

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
TECHNOLOGY AND CONSTRUCTION COURT

Birmingham Civil and Family Justice Centre
Priory Courts
33 Bull Street
Birmingham
B4 6DS

Date: 08/10/2020

Before :

HHJ SARAH WATSON

Between :

JRT Developments Ltd	<u>Claimant</u>
- and -	
TW Dixon (Developments) Ltd	<u>Defendant</u>

Mr David Hoffman (instructed by **Nowell Meller**) for the **Claimant**
Ms Brenna Conroy (instructed by **Foot Anstey LLP**) for the **Defendant**

Hearing date: 25 August 2020

JUDGMENT

HHJ Sarah Watson:

1. This is an application for summary judgment to enforce an adjudication award dated 17 December 2019 and a cross application for a stay of execution pursuant to CPR 83.7 (4). The application for summary judgment is not opposed. The issue before me is the stay of execution.
2. The Claimant, JRT Developments Ltd (JRT) has the benefit of an adjudication decision in the sum of £952,579 plus any VAT that may be applicable. Although JRT claimed VAT in addition to that sum, it now concedes that VAT is not payable. In addition, the Adjudicator awarded JRT the costs of the adjudication of £7,853.75.
3. The Defendant, TW Dixon (Developments) Ltd (TWD), has issued proceedings for a declaration that the payment notice that is the subject of the adjudication (the Disputed Payment Notice) was invalid, on the ground that it included sums to which JRT had no contractual entitlement and also on the ground that, as it was the third notice issued by JRT for the sums allegedly due at the relevant due date, it was not in substance, form or intent a payment notice under the contract and it was not free from ambiguity. That claim was issued as a Part 8 claim and TWD sought an early determination of the issue of the validity of the Disputed Payment Notice. However, there are disputes of fact between the parties, including as to whether the contract is a fixed price contract or a costs-plus contract, which make it unsuitable for Part 8. Following an order that the claim continue as a Part 7 claim, TWD has amended its claim to include determination of the sum (if any) due to JRT. TWD also argues that it has already overpaid JRT and claims a repayment. If the contract is found to be a fixed price contract, TWD claims it is entitled to repayment of £1,575,173.22. If the contract is found to be a costs-plus contract, TWD claims it is entitled to repayment of £322,167.22.
4. TWD seeks a stay of execution of judgment until the trial of its claim against JRT on the grounds of JRT's probable inability to repay the judgment sum following trial of TWD's claim, and on the ground that it is unable to pay the award and, if a stay is not granted, it will suffer manifest injustice.

Factual background

5. Before I turn to the law and the application of the law to the facts in this case, I shall set out in some detail the factual background of the case.

6. JRT is a company owned and controlled by Mr Jonathan Woodcock (Mr Woodcock), a quantity surveyor. His late father, Mr Frank Woodcock, was a builder.
7. TWD is a company that was formed for the purposes of carrying out a development of 14 houses at Station Yard, Piper Gate, near market Drayton, Shropshire. Its shareholders and directors are Mr and Mrs Dixon. They are in their 70s and Mr Dixon is not well.
8. Mrs Dixon is Mr Woodcock's aunt and the late Mr Frank Woodcock's sister. Before his death, Mr Frank Woodcock, Mr Woodcock and Mr and Mrs Dixon discussed developing some farmland by building houses on it. Mr and Mrs Dixon transferred land to TWD. It was agreed that JRT would contract with TWD to build the houses and carry out the infrastructure works and associated work. JRT had been in business for a short period before then, but this was its first major project.
9. Mr and Mrs Dixon had no previous involvement with the construction industry. It is clear from the witness statements of both parties and from the contemporaneous documentation that the dealings between JRT and TWD were informal, which is not surprising, given that Mr Woodcock was Mrs Dixon's nephew and that he had experience of the construction industry and they did not. The parties agree that Mr Woodcock and JRT helped TWD in ways that would not normally be expected. The impression I have from the evidence is that the relationship between the parties was more like that of joint venture partners than that of employer and contractor in an arm's length construction contract. For example, the parties agree that Mr Woodcock arranged the funding for the project for TWD, though they do not agree as to whether he did that personally for TWD or whether he did so in his capacity as a Director of JRT.
10. The project was funded by a loan from the Homes and Communities Agency (HCA).
11. At some point during the project, TWD employed Mr Michael Neville, who is another nephew of Mrs Dixon. It is my understanding that he did not have any previous experience of the construction industry. His original involvement with the project was to assist with sales and marketing of the houses that were to be built, though his role later expanded to that of a manager.
12. The parties are in dispute as to the terms of the contract. They executed two agreements: a contract dated 22 June 2016 in the form of the JCT Minor Works Contract with Design 2011 Edition (the JCT Contract) and an agreement entitled "Commercial Agreement" also dated 22

June 2016 (the Commercial Agreement). Article 2 of the JCT Contract, under the heading “the Contract Sum”, provides “*the Employer will pay the Contractor at the times and in the manner specified in the conditions the VAT-exclusive sum of £1,191,752 (“the contract sum”) or such other sum as shall become payable under this Contract*”. The work is described as the design and construction of 14 dwellings, the infrastructure and site facilities including foul and surface water. The JCT Contract also states that the employer has had documents prepared which show and describe works to be done, being the drawings listed in Commercial Agreement document ref NH 22/06/16, a specification and work schedules. Whilst the Commercial Agreement does contain drawings, my understanding is that no formal specification or work schedules were prepared or agreed.

13. The Commercial Agreement provides that JRT is to manage the project. It states
“The development will be constructed on a cost plus basis covered through the funding of means (sic) of the Communities and Housing Association. The associated costs and overheads of TW Dixon will be covered by JRT Developments.”
“The Properties will be delivered at cost plus the business overheads of JRT. Agreement of profit share against the sale of the properties is to be split against a 50:50 ratio of gross profit minus the plot value and the associated build and sale costs.”
14. It also provides that any dispute resolution is proposed to be delivered through the mediation process provided by the RICS.
15. The parties are in dispute as to whether the JCT Contract incorporated the Commercial Agreement or only the drawings referred to in the Commercial Agreement. As a result, they are not agreed as to whether the JCT Contract was a fixed price contract or a costs-plus contract. JRT’s case is that the JCT Contract incorporated the Commercial Agreement and was therefore a costs-plus contract as provided in that document. The payment notice that is the subject of the adjudication was prepared on the basis that the JCT Contract was a costs-plus contract.
16. Despite an Architect being named in the JCT Contract, no Architect or Contract Administrator was appointed.
17. Clause 4 of the Conditions to the JCT Contract contains the payment provisions. It provides for interim payments up to practical completion at 4 weekly intervals, on the basis of interim certificates issue by the Architect or Contract Administrator. Clause 4.5.2 provides that, if an interim certificate was not issued, the Contractor may give a payment notice to the

Architect/Contract Administrator and that the sum to be paid by the Employer shall be the sum stated in the payment notice, subject to any notice given pursuant to clause 4.5.4. Clause 4.5.4 provided for the Employer to issue a pay less notice.

18. The parties did not operate the payment procedure contained in the JCT Contract during the three year course of the contract. Instead, Mr Woodcock engaged directly with HCA's valuer, WYG, including by submitting details of JRT's costs (supporting invoices and proofs of purchase) to WYG and showing them around the site to enable them to value the work carried out. WYG carried out periodic valuations of the work pursuant to which HCA made payments. JRT issued invoices to TWD for the amounts approved by WYG for HCA. Those invoices were paid using the funding from HCA. At no time during the contract did JRT issue any payment notice pursuant to the JCT Contract or raise an invoice for any sum exceeding the amount approved by WYG and paid by HCA.
19. TWD's evidence is that the relationship soured as the result of cost overruns and delay and also as a result of JRT's actions. In particular, TWD says that JRT purported to sell one of the plots without reference to TWD. JRT denies it did this without TWD's agreement. In addition, TWD complains that JRT borrowed £95,000 from a purchaser of one of the plots to fund a project for ground source heating at the site. That project was unrelated to TWD. It was a project run by a company called Frank's Woodys' Ltd, which is another of Mr Woodcock's companies. In addition, JRT entered into a contract for the development of one of the sites directly with a purchaser, under which the purchaser paid JRT to build the house on it. TWD believes that the costs of building that house had already been included in the costs approved by WYG for HCA and had been paid by TWD using funding from HCA. It served a statutory demand on JRT for repayment of the sum they considered to have been overpaid.
20. On 13 June 2019, the contract was terminated by JRT. The parties are not agreed whether JRT terminated that contract of its own will or whether, as JRT contends, it terminated the contract to avoid TWD carrying out its threat to petition to wind up JRT pursuant to the statutory demand. Both parties allege the other is in repudiatory breach of contract.
21. After the contract had been terminated, Mr Woodcock and Mr Neville engaged in a dialogue with a view to resolving financial matters between them.
22. JRT sent to TWD an application for payment dated 28 June 2019, identifying the amount due as at 1 June 2019 as £952,578.97. That document was marked "*Application Number: 293*"

and “*Application for Payment*” and stated that it was “*Contractor’s Application for Payment (associated to the Commercial Agreement, 22 June 2019)*”. It did not mention the JCT Contract. With it was a breakdown of the amount claimed, stating the total value of contract works completed as £3,006,926.34 and giving credit for payment already received in the sum of £2,054,347.37. In the adjudication, JRT argued that this document was a prompt to make payment but was not a payment notice and did not create an obligation on TWD to make payment. Inconsistently with that, in his evidence in these proceedings, Mr Woodcock states that it was a payment notice.

23. On 19 September 2019, JRT sent TWD a letter headed “*Notice - default payment notice*” in the following terms:

“Please find attached the cost information you requested following the issue of the applications summarising the costs to date for the whole project.

Further to the submission of costs; with no payment notice issued the amount due on the 1 June 2019 is outstanding.

We hope you can discuss this further with ourselves to come to some sort of reconciliation. We would hope that mediation would be a possibility if you would be willing to come meet to review.

I hope the information issued today is of use with your discussions with Homes England and we can look forward to resolving the deficit.

If you have any queries, please don’t hesitate to contact me.”

24. It is my understanding that the reference to Homes England is a reference to HCA. It therefore appears from this letter that JRT envisaged TWD discussing JRT’s claim for payment with HCA. JRT was also suggesting a meeting or mediation.

25. On 22 September 2019 Mr Neville responded on behalf of TWD in the following terms:

“Thank you for providing the information I requested. I also acknowledge receipt of your notice of default, dated 19/09/19.

As a matter of procedure, I will now undertake a thorough review of your submissions; within the context of WYG valuations and contractual entitlements.

On first reading the information you have provided, it is clear that a significant amount of time needs to be spent on this task. I have identified some discrepancies and anomalous entries within the records; and will revert to you with my initial comments no later than 21 days from the date of this letter.”

26. On 4 November 2019 JRT issued what it argued, and the adjudicator found, was a payment notice under clause 4.5.2 of the JCT Contract (the Disputed Payment Notice). It took the form of a letter headed “*Payment notice in default*” and read as follows:

“We refer to our notice dated 19 September 2019 and your letter dated 22 September 2019. To date we have not received any response detailing the amount you consider due for payment. We note that our previous letter notified the amount we consider was due on 1 June 2019 however we appreciate you may consider the due dates are calculated from the date the commencement in the contract. Accordingly this would mean the appropriate due date was 20 May 2019.

We therefore give you notice that as you have not issued a payment notice we issue our payment notice which identifies the amount we consider to have been due on 20 May 2019 and the basis on which that sum is calculated. For the avoidance of doubt the sum due on 20 May 2019 was £952,579 as attached.

If you have any queries or would like to discuss this matter further please don’t hesitate to contact me.”

27. Unlike the notice that JRT had issued in June 2019, which had stated it was associated to the Commercial Agreement, the Disputed Payment Notice did not mention the Commercial Agreement. Nor did it make reference to the JCT Contract or the payment provisions in it. It enclosed the same breakdown of the claim as had supported the application of June.

28. TWD did not appreciate the significance of this document and did not serve a pay less notice. Instead, Mr Neville wrote to Mr Woodcock on 13 November 2019 in the following terms:

“I write further to my correspondence of 22.09.19 (attached), which was response to your demand notice of 19 period 09.09.19. The following items are raised for your explanation: –”

29. The letter raised a number of queries including

- a. the basis on which JRT accrued sales costs, marketing costs and legal costs attributable to the project,
- b. details of a number of items claimed,
- c. how the Community Infrastructure Levy (CIL) figure had been calculated and asked for acknowledgements of receipt from Shropshire Council for the CIL payments claimed,

- d. how the claimed loan costs had been calculated, and how any loans had been used for the project (noting Mr Woodcock had previously stated that some of JRT's borrowings had been applied to the funding of the neighbourhood heating system),
 - e. whether allowance had been made for a £95,000 loan from the purchaser of plot 11.
30. The letter also made clear that the queries were raised against the summary sheets and TWD reserved the right to raise further questions and seek further clarification when necessary. Mr Neville's letter ended in the following terms:
- "I would appreciate you looking into all the matters I have raised. In the meantime, I will continue to work through the supporting documentation issued with your application for payment and should I require any further clarifications I will be in touch as a matter of priority, in order to speed the resolution of this matter."*
31. Whilst the validity of the Disputed Payment Notice is a matter to be decided in TWD's claim, it is clear that Mr Neville, who was dealing with this issue for TWD, understood the Disputed Payment Notice to be part of the process in which he had been engaged with Mr Woodcock in trying to resolve the outstanding issue of what was due following termination of the contract. He did not understand that the Disputed Payment Notice was intended to be different from the previous correspondence, which he understood he was to assess with a view to attempting to reach agreement. Nor did he understand that TWD needed to serve a pay less notice to protect its position.
32. On 14 November 2019, being the first day on which it could do so, JRT referred the matter to adjudication.
33. TWD participated in the adjudication. It challenged the validity of the Disputed Payment Notice but did not raise all the points it now raises. The Adjudicator's decision was that the Disputed Payment Notice was a valid payment notice pursuant to clause 4.5.2 of the JCT Contract Conditions and that therefore TWD owed JRT the amount demanded in it, having failed to serve a pay less notice. The Adjudicator also determined that TWD should pay his fees in the sum of £7,853.75.
34. On 10 March 2020, JRT issued proceedings and sought summary judgment to enforce the adjudication decision.

35. On 22 April 2020, TWD issued Part 8 proceedings seeking a declaration that the Disputed Payment Notice was not a valid payment notice under the JCT Contract because it included sums that the Defendant was not entitled to under the contract and alternatively because it was the third notice issued by JRT for the sums allegedly due at the relevant due date, it was not in substance, form and intent a payment notice and was not free from ambiguity.
36. The Covid-19 pandemic then intervened. It created particular difficulties for TWD because Mr Dixon was required to shield. In addition, Mr Neville, who is blind and works with an assistant, was unable to read the documents he needed to read to defend the claim as his assistant was unable to work. The parties sensibly agreed an adjournment of the summary judgment application but did not agree further adjournments. At the hearing of TWD's application for a further adjournment and for directions on the Part 8 claim, TWD argued that the Part 8 claim should proceed before the summary judgment application, on the basis that the issue of the validity of the Disputed Payment Notice, if resolved in TWD's favour, would bring the proceedings to an end. However, there was a substantial dispute of fact between the parties as to the terms of the contract, so that the claim was not suitable to proceed as a Part 8 claim unless TWD made concessions that it did not feel able to make, and the Part 8 claim is now proceeding as a Part 7 claim. As a result of the fact that the claim would proceed as a Part 7 claim, TWD amended the claim to include its claim for a valuation of the sums due, to avoid a proliferation proceedings. The Costs and Case Management hearing on that claim has not yet taken place but the parties appear to be agreed that it may take a year before the case can be tried, as the draft directions envisage experts' reports being served by 25 June 2021.

The positions of the parties

37. TWD concedes that JRT is entitled to summary judgment on the adjudication award. However, it seeks a stay of enforcement pursuant to CPR 83.7 (4), on the basis that there are "special circumstances" being:
- a. the probable inability of JRT to repay the judgment sum at the end of the substantive trial. It relies on the case of *Wimbledon Construction Company 200 Ltd v Vago* [2005] EWHC 1086 (TCC); and
 - b. the risk of manifest injustice if no stay is granted, as a result of TWD's inability to pay and all the circumstances of the case. It relies on the cases of *Hillview Industrial*

Development (UK) Ltd v Botes Building Ltd [2006] EWHC 1365 (TCC) and
Galliford Try Building Ltd v Estura [2015] WEHC 412 (TCC).

38. JRT opposes the application for a stay of enforcement. It argues that the test in *Wimbledon* is not met and that, in order for the court to find there would be manifest injustice, the circumstances would have to be exceptional and I would have to consider what sum TWD could pay.

The Law

39. CPR 83.7 (4) provides as follows:

“If the court is satisfied that-

(a) there are special circumstances which render it inexpedient to enforce the judgment or order; or

(b) the applicant is unable from any reason to pay the money, then, notwithstanding anything in paragraph (5) or (6),

the court may by order stay the execution of the judgment or order, either absolutely or for such period and subject to such conditions as the court thinks fit.”

40. The parties are agreed that, in the case of adjudication enforcement, the general rule is that there should not be a stay. The purpose of the statutory scheme is to facilitate cash flow in favour of the contractor and a stay defeats that purpose. However, the court retains the discretion to stay execution. One of the circumstances in which it may do so is where it is probable that the Claimant would be unable to repay the judgment sum at the end of the trial.

41. Guidance was provided by HHJ Coulson QC, as he then was, in *Wimbledon Construction* in the following terms:

“26. In a number of the authorities which I have cited above the point has been made that each case must turn on its own facts. Whilst I respectfully agree with that, it does seem to me that there are a number of clear principles which should always govern the exercise of the court's discretion when it is considering a stay of execution in adjudication enforcement proceedings. Those principles can be set out as follows:

- a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.
- b) In consequence, adjudicators' decisions are intended to be enforced summarily and the Claimant (being the successful party in the adjudication) should not generally be kept out of its money.
- c) In an application to stay the execution of summary judgment arising out of an Adjudicator's decision, the Court must exercise its discretion under Order 47 with considerations a) and b) firmly in mind (see AWG).
- d) The probable inability of the Claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see Herschell).
- e) If the Claimant is in insolvent liquidation, or there is no dispute on the evidence that the Claimant is insolvent, then a stay of execution will usually be granted see *Bouygues and Rainford House*).
- f) Even if the evidence of the Claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:
 - (i) the Claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see Herschell); or
 - (ii) The Claimant's financial position is due, either wholly, or in significant part, to the Defendant's failure to pay those sums which were awarded by the adjudicator (see *Absolute Rentals*).

42. In *Absolute Rentals v Gencor Enterprises* HHJ Wilcox QC declined to stay execution in the following terms:

“The Defendant has late, served statements putting into question the Claimant's financial viability and contends that I should stay judgment pending the outcome of the Defendant's substantial claim now referred to arbitration, To do so would frustrate the Scheme. - Whilst the Claimant has admitted an irregularity in making its company returns, it asserts in an Accountants statement put in at the hearing that the proper notification of Directors has been made and has now been filed at Company's House. I am not in a position to judge the

financial standing of either company. It is not desirable that I should on such limited evidence before me, neither is it desirable to do so on such an application, It is entirely possible that if there is any impecuniosity in the Claimants, it could derive from the Defendant's default. I do not know what the timetable for the arbitration is or what the resolution will be by the Arbitrator or agreement. The purpose of the Scheme is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis and, by requiring decisions of Adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement, whether those decisions are wrong in point of law or fact, if within the terms of the reference. It is a robust and summary procedure and there may be casualties although the determinations are provisional and not final. See *Bouyges UK Ltd v Dahl-Jensen UK Ltd* TCC Dyson J judgment of the 17th November of 1999 at Paragraph 35.”

43. Roger Ter Haar QC, sitting as a Deputy Judge of the High Court, in the case of *Broseley London Ltd v Prime Asset management Ltd* [2020] EWHC 944 (TCC) summarised further relevant authorities in the following terms, which I shall cite as they are a helpful summary on which I cannot improve.

“[22] In *Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2018] EWCA Civ 2695, (2018) 182 ConLR 38, [2019] Bus LR 628 (at [23]) Coulson LJ confirmed that, as Fraser J had decided at first instance, the above should be supplemented as follows:

‘(g) If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the Claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay.’

[23] Further principles have been stated in the authorities, including that:

‘The burden is clearly upon the party seeking a stay to adduce evidence of a very real risk of future non-payment’ (*Total M & E Services Ltd v ABB Building Technologies Ltd* [2002] EWHC 248 (TCC), (2002) 87 ConLR 154 at [52]).

[25] In *LXB RP (Crown Road) Ltd v Squibb Group Ltd* [2016] EWHC 2669 (TCC), Stuart Smith J, at para [11], after citing the statement of principle in *Wimbledon* said the following:

‘Without derogating from that statement of principle a decision to enforce or not is an exercise of the court’s discretion, which must balance the well known interest in enforcing valid adjudication decisions – for reasons that have been repeated frequently elsewhere and do not need further

repetition now – against the perceived or actual risk of future injustice if the party subsequently becomes unable to reciprocate in the payment of what it owes under the same contract.’

[26] When carrying out the balancing exercise, O’Farrell J has held that ‘where the arguments are finely balanced ... the court should lean in favour of enforcement of the judgment’ (*Kersfield Developments (Bridge Road) Ltd v Bray & Slaughter Ltd* [2017] EWHC 15 (TCC), (2017) 170 ConLR 40 at [110]).

[27] In addition to the authorities cited by Mr Choat, Mr Townend also referred me to the decision of Weatherup J in *Sutton Services International Ltd v Vaughan Engineering Services Ltd* [2013] NIQB 63. At para [5] of that judgment, the learned judge said:

‘The Plaintiff’s financial position may be such that there will be no dispute as to the Plaintiff’s financial difficulties but this issue may also arise, as in the present case, where the parties are in dispute about the Plaintiff’s financial position. A number of general points might be made about an application for a stay in these circumstances.

First of all it is important that the exercise of the discretion to grant a stay must not be used to frustrate the purpose of the adjudication scheme. The legislation was intended to provide for expeditious treatment of disputes on an interim basis to secure the circulation of finance pending final resolution of the contractual issues.

Secondly, the onus is on the Defendant to establish that the Plaintiff is probably going to be unable to make the payment to the Defendant should the Defendant be successful in the final outcome of the contractual dispute.

Thirdly, even if the Defendant establishes that the Plaintiff will probably be unable to repay the Defendant, that would not usually justify the grant of a stay if:

- (i) the Plaintiff’s financial position is the same or similar to its financial position at the time when the relevant contract was made; or
- (ii) the Plaintiff’s financial position is due either wholly or in significant part to the Defendant’s failure to pay those sums which were awarded by the Adjudicator (see *Wimbledon Construction Company 2000 Ltd v Derick Vago* [2005] EWHC 1086 (TCC), [2005] All ER (D) 277 (Jun)).

Fourthly, the Court may take into account the diligence of the Defendant in pursuing the claim against the Plaintiff as the Defendant’s conduct of that claim may provide a basis for refusing to

grant a stay or a basis for granting a stay for a limited time to enable the Court to review the progress of the Defendant's claim against the Plaintiff.'

[28] As to Weatherup J's fourth point, this reflects the approach of the English courts as described in para 17.28 of *Coulson on Construction Adjudication* (4th edn, 2018) (particularly the last sentence of that paragraph):

'In *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd* ... HHJ Toulmin CMG QC observed that, whilst it was not possible to say how far an applicant had to go in putting evidence before a court in support of a stay, it should be noted that the court should not grant a stay unless, consistent with the overriding objective in the CPR, the justice of the case demanded it. In addition, the judge indicated that one matter that the court might consider is the diligence with which the Defendant pursued its cross-claim or challenge to the adjudicator's original decision. If the Claimant was to be kept out of its money at all, it should be for the shortest reasonable time, so that the right approach might well be to grant a stay for a limited time originally, with extensions depending on the conduct of the parties. By contrast, a failure by the Defendant to pursue its cross-claim or challenge with diligence may itself be a bar to a successful application for a stay of execution.'

[29] The principle in that last sentence is also reflected in the decision of HHJ Toulmin CMG QC in *ALE Heavylift v MSD (Darlington) Ltd* [2006] EWHC 2080(TCC) at [100]."

44. As Ms Conroy explains in her skeleton argument, to meet the test in *Wimbledon*, TWD must satisfy me that the 3 limbs of the test in *Wimbledon Construction* are met. They are:

- a. the probable inability of JRT to repay the judgment sum at the end of the trial in TWD's claim;
- b. JRT's financial position is not the same or similar to its financial position at the time the JCT Contract was entered into (22 June 2016); and
- c. JRT's financial position is not due either wholly or in significant part due to TWD's failure to pay the sums awarded in the adjudication.

45. TWD also argues that it would suffer manifest injustice if no stay were ordered and relies on the case of *Galliford Try Building Ltd v Estura Ltd* [2015] EWHC 412 (TCC). In that case, Edwards-Stuart J partially stayed execution of judgment on the ground that enforcement of the full judgment would cause manifest injustice to the Defendant. The Claimant (the Contractor) had referred to adjudication a dispute over its interim application for payment (IA

60). It had described this application as an “*indicative final account and valuation summary*”. The final account was expected to be only £4,000 more than the sum claimed in IA 60. This sum was almost £5,000,000 more than the contract sum. The Defendant failed to serve a pay less notice and the Claimant obtained an adjudication award for the full amount of IA 60. Edwards Stuart J found that payment of the award in full would probably be impossible for the Defendant and that if the Claimant were to be paid, it could well take 6 or 9 months before the Defendant could obtain a true value adjudication of the value of the works carried out by the Claimant. Edwards-Stuart J held that, even though the Defendant had brought the problem on itself by failing to issue a pay less notice, that did not mean the court had to refuse a stay of execution, no matter how unfair that would be to the Defendant. The following is an extract from the judgment in that case:

“[52] Alternatively, Estura will be able to start proceedings for a determination of GTB’s final account, albeit that this remedy will not provide much comfort to Estura in terms of cash flow. Its position, if it is correct that GTB’s final account has been grossly overvalued, is that it must pay now and wait for the outcome of the litigation to reverse the position. That will mean that it is kept out of its money for a long time, which is clearly unsatisfactory. Indeed, Estura submits that it is more than unsatisfactory because not only is it not in a position to pay the sum awarded by the adjudicator if a judgment were to be enforced now but also it would not be able to afford the litigation that will be necessary to ensure a proper valuation of GTB’s final account.

[53] Even though this is a situation which Estura has brought on itself by its failure to comply with the notice provisions in the contract (or, alternatively, the failure by its agent, P H Warr, to comply on its behalf), that does not mean that the court must refuse the grant of a stay of enforcement of any judgment irrespective of how unfair that might be to Estura.

[54] Mr Williamson referred me to the decision of Coulson J in *Hillview Industrial Developments (UK) Ltd v Botes Building Ltd* [2006] EWHC 1365 (TCC), [2006] All ER (D) 280 (Jun), where he said:

‘[33] Finally, I must consider whether or not to grant a stay in the circumstances of this case. I am satisfied that Hillview is entitled to judgment but I am also satisfied that the purpose of the 1996 Act is to provide a statutory framework which would enable justice to be done between parties to a dispute. It was not intended to cause injustice. This can, in appropriate cases, be dealt with by the grant of a stay. I am satisfied that the jurisdiction in adjudication enforcement cases to grant a stay under the CPR must be limited to cases where there is a risk of manifest injustice.’

[55] I agree entirely with those observations.”

46. In *Galliford Try*, the Edwards-Stuart J found that the Defendant's financial hardship had not been caused by the Claimant. Nonetheless, he held that, in the unusual circumstances of that case, it would be unjust to the Defendant to be forced to pay the judgment in full, and granted a partial stay of execution, in a sum that would be fair to both parties.

Application of to the facts of this case

The first limb of the test in *Wimbledon* - probable inability to repay

47. TWD argues that JRT is already insolvent, both on a balance sheet and cash flow basis.

48. JRT has produced a balance sheet as at 7 July 2020. It includes £665,888.56 in respect of TWD's debt. It is noteworthy that that figure is substantially lower than the adjudication award and I can only conclude that JRT recognises that it is unlikely to retain the benefit of the full adjudication award following trial. The balance sheet shows total net assets of £188,667.36. However, it is very confusing in its presentation. Mr Court's witness statement for TWD argues that it contains arithmetical errors and that, rather than show a positive net asset balance, if those errors were corrected, there would be a shortfall of around £144,000. I have done my best to check it and I believe that, although it is very confusing, Mr Court is probably wrong in saying that the balance sheet is arithmetically incorrect.

49. The balance sheet also is confusing because it contains under the heading "creditors: amounts falling due after more than one year" a number of entries which are negative. The balance sheet shows Frank's Woodys' Limited (which is a company owned and controlled at least in part by Mr Woodcock) as a negative creditor in the sum of £190,463.32. There is a similar entry for Frank's Woodys' Utilities Ltd, in the sum of £2,199.15, and a further entry against Station Yard Landlords for £1,129.60. I assume that those negative entries indicate sums due from those "creditors", so that they are JRT's debtors, not its creditors. If that is correct, it appears that JRT has leant over £193,500 to related companies. If that is incorrect, and those companies are JRT's creditors rather than its debtors, JRT would be balance sheet insolvent.

50. However, on the assumption that they are debtors not creditors, it appears that JRT currently has net assets of £188,667.36, as shown in its balance sheet, including about £193,500 owed to it by related companies.

51. TWD also points to the bank statements of JRT and notes that the overall indebtedness appears to be being kept consistently just under £25,000, suggesting that the JRT is keeping

within its banking facility and making inter-company transfers to do so. It also raises a concern as to the inter-company transfers. It does not allege fraud on JRT's part. There is no evidence before me of any impropriety, or that JRT is seeking to arrange its finances with the object of defeating its ability to repay the judgment sum after trial.

52. As far as cash flow insolvency is concerned, TWD relies on the facts that JRT has unsatisfied County Court judgments against it for a relatively small sums (one being for about £2,448 and the other for about £9,340) and has entered into payment arrangements with those creditors. JRT accepts that it has financial difficulties but argues that entering into the payment arrangements is part of its cash flow management and does not mean that it is insolvent on a cash flow basis. As I have noted, it appears that JRT and its associated companies are being run together, so as to maximise the use of JRT's banking facilities. It may be that, if required, those companies could repay some of their debt to enable JRT to meet its obligations as they fall due. JRT is continuing to trade.
53. On the evidence before me, I am unable to make a finding that JRT is insolvent, although it is possible that it is insolvent on a cash flow basis and, if my assumption as to the negative "creditors" is incorrect, it would be insolvent on a balance sheet basis.
54. TWD argues that, whether technically solvent or not, I should be satisfied that JRT will probably be unable to repay the judgment sum if ordered to do so. It seems clear to me that, with total net assets of £188,667, which is very much lower than the judgment sum of £952,597 plus the costs of the adjudication, JRT would be unable to repay the judgment sum unless there is reason to think that its balance sheet will significantly improve over the next year.
55. I do not have any evidence as to the ability of the associated companies to repay JRT the sums they owe. However, given that JRT has entered into payment arrangements with its creditors, is paying relatively high interest (6% to 7%) on loans from its creditors and appears to be arranging its finances so that its indebtedness to the bank does not exceed £25,000, I can only conclude that the associated companies are in need of the loans and may not be in a position to repay them in full at short notice.
56. Mr Woodcock's evidence is that JRT is attempting to trade its way out of its financial difficulties. JRT has provided a profit and loss account for the period from July 2019 to June 2020. However, that profit and loss account gives cause for concern. It shows a net profit of £18,556 for the period. The total income for the period was £309,485.18. The total costs of

sales were £207,340.24. However, within the costs of sales figure is a negative figure under the heading “*other costs of sales – CIL credits of £107,642.46*”. CIL stands for Community Infrastructure Levy. I can only assume that, for some reason, that there has been a credit in the period for CIL payments. If it were not for that credit, rather than a net profit of £18,556, there would have been a significant loss. The profit and loss account, therefore, does not appear to indicate that JRT’s trading is likely to generate sufficient profit within the next year to be able to repay the judgment sum. On the contrary, it gives the impression that its financial position is worsening, not improving, as a result of its trading. At its best, its profit for the year was only £18,556.

57. Mr Woodcock’s evidence is that JRT is currently engaged in two contracts. The first is for a residential development of a plot at the site. However, TWD adduced evidence that the owner of that plot is dissatisfied with the work and is taking legal advice in relation to defects in the work. The second contract relates to a commercial unit. The total contract value is £270,155.97. There is no information as to the likely profit from that contract but it is clear that it will not be sufficient to enable JRT to repay the judgment sum.

58. In short, I am satisfied that it is very highly probable that JRT would be unable to repay the judgment sum if ordered to do so after the trial of the Part 7 proceedings. I find that the first limb of the test is met.

The second limb of the test in *Wimbledon* - change in JRT’s financial position

59. TWD concedes that, if the Claimant’s financial position is the same as, or similar to, its financial position at the time the relevant contract was made, it is not appropriate for a stay to be granted, the Defendant having taken the commercial risk of contracting with the party in its then known financial position.

60. I do not have evidence as to the precise state of JRT’s finances in June 2016, when the contract was made. Its accounts for the period ending 31 December 2015 show net liabilities of £28,189. Its accounts for the year ending 31 December 2016 show net assets of £74,706. As Mr Woodcock explained in his evidence, this contract was JRT’s first major contract. It appears that, at the time the JCT Contract was made, TWD would have known that TWD did not have significant assets, and may even have had modest net liabilities, and that this contract would be its first major project.

61. The balance sheet as at July 2020 shows net assets of £188,667.36. On the assumptions I have made, and on the basis that figure is correct, that appears to be an improvement. However, in my judgment, it is necessary to look beyond the net asset figure alone and look at the overall financial position of the company and the risk it now poses.
62. JRT is now heavily indebted to creditors under loans at high interest. The amounts falling due to creditors within one year are now £789,580.57.
63. Included as “negative creditors” (which I assume must be debtors) are sums owed to JRT by associated companies of slightly over £193,500. As I have already indicated, I can only assume, given the way the bank account of JRT is being managed and the fact that that those loan remains outstanding despite JRT’s financial difficulties, that those companies may not be in a position to repay the loans. The value of those loans alone exceeds the net assets of JRT, and JRT would be balance sheet insolvent if they were not repaid.
64. The way JRT and its associated companies are being managed suggests that money is being moved according to the most pressing need of the companies, and that JRT is using its banking facilities to the full to assist its associated companies. JRT appears to be arranging its finances to keep just within its banking facilities, preferring to lend to associated companies than to reduce its debt.
65. JRT has entered into arrangements with some of its creditors, including in relation to two outstanding County Court judgments (albeit for relatively small sums) at a time when it is owed over £193,500 by associated companies. Whilst there is no evidence to which my attention has been drawn of any impropriety, in my judgment, this does indicate additional risk to creditors.
66. TWD has obtained two credit reference reports on JRT, both of which give JRT an extremely low credit scoring.
67. Although JRT is continuing to trade, it does not appear to be doing so profitably.
68. I am satisfied that the financial position of JRT is substantially different from when the JCT contract was entered into and that it now poses a significantly higher risk than it did in 2016. I find the test under the second limb is met.

The third limb of the test in *Wimbledon* – whether JRT’s financial position is due either wholly or in significant part to TWD’s failure to pay those sums that were awarded by the adjudicator

69. TWD argues that JRT's financial position is not due either wholly or in significant part to its failure to pay the sums awarded by the Adjudicator. Mr Woodcock's evidence is that JRT's financial difficulties are substantially, if not wholly, the result of TWD's failure to make payment to JRT and that, had payment been made in respect of the Disputed Payment Notice of 4 November 2019, JRT's finances would be in a healthy position. TWD argues that it is not its failure to pay that has caused JRT's financial difficulties.
70. Mr Woodcock's assertion that JRT's financial difficulties are caused TWD's failure to pay is not explained. He does not give evidence as to how JRT's financial position would be different had the Disputed Payment Notice been paid in November 2019. He does not give evidence that JRT has lost business as a result, or of any other specific difference that receipt of the payment would have made to JRT's financial position or its ability to repay the judgment sum after trial.
71. TWD argues that, by November 2019, JRT was already in financial difficulty, having borrowed significant sums at high interest in 2017 and 2018. It argues that the fact that the loans were taken out so long before the Disputed Payment Notice was issued on 4 November 2019 indicates that the failure to pay did not cause the financial difficulties. Whilst the timing does support TWD's argument, in my judgment, the timing of the loans alone is not sufficient to satisfy me that TWD's failure to pay has not caused JRT's financial difficulties.
72. I have set out JRT's financial position above. However, the receipt of cash in November 2019 would not increase the net assets on the balance sheet. Assuming the payment was used to reduce debt, the debtors and the creditors figures would have been reduced equally. The payment would have a neutral effect on the balance sheet.
73. However, payment in November 2019 would clearly have improved JRT's cash flow and its ability to repay or reduce the debt owed to its creditors. If the Disputed Payment Notice had been paid and the money applied to repaying debt, JRT's liability for interest on the loans would have reduced between November 2019 and now.
74. Mr Woodcock's evidence is that interest on some of the loans has been frozen. However, it appears that the bulk of the debt carries interest of around 6% or 7% per annum. As at July 2019, JRT's balance sheet shows total creditors falling due within one year of £789,580.57. The figure for creditors falling due after one year is negative, indicating money is owed to JRT from its associated companies rather than money being owed by JRT. I do not have any

evidence as to what, if any, interest JRT is charging its associated companies on those balances. In JRT's favour, I will assume it is nil. On that basis, in the roughly eight-month period between 13 November 2019, when the Disputed Payment Notice fell due for payment, and 7 July 2020, when JRT's balance sheet was prepared, the interest on those loans would be no more than £37,000. On that basis, JRT's balance sheet would only have shown about a £37,000 improvement had TWD paid the Disputed Payment Notice on 13 November 2019

75. On the evidence before me, it appears that the only difference that TWD's payment in November 2019 would have made would have been to JRT's ability to reduce its debt, and hence reduce interest payments by about £37,000.
76. Its cash flow would have been improved, but there is no evidence that lack of cash has hampered its trading, in the sense of preventing it from entering into contracts that it otherwise would have done so as to improve its overall financial position. In addition, it is clear that JRT has considered itself in a position to lend £190,000 to a related company.
77. There is no evidence that, had TWD paid JRT the Disputed Payment Notice in November 2019, JRT would have been able to repay the judgment sum following trial, or even any significant part of it. In my judgment, JRT's probable inability to repay the judgment sum after trial was not caused by the failure to pay the Disputed Payment Notice or the adjudication award. Had TWD paid in full in November 2019, JRT still would not be able to repay it at the end of trial.
78. Further, TWD argues that JRT's financial position, which is the result of its indebtedness to various creditors under high interest loans, is likely to be the result of one of more of the following:
 - a. reasons that are unrelated to the project; and/or
 - b. to the extent that any loans were needed to finance the project, JRT's costs exceeding the reasonable costs of the work carried out, so that the project's funder, HCA, was unable to approve further payment to cover those costs.
79. As to the first of those possibilities, it is clear from JRT's accounts that inter-company transactions have taken place and that at least a significant part of the borrowing has been to support work unrelated to the project. Currently, over £190,000 is owed by Frank's Woodys'

Ltd, which undertook a ground source heating project, which was its own venture. In addition, there is reference in the correspondence to Mr Woodcock having confirmed to HCA that some of JRT's loans related to the ground source heating project. I am satisfied that the loans were not purely to fund the work for TWD.

80. In addition, JRT itself was engaged in other work. For example, it built a house for the purchaser of one of the plots, contracting with the purchaser directly. JRT also entered into direct contracts with other purchasers for work on their properties. It has continued to trade after the contract with TWD was terminated. It is clear that JRT was doing significant work for other customers.
81. TWD has obtained a CPR compliant expert's report from a quantity surveyor valuing JRT's work at termination of the contract at £1,764,000, assuming the contract was a costs-plus contract (as JRT contends). The expert values the work at a much lower sum if it was a fixed price contract. I give little weight to that report, not least because JRT has not obtained expert evidence.
82. However, Mr Woodcock's own evidence is that the payment process adopted during the contract was that JRT provided details of its costs to WYG, who were HCA's valuers. Mr Woodcock's evidence is that the process was in accordance with the JCT Contract. It is clear from the evidence before me that it is not correct to say the process was made in accordance with the JCT Contract, at least with regard to the payment mechanism in it. However, it is clear from Mr Woodcock's evidence that JRT's requests for payment, supported by evidence of the costs JRT had incurred such as invoices and proofs of purchase, were scrutinised by WYG on behalf of HCA and that WYG valued the work completed. HCA paid TWD in accordance with WYG's valuations, and JRT invoiced TWD for the approved amounts, which TWD paid from funds received from HCA. WYG valued JRT's work to the point of termination of the contract at around £2.1m. WYG did not consider any further payment to JRT was justified based on its valuation of the work carried out. That is relevant contemporaneous evidence as to the value of the work carried out.
83. The Disputed Payment Notice valued the work at over £3m. Whilst it is of course possible that, for some reason, JRT incurred costs that were very significantly higher than the value of the work it had carried out, as assessed by WYG, JRT has not explained why that is the case. TWD argues that a significant proportion of the Disputed Payment Notice is for sums to which JRT has no contractual entitlement, including a 25% overhead and profit mark up and the inclusion of the costs of building a house for which JRT entered into a direct contract with

the purchaser. JRT has not explained why TWD's liability to JRT, even on a costs-plus basis, would so significantly exceed WYG's valuation of it. The fact that TWD had paid what HCA's valuer considered to be the value of the work done supports TWD's argument that it was not its failure to pay sums due to JRT that led to JRT's financial difficulties.

84. Mr Woodcock's evidence is that TWD began to withhold payment from JRT in December 2017. However, there is no evidence at all of any request for payment other than for sums authorised by WYG and paid by HCA. On the evidence before me, it appears that, until the contract was terminated, TWD paid all JRT's invoices.
85. Further, Mr Woodcock gives evidence that what he describes as TWD's debt was intended to be cleared on the sale of the completed houses. He states as follows "*These loans were taken out in good faith that all TWD debts would be cleared on completion of the sale of the completed houses, at which point the profits would be distributed between both JRT and TW Dixon as agreed.*" This statement is inconsistent with JRT's position in the Disputed Payment Notice. It suggests that JRT did not expect any loans it took out to be repaid until there was money available to TWD from the sale of the houses. It appears that JRT never expected to be paid more than TWD was able to pay from the funding from HCA and from house sales. JRT does not suggest that TWD has failed to pay what it was able to pay any sum it received from HCA funding.
86. For the reasons set out above, in my judgment, JRT's financial position was not caused by TWD's failure to pay the sums awarded by the Adjudicator, with the possible exception of a worsening of its indebtedness to the extent of loan interest since November 2019. That would be no more than about £37,000 which is not significant in the context of JRT's overall financial position.
87. I find that JRT's financial position was not caused either wholly or in significant part by TWD's failure to pay the sums awarded by the adjudicator.
88. I am satisfied that all three of the limbs set out in *Wimbledon* are satisfied.

TWD's financial position and manifest injustice

89. The evidence of Mr Neville is that TWD has current liquid assets of £16,000. TWD has around £166,500 in a project account, but TWD cannot draw on that account without HCA's agreement. HCA's valuer, WYG, has valued JRT's work at £2.1m and will not authorise

further payment to JRT. Whilst TWD has land and partially built properties, it cannot borrow against those assets as they are already charged. HCA must be repaid before any proceeds of sale are available to TWD. There is doubt as to whether there will be any profit in the development. Mr Court's evidence for TWD is that it cannot pay the adjudication award and that, if it were forced to do so, it would immediately be insolvent as it would be unable to pay its debts as they fall due. I am satisfied that TWD cannot pay any of the judgment sum without rendering itself immediately insolvent and being forced into liquidation.

90. I do not find it surprising that TWD has no means to pay the judgment debt. It is a company formed for the purpose of the development. The Commercial Agreement between TWD and JRT states:

“The development will be constructed on a costs plus basis through the funding of means (sic) of the Housing and Communities Association. The associated costs and overheads of TW Dixon will be covered by JRT Developments.”

91. Whilst the construction of the contract will be the subject of TWD's claim, on the evidence currently before me, it appears likely that, far from expecting TWD to pay JRT's costs and overheads during the course of the project, the Commercial Agreement provided that JRT was to cover TWD's overheads during the course of the project, with the parties then equally sharing the profit after taking into account JRT's costs and overheads. JRT made no demand of TWD for payment of any sum other than from HCA funding following HCA's valuations of the work during the course of the contract. JRT also paid the wages of TWD's manager, Mr Neville, which is consistent with JRT funding TWD (and not the other way round). It was only after JRT terminated the contract that it demanded money from TWD in excess of funding received from HCA. The funding arrangements make this case highly unusual.

92. This is also an unusual case because Mr Woodcock is Mrs Dixon's nephew and, as Mr Woodcock states in his own witness statement, he and JRT helped TWD, including by arranging the funding for the project. It is clear that TWD relied on Mr Woodcock to manage the project and deal with the funding of it through HCA in a way that is unusual in a contract between an employer and contractor. Both parties give evidence that the arrangements between them were informal and cooperative.

93. In addition, I note that the Commercial Agreement provides:

“JRT to (sic) manage the project through a design team of professionals ref Appendix 1”

94. Appendix 1 lists the professionals including the architects, structural engineers planning advisers and, very unusually, the contractor, JRT. This was clearly not a project where the relationship between the parties was that of employer and contractor at arm's length. The effect of the Commercial Agreement appears to be that JRT was expected to manage TWD's professional advisers, and even to manage itself.
95. I have set out above the circumstances leading to the failure on TWD's part to serve a pay less notice. TWD does not oppose summary judgment as it concedes it is bound by the Adjudicator's decision pending trial of its claim. However, in those proceedings, TWD seeks a declaration that the Disputed Payment Notice was not a valid payment notice as it was not in substance, form and intent a payment notice and was not unambiguous. Whilst that is an issue for the trial in TWD's claim, it is clear that TWD did not appreciate the effect of the Disputed Payment Notice. Whilst Ms Conroy concedes that a technical adjudication award based on the failure to serve a pay less notice is every bit as enforceable as an award in which the adjudicator has adjudicated on the value of a payment notices, she does argue that the way that JRT obtained the adjudication award should be taken into account.
96. During the entire three-year course of the contract, JRT limited its claims to the sums recovered from HCA and the payment terms of the JCT Contract were ignored by both parties. After termination, Mr Woodcock corresponded with Mr Neville about JRT's claim for payment. Its first payment notice (which it concedes was not a valid payment notice) was expressly made in relation to the Commercial Agreement, not the JCT Contract. Two later demands, including the Disputed Payment Notice, were made for the same sum. None of the demands made reference to the JCT contract. As I have found, Mr Neville did not appreciate the significance of the Disputed Payment Notice. He had already promised to investigate the demand for the same amount when it was made in September. JRT clearly intended the Disputed Payment Notice to trigger an adjudication and an award of the full amount of the Disputed Payment Notice. It was ready to make its referral on the first day it was able to. Whilst the court may yet determine at trial that the Disputed Payment Notice was valid and that it was simply unfortunate for TWD that Mr Neville did not understand the effect of it, these circumstances do appear to me to be relevant to the fairness of enforcing the judgment sum when TWD cannot pay it without going into liquidation and when JRT will be unable to repay it after trial.
97. In addition, TWD has claimed that the Disputed Payment Notice is not a valid payment notice because it contains payments to which JRT has no contractual entitlement. That is an issue

for trial. However, TWD argues that this is also part of the context that is relevant to the question of fairness.

98. In particular, TWD points to the inclusion in the Disputed Payment Notice of the sum of £238,008 for Community Infrastructure Levy payments. Of that, it says that there can be no possible entitlement to about £218,000 because Shropshire Council has confirmed that those sums were not paid by JRT. JRT has not answered this in its evidence.
99. In addition, I note that the Disputed Payment Notice includes a 25% mark-up for overhead and profit. The JCT Contract is expressed to be for a fixed sum, though it does include the standard wording "*or such other sum as shall become due under this contract*". The Commercial Agreement refers to cost plus JRT's overheads and a 50% profit share from the development. There is no reference in either document to a 25% mark-up. JRT's pleaded case is that this was agreed, or alternatively it is a reasonable overhead. However, that does not sit well with the contractual documents available to me on this application or Mr Woodcock's own evidence that the profit share would be due when profits were known after the properties had been sold. In addition, JRT used the description "overhead and profit charge" to describe the 25% mark-up in the Disputed Payment Notice. At least at this stage, on the evidence before me, it seems highly questionable as to whether there is an entitlement to the 25% mark-up included in the Disputed Payment Notice.
100. There are other disputes raised by TWD. They include a claim that JRT has failed to account for £95,000 it borrowed from a buyer of one of the plots which was used to fund Frank's Woody's Ltd community ground source heating project, which was unrelated to JRT's work for TWD.
101. In addition, TWD claims that JRT has been paid for building plot 9 both by TWD, through the HCA funding process, and also by the buyer of plot 9, with whom JRT entered into a direct contract. TWD argues that a credit of either £235,784.21 (based on the sum paid by the buyer) or £208,209 (based on the amount TWD believes it has paid for the work to plot 9 through the HCA funding process). JRT denies it has been paid twice for the same work.
102. Ms Conroy concedes that it is not appropriate to ask the court on application for a stay of enforcement to consider in any detail the merits of the arguments as to the amount that would be payable on a true value adjudication. However, she does ask me to take into account, as part of the context to TWD's application, that certain sums included in the disputed payment application are sums that are clearly not payable to JRT and for which there

is no explanation as to why they have been included. Particularly, she points to the claim for over £218,000, for which it appears there is no justification, Shropshire County Council having confirmed that the sums were not paid by JRT, and JRT having adduced no evidence to show that it has paid the sums or provided other explanation for their inclusion in the Disputed Payment Notice. Mr Hoffman suggested that, if I had concerns about this element of the claim, I should stay execution of only that part of the judgment sum. However, in my judgment, the inclusion of the CIL payments without any apparent justification does support TWD's case that there may well be merit in its claim that the Disputed Payment Application does not represent JRT's entitlement, even on a costs-plus basis. As I have already indicated, I also have considerable reservations about the inclusion of a 25% mark-up which appears to include a "profit charge" when it appears from the Commercial Agreement that profit was to be derived from a profit share on the sale of the properties. Further, JRT's balance sheet does not include the judgment sum but a figure of £665,888.56 for TWD's debt, suggesting that it does not expect to recover the full amount of the Disputed Payment Notice following trial.

103. Whilst it is not appropriate for me to pre-judge the proceedings for the true valuation of any sums due, it does appear from the evidence before me today that it is at least likely that, following trial, there would be an order for a significant repayment to TWD.

Conclusion and decision

104. I consider the facts of this case are very unusual for the following reasons.

105. TWD's pleaded case is that, on a true value adjudication, JRT has already been overpaid and nothing is due under the Disputed Payment Notice. If the JCT Contract is found to be a fixed price contract, TWD reclaims £1,515,173.22 that it says it has overpaid JRT. If the JCT Contract is found to be a costs-plus contract, TWD reclaims £322,167.22 that it says it has overpaid JRT.

106. JRT has already been paid in full the amount of the valuation of its work by WYG for the funder, HCA.

107. The directors and shareholders of TWD and JRT were family members who were dealing with each other informally and in a way consistent with a joint venture arrangement, rather than at arm's length.

108. The Commercial Agreement that the parties executed on the same day as the JCT Contract provides for JRT to manage the project, including, arguably, by managing itself as contractor.
109. TWD relied on JRT to manage the project, raise the funding required, and obtain payment from the funder during the course of the project.
110. The Commercial Agreement appears to provide that TWD would not be expected to fund the project except through HCA funding and from the proceeds of sale of the properties. The stage when TWD would be in a position to pay more than HCA's funding payments has not been reached.
111. Very unusually, the Commercial Agreement appears to provide for JRT to pay TWD's overheads during the course of the project, and not the other way around.
112. JRT in fact did pay TWD's overheads during the project, for example, by paying TWD's manager's wages.
113. No demand was made for TWD to pay any sum exceeding funding received from HCA before JRT terminated the contract.
114. Mr Woodcock's own evidence confirms that JRT expected the loans it claims it took out to finance the work for TWD to be repaid from sales of properties. It appears that JRT did not expect to receive payment from TWD unless TWD had the means to pay, either from HCA funding or the sale of properties. That stage has not been reached.
115. The adjudication award was the result of a failure to issue a pay less notice. Whilst the question of the validity of the Disputed Payment Notice is a matter for separate proceedings, it is clear that:
- a. TWD did not understand the effect of it or the need to serve a pay less notice and was considering JRT's claim with a view to seeking to resolve financial matters between the parties, possibly through the mediation JRT had proposed; and

- b. the Disputed Payment Notice was the first payment notice issued by JRT under the JCT Contract, and it was issued several months after the contract had been terminated.
116. TWD cannot pay the judgment sum and would be forced into liquidation if it were required to so. If the claim is not stayed, TWD would be deprived of the opportunity to seek redress through its claim.
117. It is likely that at least substantial elements of JRT's claim for payment in the Disputed Payment Notice were not properly due to it at the time it issued the Disputed Payment Notice. For example, it had claimed over £218,000 to which it had no entitlement as it had not paid Shropshire Council the sums included.
118. It is clear that, if the judgment is not stayed, TWD would recover little, if any, of the judgment sum following trial.
119. TWD issued its claim promptly and did all it could to seek early determination of the issue of the validity of the Disputed Payment Notice, hoping to avoid judgment being entered. It was defeated in its attempt to do so by a dispute of fact as to the terms of the JCT Contract.
120. In summary, if the judgment is not stayed, TWD would be unlikely to recover the judgment sum following trial, and the test set out in the case of *Wimbledon* is satisfied.
121. In the exceptional circumstances of this case, there would be manifest injustice to TWD if the judgment were not stayed. It would be forced to pay a sum that it appears the parties had expressly agreed it would not be expected to pay before it had funds to do so either from HCA or from the sale of properties, and which, as a result, it cannot pay. It would be forced into liquidation and unable to pursue its claim for a declaration that the Disputed Payment Notice was not a valid payment notice and to recover the judgment sum and the further sums it claims it has already overpaid on a true valuation of the work.
122. For the reasons set out above, in the very unusual circumstances of this case, TWD would suffer manifest injustice if enforcement of the judgment were not stayed. I consider it expedient to exercise my discretion to stay execution of the judgment sum until trial of TWD's claim.