudicator's decision was an order for payment of a sum stated in a Payment Notice where the Defendants had failed to serve a Pay Less Notice. It was not a decision that it represented a valuation of Indigo's claim after taking into account any cross claims by the Defendants.

3. If the application for summary judgment is granted, the Defendants seek a stay of execution, principally on the ground that if the decision is enforced Indigo may be unable to repay any sum that is ultimately found due to the Defendants.

4. In the alternative to its primary application, Indigo seeks summary judgment with a stay of execution of only part of the sum awarded by the adjudicator. If that is refused, it asks that the full amount is paid into court pending resolution of the underlying liability.

5. At the hearing of the application for summary judgment Indigo was represented by Mr Arthur Graham-Dixon, instructed by Candey, and the Defendants were represented by Ms Emma Healiss, instructed by Crumplins.

The background

6. By a contract dated 26 April 2017, in the form of the JCT Standard Building Contract With Quantities 2011, the defendants engaged Indigo as Main Contractor to construct a new four-storey detached house, which included a basement, external works and associated drainage, at 8 Greenwood Park, Kingston-upon-Thames for the sum of £2,350,000 ("the contract"). Mr Martin Down has been the director of Indigo since 17 December 2015 and appears to have had control of its operations.

7. The Defendants say that the work was badly done and that their house contains numerous defects. However, Indigo says that it was not responsible for the design and asserts that such faults as have been found, such as with the heating and ventilation systems, are the responsibility of the Defendants' "*own poor design team*" (witness statement of Mr Down, paragraph 18).

8. The Defendants say also that the work was delayed. The original completion date was 3 November 2017, but Indigo failed to achieve Practical Completion until 20 September 2018. The Defendants say that they are entitled to at least £87,000 in respect of liquidated damages for the delay.

9. On 20 June 2018 Indigo issued an interim payment notice for the sum of £202,036.05. If the Defendants disagreed with this sum, they were required to issue a Pay Less Notice in accordance with clause 4.13 of the contract by 24 June. They did not do so and so the sum became due on the final date for payment, namely 29 June 2018.

10. The Defendants told Indigo that they could not pay the full sum demanded and offered to pay £50,000 on account. In fact, on 19 September 2018 they paid £30,000.

11. Although the Defendants are residential occupiers for the purposes of section 106 of the Housing Grants, Construction and Regeneration Act 1996, the parties had a right to refer any dispute to adjudication pursuant to clause 9.2 of the contract.

12. On 29 November 2018 Indigo served a notice of intention to refer to adjudication the dispute over the non-payment of the balance, namely £172,036.05. An adjudicator was duly appointed by the RICS and, by a decision dated 10 January 2019, he decided that the Defendants were obliged to pay the sum stated in the Payment Notice, less the £30,000 paid on account, together with interest in the sum of £5,626.67. The total sum of £177,662.72 was to be paid within seven days, together with the adjudicator's fees. The Defendants paid the adjudicator's fees but did not pay Indigo the sum awarded.

13. On 19 February 2019 solicitors acting for the Defendants wrote to Indigo on the authority of Mr Razin making a demand for liquidated damages in the sum of £87,000. The letter also referred to a Non-Completion Certificate dated 14 January 2019 and a notice of intention to require payment of, or withhold or deduct, liquidated damages dated 15 February 2019. The letter also enclosed a Pay Less Notice dated 19 February 2019 which deducted by way of liquidated damages the difference between the current gross valuation of the work (less retention) and the amount previously certified: this was in order to reduce the sum owed by the Defendants to nil (it could not deduct the entirety of the claimed liquidated damages because the contract machinery did not permit a negative valuation).

14. Also, on 19 February 2019 the BRE wrote a seven page letter to the Defendants providing "a brief overview" of findings following a visit on 7 February 2019. The letter noted that the Defendants' concerns related primarily to defects in relation to the HVAC and air-conditioning systems, the external "stonework" and the quality of workmanship in relation to surface finishes. Amongst other things, the report made criticisms of both the design and installation of the HVAC and air conditioning systems, noted defects of both design and workmanship in relation to the reconstituted stonework features and recorded various problems in relation to water ingress to the pergola roof, garage roof and water egress from the ground floor level side walkway. The BRE has since produced a further report, dated 17 April 2019, which identifies defects of both design and workmanship in the HVAC systems at the Defendants' property.

These proceedings and the CVA

15. On 24 January 2019 Indigo issued an application for summary judgment to enforce the decision of the adjudicator. By an order made on the following day Fraser J gave the standard directions abridging time for acknowledgement of service and providing for a hearing on 13 March 2019.

16. Fraser J's order of 25 January 2019 required the Defendants to file their Acknowledgement of Service within four working days and two file their evidence by 4:30 pm on 13 February 2019. Owing to a difficulty with the court electronic filing system the Defendants' Acknowledgement of Service was not registered on the system and so it appeared to Indigo that no Acknowledgement of Service had been filed. Accordingly, it made an application for judgment in default on 7 February 2019.

17. This gave rise to a further order refusing the application for judgment in default and extending time for service of evidence to 20 February 2019, but the Defendants failed to serve their evidence by that deadline.

18. In the meantime, Mr Down had made a proposal to Indigo's creditors for a CVA, but no notice of this proposal was sent to the Defendants. The First Defendant, Mr Razin, says that he found out about the proposal for the CVA on 26 February 2019. This led to an application by the Defendants on 4 March 2019 for, amongst other things, permission to rely on witness statements that had been served beyond the original deadline.

19. Sensibly, Indigo did not oppose that application and on 7 March 2019 it applied (by consent) for an adjournment of the hearing date. Following a short court hearing on 12 April 2019, the hearing of the application for summary judgment was listed for 8 May 2019. However, the Defendants were in breach of the order relating to the service of witness statements and therefore needed to apply for relief from sanctions. That application was not opposed and so I granted it at the hearing.

20. Reverting to the CVA, by a letter dated 8 February 2019 notice was given to the recipients of a "virtual" meeting which was to be held on 28 February 2019 in order to approve the CVA proposal. At that telephone meeting the proposal was approved and the CVA came into effect that day.

21. The proposal, which was signed by Mr Down, ran to over 15 pages. I will refer only to the essential extracts.

Paragraph 6: This noted that Indigo was profitable, having generated a profit after tax of £143,232 and £366,782 in the years ended 31 December 2016 and 31 December 2017, respectively. It went on to say that since July/August 2018 Indigo had experienced difficulty collecting outstanding monies on completed contracts for which practical completion had taken place, and that it had suffered cash flow difficulties over recent months and had received various threats of action from creditors.

Paragraph 7: This stated that particular problems had been encountered on three completed contracts, Brighton Road, Greenwood Park and Ridgeway Place, where the sums outstanding were said to be about £520,000, £177,663 (plus a retention of £41,000 due on 31 July 2019) and £460,000 (plus retentions), respectively. It noted that the director (Mr Down) had "paid £10,000 towards further fees in enforcing the adjudicator's decision".

Paragraph 8: This referred to 2 ongoing projects with a total value of over £6 million.

Paragraph 10: This explained that Indigo had previously attempted to resolve its financial difficulties by reaching informal payment plans with creditors, although no such plan had in fact been successfully implemented.

Paragraph 11: Here Mr Down stated: "I consider that a CVA is desirable because the CVA will preserve the Company as a trading entity and will allow outstanding debts/retentions on completed contracts to be collected and any snagging/remedial works to be completed (therefore reducing the likelihood of any set-off/counterclaims). It also preserves the jobs of employees and provides creditors with a better return than they would receive in liquidation".

Paragraph 13: This stated that the proposal was to be read in conjunction with the standard terms attached at Appendix 7, and that where there was "any conflict between the Standard Terms and that these proposals, these proposals will prevail, but wherever possible conflict has been avoided".

Paragraph 17: This stated that the estimated expected realisations under the proposal included book debts/retentions in relation to completed contracts (net of costs of collection estimated at 5%) amounting to £867,358.

Paragraph 24: This Paragraph provides that Indigo's "book debts/retentions on completed contracts will be pursued by the Company and will either be paid directly to the Supervisors by debtors or, if collected by the Company, paid over to the Supervisors within 14 calendar days of receipt".

Paragraph 26: This referred to the adjudicator's decision in relation to the contract with the Defendants for £170,632, payable within 7 days of the date of the decision, but not yet paid. It stated that any sum received in respect of this contract (net of costs of recovery) would be "paid into a client account operated by the Joint Nominees and held pending approval of [the CVA]" . . . "Upon approval, any sum held by the Joint Nominees will be paid into an account held by the Joint Supervisors and will form part of the assets available under this arrangement".

Paragraph 46: This stated that the first dividend was to be paid to creditors within 6 months of approval of the proposal - this became 28 August 2019. The estimated dividend to the creditors was said to be "60.42 pence in the £".

Paragraph 51: This provided that the duration of the CVA was not to exceed 16 months "without the prior approval of a 75% majority in value of creditors' claims voting for the resolution".

Paragraph 60: This provided that the CVA would terminate upon either the making up of a winding-up order against the company or the passing of a winding-up resolution or the company going into administration or, where there was express authority to do so, the Supervisors issuing a certificate of termination.

Paragraph 93: This provided that the CVA would be binding on any creditor whose claim had been omitted from it, but who would have been entitled to vote if notified of the decision procedure held to approve it. On discovering the claim of such a creditor, the Supervisors were required to send that creditor immediate notice requiring them to give details of their claim as at the effective date.

The proposal concluded by listing seven appendices as part of the proposal, of which Appendix 7 was the Standard Terms and Conditions.

22. The court was referred to the following clauses in the Standard Terms and Conditions:

Clause 4(3): [Restriction on Creditors rights] after the commencement of the Arrangement, no Creditor shall, in respect of any Debt which is subject to the Arrangement:

(a). . .

(b) commence or continue any action or other legal proceedings against the Debtor.

> (c) during that time a Creditor shall look only to the Arrangement for his remedies and for payment in respect of any debts.
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> Clause 7: Mutual credit and set-off
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> (1) [Application] This Paragraph applies where before the commencement of the Arrangement there have been mutual credits, mutual Debts or other mutual dealings between the Debtor and any Creditor other than in the circumstances to which Paragraph 79 of these Conditions apply.
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> (2) [Account to be taken] An account shall be taken of what is due from each party to the other in respect of the mutual dealings and the sums due from one party shall be set-off against the sums due from the other.
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> . . .
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> (5) [Balance provable or to be paid] Only the balance (if any) of the account taken under Sub- paragraph (2) is provable in the Arrangement or, as the case may be, to be paid to the Debtor or, if the Proposal so provides, to the Supervisor.

The submissions on the application

23. I would like to thank both counsel for their excellent submissions, both oral and written. It is out of no disrespect to them that I have not found it necessary to address all the points that were raised.

24. Mr Graham-Dixon submitted that the Defendant's reliance on clause 7 of the CVA Standard Terms was misplaced, since the adjudication award pre-dated the CVA. He submitted that the award should be enforced first, with the accounting exercise under the netting-off provisions to follow. Alternatively, he submitted that the award could be enforced in part, as an initial step under the accounting exercise, to the extent that the Defendants have not been able to reduce the sum due by reference to quantified alleged counterclaims.

25. Ms Healiss's primary submission was that it was an express term of the CVA that the supervisors were to take account of the sums claimed and counterclaimed between Indigo and each of its creditors, and were to calculate the balances due. Accordingly, this was the exercise that was required to be carried out as between Indigo and the Defendants.

26. She submitted that the Defendants' cross claims had not been determined and so would have to be considered for the first time by the supervisors in the CVA. To enter judgment for the sum awarded by the adjudicator would result in the CVA supervisors having to distribute that sum amongst the other creditors and would therefore interfere with the CVA supervisors' exercise of taking an account as between Indigo and the Defendants. Further, if the judgment was enforced, the Defendants would only receive a few pence in the pound from the CVA.

The impact of the CVA

27. Unlike any of the decided cases, the CVA in this case was entered into after the adjudicator's decision and the application to enforce it. It is also relevant, in my

judgment, that the decision of the adjudicator in this case was not a decision on the merits of one party's case, or part of its case, but a decision based solely on the failure to serve a Pay Less Notice. If that decision had been complied with, the effect in a subsequent resolution of the entire dispute by arbitration or litigation would have been that the payment would have been treated as an interim payment on account.

28. A CVA is a creature of statute and is governed by the Insolvency (England and Wales) Rules 2016, the provisions of which are reflected in the Standard Terms at Appendix 7 to the Proposal. Section 5 of the Insolvency Act 1986 (as amended) provides that a CVA takes effect as if made by the company at the time that the creditors decided to approve it and thereafter binds every person entitled to vote or would have been entitled to vote if he had had notice of it. This is reflected in paragraph 93 of the Standard Terms.

29. Paragraph 24 of the Proposal provides that Indigo will pursue its debts and account to the Supervisors for any recoveries. As Akenhead J observed in *Westshield v Whitehouse* [2014] Bus LR 268, at paragraphs 20-23:

> "20. It is clear that a company subject to a CVA, whilst bound by the terms of the CVA, can otherwise carry on business. Indeed, in this case, conditions 20(b) and (e) expressly confirm this. It follows that the company can sue and be sued albeit that, if sued by a creditor for debts or other claims arising before the CVA, it may be subject to the CVA provisions and there may be a limited recovery.
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> 21. . . .
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> 22. There can be no doubt that in the current circumstances Westshield have the right to pursue recovery of sums said to have been due to it from the Whitehouses. It was an obvious part of its business to collect old debts. It could have had little reason to believe that was any or any sizeable cross-claim from the Whitehouses as none had been registered for the CVA, although there was some fairly informal indication in about 2009 that there was some criticism about the quality of work . . .
>
> 23. As a matter of jurisdiction, the existence of the CVA does not act as some sort of bar on adjudication which prevents a company such as Westshield from pursuing adjudication for a pre-CVA debt and the adjudicator was right to disregard it as a valid challenge, particularly here. A CVA is not akin to a liquidation whereby it is the liquidator who must take proceedings and there are restrictions even on that. No set-off or cross-claim had been raised, clearly or even at all, by the Whitehouses before the adjudication; neither the company nor the supervisors can be criticised for not actually then knowing that there was or might be a viable cross-claim from the Whitehouses."

30. As Akenhead J said, at paragraph 26 of his judgment, I must construe the CVA conditions as if they were contractually binding as between Indigo and creditors or potential creditors such as the Defendants. Like the position in *Westshield*, in this case the Defendants' cause of action in contract against Indigo had accrued prior to the CVA because practical completion was achieved in September 2018 and, if relevant, claims had been intimated in February 2019 prior to entry into the CVA on 28 February 2019.

31. Again, as in *Westshield*, there had been prior mutual dealings in that there was a contract between Indigo and the Defendants and there were claims by Indigo for payment of sums alleged to be outstanding and cross-claims by the Defendants in respect of defects and delay: all these arose out of or in connection with that contract.

32. However, unlike *Westshield*, before the commencement of the CVA there was also a debt in the form of the adjudicator's decision. That had become due for payment within 7 days, but the Defendants had not paid the principal sum that the adjudicator had found due to Indigo. So, when the Supervisors take an account of what is due to each party to the other, the adjudicator's decision has to be considered.

33. However, the adjudicator's decision was, in effect, nothing more than an order for a payment on account. It was not a valuation of the work carried out by Indigo or an assessment of the account between the parties, but a statement of a sum that had become due by default. In my view, it would have had no effect on the result of the account taken by the Supervisors because it had not been paid and was not a determination of a sum due in respect of any particular work. So the Supervisors would simply have noted the existence of the decision and moved on to an assessment of the parties' claims and cross-claims. On the other hand, if the sum determined by the adjudicator had been paid to Indigo prior to the commencement of the CVA, then the Supervisors would have had to take it into account when arriving at the final balance due from one party to the other, just like any other previous payment on account.

34. However, if the sum were to be paid after the commencement of the CVA then, as Chadwick LJ pointed out in *Bouygues v Dahl-Jensen* [2001] All ER (Comm) 1041 (a case where Dahl-Jensen was already in liquidation at the time of the referral of the dispute to adjudication), it would be a recovery that would go into the general fund available for distribution amongst the creditors when the time came. The relevant provisions of rule 4.90 of the Insolvency Rules 1986, which applied in that case, were in almost precisely the same terms as those of clause 7 of the Standard Terms of the CVA.

35. What Chadwick LJ said in that case, at paragraph 33, was:

> "The importance of the rule is illustrated by the circumstances in the present case. If Bouygues is obliged to pay to Dahl-Jensen the amount awarded by the adjudicator, those monies, when received by the liquidator of Dahl-Jensen, will form part of the fund applicable for distribution among Dahl-Jensen's creditors. If Bouygues itself has a claim under the construction contract, as it currently asserts, and is required to prove that claim in the liquidation of Dahl-Jensen, it will receive only a dividend pro-rata to the amount of its claim. It will be deprived of the benefit of treating Dahl-Jensen's claim under the adjudicator's determination as security for its own cross-claim."

36. It follows from this that an order to pay the sum found due by the adjudicator would work harshly against the Defendants. Suppose, for example, that the creditors' claims amounted in total to £1 million but there was also a total net recovery of £1 million: each creditor would then receive 100p in the pound. But if, after the commencement of the CVA, one of the creditors had been ordered to pay £200,000 to the company, that sum would have been credited to the general fund and formed part of the £1 million recovered by the Supervisors. So, whilst that creditor would recover its claim pound

for pound, it would do so without any account being taken of the fact that it had paid £200,000 into the general fund.

37. Suppose now that this creditor had not paid £200,000 after the CVA: that would leave a sum available for distribution to the creditors of only £800,000, so that each creditor would now receive 80p in the pound. But in that scenario, whilst the creditor in question would only receive 80% of his claim, this would be in a situation where he would not have paid £200,000 into the general fund. Accordingly, it is an inevitable consequence of ordering a creditor to pay, after commencement of the CVA, a sum to the company that he will suffer a substantial loss irrespective of the fact that the creditors generally recover 100p in the pound.

The authorities

38. I was referred by counsel to numerous authorities, but as will be clear from the preceding section of this judgment, I consider that the outcome of this application can be determined by an analysis of the provisions of the CVA and the application of the dicta in the *Bouygues v Dahl-Jensen* and *Westshield v Whitehouse* decisions.

39. However, since both counsel referred me to the recent decision of the Court of Appeal in the conjoined appeals of *Bresco Electrical Services v Michael J Lonsdale* and *Cannon Corporate v Primus Build* [2019] EWCA Civ 27, (2019) 182 Con LR 1, I should mention it. The decision in *Bresco* was that whilst an adjudicator had jurisdiction to determine a claim by a company in liquidation, if the company faced a separate cross claim an adjudicator's decision would not ordinarily be enforced because it would not necessarily form any part of the proper calculation of the net balance between the parties (see *Bresco* at [41]). In *Primus*, it was held that a contractor in a CVA was entitled to enforce summary judgment of an adjudicator's decision which determined on the merits the entire dispute between the parties.

40. In *Bresco*, Coulson LJ said, at [43] to [45]:

> "43. This incompatibility [the incompatibility of the separate processes of adjudication and insolvency] is also demonstrated by looking at what might happen if the company in insolvent liquidation was entitled to the sum found due by the adjudicator, but where the responding party has a cross-claim. As Chadwick LJ pointed out in *Bouygues* (para [20], above), if Bouygues had to prove their claim in Dahl-Jensen's liquidation, it would only receive a dividend, and would be deprived of the benefit of treating Dahl-Jensen's claim under the adjudicator's determination as security for its own cross-claim. Lonsdale would be exposed to precisely the same danger here if they sought to prove their own claim (para [10], above) in Bresco's liquidation. For that reason, Chadwick LJ said that, ordinarily, summary judgment to enforce the adjudicator's decision would not be available. He only upheld the order for summary judgment in that case because the point had not been taken before the judge and he could achieve the necessary result by staying execution.
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> 44. The point about the lack of utility of an adjudication involving a company in liquidation was also picked up by HH J Purle in *Philpott*. In that case (at [30]) he said:
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> > "The adjudication will produce at most a temporary obligation, more in the nature of an interim payment. However the contractual right to

> an adjudication is there. Whether or not the court would enforce any order against the company seems inconceivable, as this would defeat the requirement of pari passu distribution, and it may therefore be that were the school to make an adjudication application, that might be met by an application for a stay by the liquidators on conventional insolvency grounds."
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> 45. Accordingly, these authorities acknowledge that a decision of an adjudicator in favour of the company in liquidation, like Bresco, would not ordinarily be enforced by the court. HHJ Purle said that such enforcement was "inconceivable"; that may put it too high but, in my view, judgment in favour of a company in insolvent liquidation (and no stay), in circumstances where there is a cross-claim, will only be granted in an exceptional case."

41. It is important to appreciate that in these passages Coulson LJ was contemplating a typical adjudication which only involves certain limited issues in dispute between the parties, rather than the (fairly rare) adjudication which deals with a contractor's final account and covers all the matters in issue between the parties. Such a decision would determine, albeit on an interim basis, the entirety of the dispute between the parties.

42. This, in effect, may have been the position in the *Primus* case. On 5 May 2015 Cannon engaged Primus to design and build a new hotel in London. On 26 July 2016 Primus served on Cannon a payment notice in the sum of £261,000 odd. Cannon served a pay less notice in response, putting the amount due at nil. Shortly thereafter, on 11 August 2015, Cannon served a notice of termination and ordered Primus to leave site that same day, which it did. Each side alleged that the other was in repudiatory breach of contract and the dispute was referred to what became the second adjudication between the parties.

43. In that decision it was held that Primus was not in repudiatory breach of contract but that Cannon was. Almost at the same time there was a third adjudication, in which the same adjudicator held that Cannon was liable to pay Primus £220,000 odd in respect of the payment notice that it had served back in July 2016. That sum was not paid.

44. On 10 January 2017 Primus issued proceedings in the TCC, claiming damages for the repudiatory breach of contract, together with the unpaid sum due as a result of the third adjudication.

45. On 27 July 2017 Primus entered into a CVA. Although Primus was currently insolvent, it was anticipated that it could trade its way out of its difficulties so that the creditors would ultimately receive 100p in the pound, as opposed to nothing if there was an immediate liquidation.

46. On 8 March 2018 Primus referred to adjudication its claim for the damages caused by the repudiatory breach of contract. In this fourth adjudication the adjudicator went through the claims in detail and identified a net sum due to Primus of £2.128 million, plus interest. The adjudicator addressed, and almost entirely rejected, the cross-claims raised by Cannon.

47. On 21 May 2018 Primus commenced separate proceedings in the TCC to enforce the decision of the fourth arbitrator in the sum of £2.128 million odd. A month later Cannon

expressly accepted in writing that summary judgment could be entered against it, but sought a stay of execution.

48. The application came before HHJ Waksman QC (as he then was), who considered the decision of Akenhead J in *Westshield* and concluded that he had not held that merely because a company was in a CVA summary judgment should be refused. At paragraph [91] he said this:

> "For all of those reasons it cannot be said, adopting the observations of Chadwick LJ, as echoed by Akenhead J, that summary judgment is always to no advantage to a party because inevitably there will be a netting-off exercise taking account of the counterclaim. Where both parties are already in litigation, where claims and counter claims have already been advanced or will be advanced, where the supervisor has already taken the view and considered that Cannon is no longer a creditor, a different situation applies. If Primus is the net winner in the litigation it will recover money from Cannon. It will distribute it to its creditors. If Cannon is the net winner it will, in effect, have to prove for its net claim in the CVA. Precisely the same result would obtain had there been no litigation but only a supervisor's exercise of the netting-off. So although there is no evidence directly from the supervisor as to what he would do, it seems to me inconceivable that there will be any kind of netting-off exercise here unless it is simply a repetition of the view which the supervisor has already taken."

49. HHJ Waksman QC did not order a stay of execution. His conclusion, after considering the Westfield case, with which the Court of Appeal agreed, was summarised as follows, at [87]:

> "What I do <u>not</u> read from that decision is that wherever there is a purported counterclaim and a CVA it must follow that there can be no summary judgment. For example, take this case. The adjudicator has in effect already considered both claim and counterclaim and both parties have agreed to litigate the matter as effectively the step which is going to be required in any event in order to achieve finality. In those circumstances, whatever else may be said about the CVA, it is impossible to see how or why the supervisor would wish to undertake some yet further consideration of the claim and counterclaim. There would be absolutely no point because (a) it is all going to end up in the current litigation anyway and (b) the supervisor here has, as it seems to me on the evidence, already adopted the result of the adjudication as against Cannon, to say that it was not a creditor. This, of course, is in circumstances where the entire purpose of the CVA was to make recovery of all sums owed to it by litigation if necessary."

50. Finally, in his judgment in the Court of Appeal Coulson LJ said, at [108]:

> "In addition, it seems to me that the general position relating to a CVA may, depending on the facts, be very different to a situation where the claimant company is in insolvent liquidation. In the latter case, claims being made by the company are part of what might be called a damage limitation exercise, whereby the liquidators endeavour as best they can to pay dividends to creditors. A CVA is, or can be, conceptually different. It is designed to try and allow the company to trade its way out of trouble. In these circumstances, the quick and cost-neutral mechanism of adjudication may be an extremely useful tool to permit the CVA to work. In those circumstances, courts should be wary of reaching any conclusions which prevent the company from endeavouring to use adjudication to trade out of its difficulties. On

> one view, that is what adjudication is there for: to provide a quick and cheap method of improving cash flow."

51. The Court of Appeal went on to refuse to stay execution of the judgment enforcing the adjudicator's decision in this case.

52. This decision broadly confirms the views that I have already reached based on an analysis of the provisions of the CVA and the nature of the adjudicator's decision. If the adjudicator here had decided all the claims and cross claims between the parties, then a different result might have followed. But that is not what happened. I should add that I am not wholly convinced that the actual result in *Primus* is consistent with my reasoning in paragraphs 34-37 above, but the facts were complicated and, based on the material in the judgment, I cannot form a view one way or the other.

Conclusions

53. It seems to me that the flaw underlying Mr Graham-Dixon's approach is that the effect of the adjudicator's decision, which created a debt that arose before the CVA was entered into and which, if paid prior to the CVA, would have to be taken into account as part of the netting off exercise, is, under the rules of the CVA, quite different from the effect of a payment of that sum to Indigo after the CVA has been entered into. That is because the latter would go into the general fund for the benefit of the creditors as a whole, rather than being taken into account as part of the exercise of drawing up the balance of the dealings between Indigo and the Defendants.

54. For the reasons that I have given, I consider that since the adjudicator's decision was not a decision that determined the value of Indigo's claims or the value of any particular claim, but was in effect an order for an interim payment, it would have had no effect on the supervisors' setting-off exercise unless it had been complied with prior to the CVA. Had that happened, there would have been a payment made before the CVA which would form part of the parties' mutual dealings.

55. In my judgment, therefore, the existence of an unsatisfied adjudicator's decision prior to the entering into of the CVA is the significant factor which distinguishes this case from those decided previously. To order the Defendants to pay, after the CVA has been entered into, the sum determined by the adjudicator would, in my judgment, distort the process of accounting that is required under the CVA because the money would not be applied for the sole benefit of the Defendants but instead for the benefit of the creditors generally.

56. Further, it would be distorted in a way that would always operate to the detriment of the Defendants, so that it would be wrong in principle to enforce the decision by ordering the Defendants to pay Indigo the sum found due.

57. If I am wrong about this, I would hold that this is a case where the conclusions that I have reached about the effect of ordering payment of the sum found due by the adjudicator would amount to special circumstances within the meaning of CPR 83.7(4)(a) such as to justify staying enforcement of the full amount. Whilst in some circumstances it might be right to order a stay of part of the sum awarded by the adjudicator, I can see no way in which the court on this application could arrive at an appropriate figure to be paid on the basis of the material available.

58. Indigo's final position is that if I am against it on all other points, I should order payment into court of the amount determined by the adjudicator. However, in circumstances where it is quite impossible to predict the value of either Indigo's claim or the Defendant's cross-claims for delay and defective work, I cannot see how this would be a fair or appropriate solution. I therefore decline to make such an order.

59. For all these reasons Indigo's application fails and must be dismissed.

60. As to costs, I will give Indigo permission to make brief written submissions as to the correct order for costs within seven days of the circulation of this judgment in draft. The Defendants may have a further seven days in which to put in brief submissions in response. I shall then decide the matter on paper.