[2020] JMCA Civ 43

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 39/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE PUSEY JA (AG)

BETWEEN	**SABAL PH 1200 LIMITED**	**APPELLANT**
AND	**GM AND ASSOCIATES LIMITED**	**RESPONDENT**

Mrs Denise Kitson QC and Miss Anna-Kay Brown instructed by Grant, Stewart, Phillips & Co for the appellant

Duane Thomas for the respondent

13 November 2018 and 25 September 2020

MORRISON P

Introduction

[1] This is an appeal from a decision of Batts J ('the judge') given on 17 April 2018. The judge's reasons for the decision were subsequently reduced to writing and issued on 29 June 2018[1].

[1] [2018] JMCC Comm. 19

[2] The matter arises out of a construction contract dated 25 February 2014[2] ('the agreement') between the appellant ('the employer') and the respondent ('the contractor').

[3] The agreement incorporated a dispute settlement mechanism[3]. This mechanism called for, in the first place, resolution of disputes by an adjudicator appointed by the parties; and, in the second place, in case of dissatisfaction by either party with the determination of the adjudicator, settlement by way of arbitration. The parties were also agreed that, on the face of it, the agreement did not exclude a direct reference to arbitration, but nothing turns on this in this case.

[4] A dispute arose between the parties as to the final amount payable by the employer to the contractor under the agreement and the employer activated the adjudication process. The adjudicator ruled in the employer's favour and the contractor immediately advised the employer that it was dissatisfied with the adjudicator's award and intended to proceed to arbitration.

[5] However, before taking any further steps in that regard, the contractor commenced proceedings against the employer in the Supreme Court ('the court proceedings')[4]. In the court proceedings, the contractor sought resolution of the same issues which had led to its express dissatisfaction with the adjudicator's award. Pleadings were in due course exchanged between the parties in the court proceedings. But, on 17

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[2] Articles of agreement made the 25 February 2014 between GM & Associates Limited and Sabal PH 1200 Limited
[3] In clause 8, under the rubric "Settlement of Disputes"
[4] Claim No 2017 CD 00469

April 2018, on the application of the contractor, the judge granted a conditional stay of the court proceedings pending completion of the arbitration proceedings. We were told at the hearing of the appeal that the conditions imposed by the judge were duly met, with the result that the stay is now in place.

[6] This appeal is brought with the leave of the judge. Broadly speaking, the employer contends that, in ordering the stay, the judge failed to have sufficient regard to the procedural history of the matter, which showed that, among other things, the contractor had (i) failed to comply with the requirements of the agreement in relation to the commencement of arbitration proceedings; (ii) waived or repudiated the arbitration clause in the agreement; and (iii) breached the principle that a party should not be allowed to approbate and reprobate at the same time. The respondent on the other hand points out that the judge's decision to grant a stay was a discretionary one. Accordingly, in the light of this court's well-known reluctance to interfere with an exercise of judicial discretion, and for the reasons given by the judge, the decision ought not to be disturbed.

The background to the action

[7] Under the terms of the agreement, it was agreed that the contractor would construct a two-storey dwelling house ('the house'), along with various appurtenances, for the employer at 1 Montrose Road, Kingston 5, in the parish of Saint Andrew. The agreed contract price was US$1,713,040.00, though this was subject to adjustment pursuant to the agreed variation process set out in the agreement.

[8] The construction project proceeded apace. It was supervised on behalf of the employer by its duly appointed architect/contract administrator[5] ('the architect') and quantity surveyor[6] ('the QS'). On 3 August 2016, the contractor, the architect and the QS signed off on a statement of final value of the works ('the statement of final value'). The statement of final value certified the final value of the contractor's work on the project to be US$2,972,574.21, comprising the contract sum of US$1,713,040.00 and variations of US$1,259,534.21.

[9] A statement of penultimate payment issued on the same day , also signed off on by the architect and the QS, showed a penultimate payment of US$139,056.37 to be due from the employer to the contractor. It is common ground that this balance did not include the sum of US$42,826.00, which was held back under the retention provisions of the agreement[7].

[10] The employer disputed the statement of final value and refused to make the penultimate payment. Instead, the employer commissioned an independent audit report from CPM Consultants ('CPM'), which in due course determined that, based on the total amount which the employer had paid to the contractor and the final value of the works, the employer had overpaid the contractor to the extent of US$390,810.06.[8]

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[5] Rivi Gardner & Associates Ltd
[6] Berkeley & Spence
[7] Clause 4.3 ("Progress Payments and Retention"), and Appendix A
[8] Audited statement of accounts for completion of dwelling house at No 1 Montrose Road, Kingston 6, Saint Andrew, revised May 2017

[11] In the circumstances, the employer referred the dispute to adjudication, as provided for in clause 8.1 of the agreement. Clause 8.1 reads as follows:

> "**8.1 Adjudication**
>
> 1. If any dispute or difference of any kind whatsoever shall arise between the Employer and the Contractor, at any time after execution of this Contract, arising out of or in connection with this Agreement or the construction of the Works, then such dispute or difference shall be referred in writing, by either party, to and be settled by the Adjudicator. The adjudicator shall be a person agreed by both Employer and Contractor and failing to agree be a person appointed by the President of the Jamaican Institute of Architects. The Adjudicator shall within a period of fourteen (14) days after being requested to settle any dispute or difference, by either party, give written notice of his decision to the Contractor and the Employer and the decision shall be accepted by both parties.
>
> 2. In giving a decision, the Adjudicator shall be deemed to be acting as an expert and his decision shall be final and binding upon the parties, unless either party shall, within fourteen (14) days of the Adjudicator's decision, notify the other of dissatisfaction with the decision and require the matter to be settled by Arbitration, in which case, the decision be binding until practical completion of the Works or termination of the employment of the Contractor."

[12] Clause 8.2.1 of the agreement sets out the steps to be taken by a party that is dissatisfied with the decision of the adjudicator under clause 8.1, and who requires the dispute to be referred to arbitration:

> "**8.2 Arbitration**
>
> When the Employer or the Contractor require a dispute or difference to be referred to arbitration then either the Employer or the Contractor shall give written notice

> to the other to such effect and such dispute or difference shall be referred to the arbitration and final decision of a person to be agreed between the parties as the Arbitrator, or upon failure so to agree within 14 days after the date of the aforesaid written notice, such dispute or difference shall be referred to the arbitration and final decision of two Arbitrators, one to be appointed by each party and their umpire in a manner provided by the terms of the Arbitration Act.
>
> ..."

[13] In its amended referral notice and points of claim in the adjudication[9], the employer claimed, among other things, (i) a refund of US$390,810.06; (ii) a refund of a total amount of US$82,025.12 paid to third parties by the employer; and (iii) a refund of $616,635.61 paid by the employer for repairs to the wooden flooring in the house.

[14] In its reply to the amended referral notice and points of claim[10], the contractor denied owing any sums to the employer as claimed, and maintained that the true final contract sum was the sum of US$2,972,574.21 referred to in the statement of final value.

[15] The parties agreed to the appointment of Mr Dean H Burrowes, a chartered quantity surveyor, as the adjudicator ('the adjudicator'). The adjudicator visited the site on 21 June 2017 and conducted a hearing on 22 June 2017. At the hearing, the employer and the contractor were represented by Mrs Denise Kitson QC of the firm of Grant, Stewart, Phillips & Co ('GSP'), and Mr Duane Thomas respectively. And, in addition to

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[9] Amended referral notice & points of claim dated 31 May 2017
[10] Reply to amended referral notice & points of claim dated 20 June 2017, para. 18

written material supplied by the parties, oral evidence was taken from witnesses on both sides.

[16] An issue which assumed considerable significance at the hearing was whether several variations, in respect of which the contractor claimed to be entitled to payment, had been issued in writing in accordance with the procedure set out in the agreement. The employer took the position that it should not be required to pay the cost of these variations, since it had not approved them. However, the adjudicator concluded that, given the course of conduct between the parties over the period of construction, and given the employer's acceptance of the sum of US$2,487,530.67 as valid, which figure included variation costs informally issued, "[the employer] waived the strict requirement for written instructions by previously accepting unwritten Variation Orders"[11]. Accordingly, the adjudicator ruled that he could not withhold payment for variations not issued in writing.

[17] The adjudicator gave his decision in writing on 29 June 2017. He found that the amounts due to the employer were as follows[12]:

> "US$82,025 being the amount paid to suppliers.
>
> JA$616,635.61 being the amount paid for repairs to the timber floors.
>
> Interest on the sums due at the relevant interest payable from the date of the Statement of Final Accounts."

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[11] Adjudication decision dated 29 June 2017, para. 15.2, at page 27
[12] Adjudication decision dated 29 June 2017, para. 16

[18] The adjudicator made no express finding or determination as regards any sums due from the employer to the contractor, whether based on the statement of final value or otherwise.

[19] By letter to GSP dated 7 July 2017 ('the 7 July 2017 letter'), Mr Thomas gave formal notice to the employer of the contractor's dissatisfaction with the decision of the adjudicator. In so far as is material, the letter stated the following:

> "We hereby give formal notice pursuant to clause 8.1(2) of the Articles of Agreement that G.M. And Associates Limited is dissatisfied with the decision of the Adjudicator and requires that the matter be settled by Arbitration.
>
> G.M. And Associates Limited's notice of arbitration pursuant to clause 8.2(1) of the aforementioned Articles is imminent."

[20] Further correspondence followed from Mr Thomas. Firstly, in a letter to the adjudicator dated 10 July 2017, Mr Thomas pointed out what he considered to be an inconsistency in the adjudicator's award as regards the award of US$82,025.00 to the employer. Mr Thomas' point was that the award did not appear to take into account the fact that US$55,513.84 out of the amount of US$82,025.00 had already been deducted from sums due to the contractor from the employer. The adjudicator responded by letter dated 14 July 2017, to say that his decision given on the 29 June 2017 "was grounded and specific to the facts presented".

[21] Then, in a letter to GSP dated 20 July 2017, Mr Thomas made the same point which he had made in his letter to the adjudicator and, on this basis, went on to invite

GSP's agreement as to the amounts that remained outstanding from the employer to the contractor and *vice versa*. The contractor included in this computation the sum of US$139,056.37 which the statement of penultimate payment had certified as being due to it from the employer.

[22] GSP's response was that "our client rejects your interpretation of the decision and stands by the written decision made by the Adjudicator"[13].

[23] Based on this correspondence, therefore, the contractor's position was that (i) a part of the amount of US$82,025.00 which the adjudicator awarded to the employer (US$55,513.84) had already been deducted from amounts due to the contractor; and (ii) it was in any event entitled to the sum of US$139,056.37 as shown in the statement of penultimate payment. And, for its part, the employer disputed the contractor's position.

[24] Despite having already notified the employer of its dissatisfaction with the adjudicator's award, the contractor took no further steps to activate the arbitration process in accordance with clause 8.2 of the agreement. Instead, as I have already indicated, the contractor commenced court proceedings against the employer.

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[13] See GSP's letter dated 31 July 2017.

The court proceedings

[25] In its particulars of claim filed on 18 September 2017, the contractor, having made reference to and stated the details of the adjudicator's award[14], set out the basis of the claim as follows[15]:

> "9. The [adjudicator's] Decision held that US$82,025.00 is owed to [the employer], but of this sum US$55,513.84 has effectively been paid to the [employer] since that said sum was deducted from the sum due to the [contractor] in the aforementioned Statement of Penultimate Payment. Consequently, based on the aforementioned [adjudicator's] Decision the foreign currency sum due to the [employer] is US$26,511.16 (being US$82,025.00-US$55,513.84).
>
> 10. Based on the aforementioned Decision, Statement of Final Value of Works and Statement of Penultimate Payment, the [employer] owes the [contractor] US$155,371.21 inclusive of the relevant retention of US$42,826.00.
>
> 11. The [contractor] admits that [it] owes the [employer] JA$616,635.61 based on the aforementioned Decision."

[26] In its amended defence and counterclaim[16], the employer refuted the basis of the contractor's claim. In the process, it rehearsed much of the ground previously covered before the adjudicator, and asserted that all the issues raised in the claim were already determined by the adjudication process. Of particular relevance to this aspect of the proceedings, the employer stated as follows[17]:

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[14] Particulars of claim, paras. 6-8
[15] Particulars of claim, paras. 9-11
[16] Amended defence and counterclaim filed 3 January 2018
[17] Amended defence and counterclaim, para. 11

> "… The [employer] further states that pursuant to clause 8.1 of the Construction Agreement the [contractor] is bound by the decision of the Adjudicator dated 29 June 2017 by its own admissions … and by its failure to refer the matter to arbitration within the time specified in the contract, after it issued the [employer] written notice of its dissatisfaction with the Adjudicator's decision under clause 8.1(2) of the contract. Accordingly, the [employer] is not indebted to the [contractor] as claimed or at all; and the claim is therefore bound to fail."

[27] The employer counterclaimed against the contractor for the sums of US$82,025.00[18] and $616,635.61 (the sums awarded by the adjudicator).

[28] In a brief reply and defence to the counterclaim[19], the contractor contended that its claim was for "enforcement of the decision of the adjudicator", and "not re-litigation of issues determined by the adjudicator". The contractor also admitted being bound by the decision of the adjudicator, but maintained that it had already paid the employer some US$56,001.20 of the sum of US$82,025.00 awarded by the adjudicator.

The employer goes on the offensive

[29] On 3 January 2018 the employer filed a notice of application for court orders against the contractor ('the employer's application'). The principal relief sought by the employer's application was an order for summary judgment against the contractor on its defence and counterclaim, and an order that the amount for which judgment was entered

[18] The actual figure stated in the counterclaim was US$82,925.00, but it is common ground that the correct figure was US$82,025.00

[19] Reply and defence to counterclaim filed 12 December 2017, para. 3

be paid forthwith. Further or in the alternative, the employer's application asked for an order that the contractor's claim form and particulars of claim be struck out or dismissed.

[30] The grounds of the employer's application were follows:

> "i. The application is made pursuant to Rules 15.2(a), 15.6 and 26.3(1)(b) of the Civil Procedure Rules (CPR), 2002;
>
> ii. The [Contractor] entered into a Construction Agreement dated 25 February 2014, whereby the parties were obliged to refer in writing any dispute or difference of any kind whatsoever, which shall arise between them at any time after the execution of the contract to be settled by an Adjudicator. The parties have done so and the adjudicator has made his finding which is now conclusive;
>
> iii. The Adjudicator on 29 June 2017 determined that the [Contractor] owes the [Employer] the sums claimed in the counterclaim, US$82,025.00 plus JM$616,635.61 and interest at the rate of 2% from 3 August 2016.
>
> iv. The Adjudicator did not determine that [Employer] [sic] owed the [Contractor] money under the Construction Agreement.
>
> v. The [Contractor] has admitted that it is bound by the Adjudication Decision;
>
> vi. The [Employer] therefore has a strong Defence, and the [Contractor] has no real prospect of succeeding on the claim as the [Employer] is not liable to pay the amount claimed pursuant to the Construction Agreement dated 25 February 2014;
>
> vii. The Claim has been brought in breach of the Construction Agreement dated 25 February 2014;
>
> viii. The Claim Form and Particulars of Claim ought to be struck out as an abuse of the process of the court as it concerns issues already decided in adjudication pursuant to the Construction Agreement dated 25 February 2014;

ix. The application is made pursuant to the overriding objective of the Civil Procedure Rules."

[31] The employer's application was supported by an affidavit sworn to by Mr Carlton Augustus Masters, the principal of the employer, in which the history of the matter was again rehearsed in detail. Mr Masters summarised the employer's position on the application in the following paragraphs of the affidavit[20]:

> "9. The Adjudicator did not find that the [employer] approved the sum of US$2,972,574.21 under the Statement of Final Value of Works.
>
> 10. Accordingly, via the said Adjudication decision the issue of whether or not the sums claimed by the [contractor] from [the employer] were due under the [agreement] and the Statement of Final Value of works dated August 3, 2016 was already decided.
>
> 11. If the [contractor] wanted to contest the Adjudicator's decision, pursuant to clause 8.1(2) of the [agreement] it was obliged to notify the [employer] of its dissatisfaction with the Adjudicator's decision within fourteen (14) days of the decision and require that the matter be settled by Arbitration; failing which the adjudicator's decision is deemed to be binding.
>
> 12. The [contractor] has only given notice of its dissatisfaction with the Adjudicator's decision via letter dated 7 July 2017 which was received by my attorneys-at-law … on the 12th of July 2017 …
>
> 13. Contrary to clause 8.1(2) the [contractor] failed to require that the matter to [sic] be settled by Arbitration within 14 days of the Adjudication Decision; and as a result, pursuant to section 8.1(2) it is bound by the Adjudicator's decision, a fact the [contractor]

[20] Paras 9-17

acknowledges at paragraph 7 of its Reply and Defence to Counterclaim.

14. The [contractor] in its Particulars of Claim has not sought to contest the decision of the Adjudicator …

15. Therefore, in the circumstances the [contractor] is bound to fail on its claim herein.

16. Moreover, it would be an abuse of process to litigate the said issues because they have already been dealt with in the said Adjudication.

17. Additionally, the claim herein abrogates the mutually agreed procedures between the [employer] and the [contractor], whereby all issues arising under the [agreement] should be dealt with via adjudication or arbitration."

[32] The contractor's response to the employer's application was set out in an affidavit sworn to on its behalf on 13 February 2018 by Mr Markland Gordon, a chartered quantity surveyor. Mr Gordon stated that, having reviewed the adjudicator's decision, he had formed the view that the decision did not invalidate the statement of final value of works and the statement of penultimate payment. In his view, therefore, the correct interpretation of the decision was that the sums which the adjudicator found to be due to the employer were to be set off against the sums that were owed to the contractor by virtue of the said statements. This was because, upon a careful reading of the decision, "it does not state anywhere therein that the amount due to the [contractor] shall not be paid"[21].

[21] Affidavit of Markland D Gordon, sworn to on 13 February 2018, para. 11

[33] The employer's application came on for hearing before the judge on 20 February 2018, but on that date it was adjourned to 8 March 2018. In the interim, on 7 March 2018, the contractor filed an application of its own ('the contractor's application'). In that application, the contractor sought orders (i) referring the dispute comprised in the claim to arbitration pursuant to clause 8.1.2 of the agreement; (ii) staying the adjudicator's decision until the completion of the arbitration; and (iii) staying the contractor's claim and the employer's counterclaim until the completion of the arbitration.

[34] When the matter came on for hearing before the judge on 8 March 2018, the parties agreed ("prompted by the court", as the judge would later put it in his judgment[22]) to write a joint letter to the adjudicator seeking clarification of his decision[23]. Consequently, in a joint letter to the adjudicator dated 15 March 2018, after setting out the terms of the adjudicator's award, GSP and Mr Thomas posed the following question:

> "We hereby request clarification of the decision as to whether [the contractor] is required to pay the above sums found by you to be due to [the employer] together with interest at 2% per month *without any deduction or set off in relation to additional amounts claimed by [the contractor] in the Statement of Final Accounts.*" (Emphasis as in the original)

[35] The attorneys-at-law then set out the respective positions of the parties, as I have attempted to summarise them at paragraphs [19]-[23] above.

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[22] Judgment, para. [5]
[23] See affidavit of Anna-Kay Brown sworn to on 16 April 2018, para. 3

[36] In his response dated 11 April 2018, the adjudicator supported the employer's interpretation of the decision as follows:

> "An overpayment of US$390,810.06 was identified in the amount of US$2,867,238.68 paid by the [employer] to the [contractor], however this overpayment was not ordered refunded as it was deemed earmarked for unwritten variations to which the [employer] was bound by the decision of his agent, the [architect] …
>
> … The payments to artisans and suppliers made by the [employer] on behalf of the [contractor] are recoverable by the [employer] under the contract.
>
> I made no findings on the amounts stated as unpaid as reflected in the Final Value of Works presented by the [QS] ...
>
> My decision is therefore reflected in the interpretation stated by [the employer]."

The judge's decision

[37] When both applications came back before the judge on 17 April 2018, the contractor withdrew the claim and the employer applied for judgment on the counterclaim. After hearing counsel for the parties, the judge made the following orders:

> "1. The Claim is withdrawn with costs to the [Employer] to be agreed or taxed, and paid.
>
> 2. The [Employer's] Counterclaim is stayed pending Arbitration, on the condition that on or before the 1st June 2018 the [Contractor] provides security sufficient and satisfactory to the [Employer] in the amount of US$82,025.00 and JM$616,635.61 at a rate of 1.5% per month from the 3rd August 2016 to the date hereof.
>
> 3. In the event of a failure to agree on adequate security as aforesaid, the [Contractor] shall be at

liberty to satisfy the condition in paragraph 1 by paying into a joint interest bearing account in the names of the parties the said amount plus interest aforesaid; or by payment of the said amount into court on or before the 29th June 2018.

4. Unless the [Contractor] takes the necessary steps to pursue arbitration on or before the 31st May 2018 the stay of execution shall be set aside and judgement be entered on the [Employer's] Counterclaim accordingly.

5. Liberty to Apply.

6. Leave to appeal granted to the [Employer]."

[38] In his written reasons for making these orders, the judge considered that (i) the 7 July 2017 letter was a sufficient request for arbitration, as provided for in clause 8.1(2) of the agreement; (ii) the contractor had not made a genuine election to proceed to litigation rather than arbitration; and (iii) it was fair and just to allow the contractor to pursue arbitration.

[39] This is how the judge explained his decision[24]:

> "[8] Mrs. Kitson QC has strongly urged that, by filing a claim to enforce the adjudicator's award, the [Contractor] has unequivocally elected to uphold the adjudicator's decision. The failure to implement arbitration within 14 days is therefore fatal. …
>
> [9] The question before me therefore was, whether there had been a sufficient notification and request for arbitration within 14 days and/or whether the [Contractor] had knowingly elected not to pursue arbitration. I came to the

[24] Judgment, paras [8]-[12]

conclusion that there had been no valid election and that, the [Employer] had been notified of the [Contractor's] dissatisfaction and request for arbitration. …

[10] I hold that [the 7 July 2017 letter] was a sufficient reference as it clearly requests arbitration. The subsequent letters of the 20th July 2017 and 10th July 2017, written on the [Contractor's] behalf, do not withdraw the request for arbitration. Rather they put forward a construction of the Adjudicator's award which is in the [Contractor's] favour. The adjudicator did not at that time clarify his award. The [Contractor] therefore applied to this court for relief. It was after the adjudicator clarified his position that the [Contractor] withdrew its claim and sought to pursue arbitration. It is noteworthy that the agreement has no Clause 8.2(1) as referenced in [the 7 July 2017 letter].

[11] I do not think the door to arbitration should be closed because the [Contractor] adopted an erroneous, and perhaps ill-advised, construction of the adjudicator's decision. The [Contractor] had taken the prudent course of requesting arbitration within 14 days of the adjudicator's award. I do not think the words at the end of the letter 'Notice of arbitration is imminent' detract from my conclusion. This is because the request for referral was contained in the preceding paragraph of that same letter and was described as 'formal'. The letter is a sufficient notice as no document entitled 'Notice' is required. The contract says one party is to 'notify' the other. A letter will I think suffice. The further actions of the [Contractor] do not constitute a withdrawal of the request. In any event those actions were based on an error of fact, that is, as to the result of the adjudication. It cannot therefore have been a genuine election. I test my conclusion by asking whether, had the [Contractor] proposed a named arbitrator instead of commencing legal action, the [Employer] could reasonably have said 'we have not received notice of arbitration you are out of time'. I think not.

[12] In these circumstances I considered it fair and just to allow the [Contractor] to pursue arbitration. The [Employer] is protected by a condition that the amount of the award is to be put forward as security. This will ensure that the [Contractor] is not merely utilising the process because it is unable to pay a lawful debt. It also protects against dissipation of assets in the event the arbitration ultimately ends in the

[Contractor's] favour. The delay in consequence of the [Contractor's] error is not so great as to cause me to exercise my discretion in any other way."

The grounds of appeal

[40] The employer relies on seven ground of appeals as follows:

"a) The learned judge erred in law and in fact in granting the challenged orders.

b) The learned judge erred in law when he declined to find that the [Contractor] having failed to satisfy the requirements of section 11 of the Arbitration Act 2017 to make the request to refer the matter to arbitration in its first statement filed with court was precluded from referring the matter to arbitration.

c) The learned judge erred in finding that the [Contractor] was not precluded from challenging the Adjudication Decision dated 29 June 2017 and was entitled to proceed to arbitration.

d) The learned judge erred in not finding that the [Contractor] had sought to approbate and reprobate the Adjudicator's decision in that the [Contractor]:

(i) not only endorsed the Adjudicator's decision but also sought to enforce the same in its Claim Form and Particulars of the Claim and its Reply and Defence to the [Employer's] Defence and Counterclaim;

(ii) sought to challenge the Adjudicator's finding in favour of the [Employer]; and

(iii) simultaneously, sought to accept that pursuant to the Adjudication Decision it owed the [Employer]

i. US $82,025.00 being the amount paid to suppliers;

ii. JM $616,635.61 being the amount paid for repairs; and

iii. Interest on the said sums from the date of the Statement of Final Accounts.

e) The learned judge erred in finding that the [Contractor] had endorsed the Adjudicator's decision based on a mistake as to the interpretation of the same; and accordingly, that the endorsement of the same should not bar the [Contractor] from pursuing arbitration.

f) The learned judge erred in imposing a condition on the [Contractor] to provide security satisfactory to the [Employer] or to pay the sum ordered by the Adjudicator to be paid to the [Employer] into a joint interest bearing account, by a specified date without imposing a concomitant sanction for the failure of the [Contractor] to comply with the same.

g) The learned Judge fell into error in not granting the orders sought by [the employer's application]."

[41] In their detailed skeleton submissions filed on behalf of the employer[25], Mrs Kitson and Ms Brown deployed the arguments on these grounds under the following five broad heads:

1. Arbitration precluded under the Arbitration Act (grounds a), b) and c))

2. Approbation and reprobation of the adjudicator's decision (grounds a) and d))

3. No sanction for failure to provide satisfactory security (grounds a) and f))

[25] Appellant's skeleton submissions dated 15 May 2018

4. Endorsement of the adjudicator's decision on the basis of a mistake (ground e))
5. Summary judgment (grounds a) and g))

[42] In written submissions in response[26], Mr Thomas for the contractor very helpfully adopted the same order. There is, however, a considerable degree of overlap between these issues and I think it will therefore be convenient to consider issues 1, 2 and 4 together.

Arbitration precluded under the Arbitration Act

Approbation and reprobation of the adjudicator's decision

Endorsement of the adjudicator's decision on the basis of a mistake

The Arbitration Act 2017

[43] By an unusual coincidence, the Arbitration Act 2017 ('the 2017 Act') came into force on 7 July 2017[27]; that is, the same date of the 7 July 2017 letter in which the contractor advised the employer of its dissatisfaction with the adjudicator's award.

[44] For transitional purposes, section 64 provides that the 2017 Act "… applies to an arbitration conducted under an arbitration agreement made before the day this Act comes into force, if the arbitration is commenced on or after the day this Act comes into force".

[26] Respondent's written submissions in response to notice and grounds of appeal, dated 24 September 2018
[27] LN 120/2017 (dated July 7, 2017)

There can be no doubt, therefore, and neither party argued to the contrary, that the 2017 Act applies to this case.

[45] Both parties rely heavily on section 11 of the 2017 Act, which provides as follows:

> "11(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the Court."

[46] Also of relevance is section 36 (upon which the contractor in particular relies), which provides that –

> "Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

The submissions

[47] Mrs Kitson submitted that the judge erred as matter of law by failing to appreciate that he had no power to refer the matter to arbitration, given the contractor's failure to satisfy the requirements of section 11(1). Properly understood, section 11(1), empowers the court to refer a matter to arbitration only where the party making the request does so in its first substantive statement of claim. Accordingly, in this case, in which the contractor made no request to refer the matter to arbitration in its claim form, particulars of claim or reply to defence and counterclaim, the requirements of section 11(1) were

not satisfied. The court therefore had no power to refer the matter to arbitration and the judge erred in finding that the contractor was entitled to proceed to arbitration. Mrs Kitson submitted further that, in any event, by filing its claim, replying to the employer's defence and defending the counterclaim, the contractor evinced an intention to abandon the right to arbitration, waived the right to arbitration and committed a repudiatory breach of the agreement to arbitrate. The employer's acceptance of this breach therefore meant that the contractor's waiver was irrevocable and the matter could no longer be referred to arbitration.

[48] Further still, Mrs Kitson submitted that the judge erred in failing to find that what the contractor had in effect sought to do was to approbate and reprobate the adjudicator's decision, contrary to the well-known rule that it is not open to a party to at the same time accept and reject the same instrument.

[49] I hope I do no disservice to Mr Thomas' detailed response to these submissions by summarising their essence in this way. The adjudicator's decision was not entirely clear. The contractor complied with the requirement of clause 8.1.2 of the agreement by virtue of the 7 July 2017 letter, since all that clause 8.1.2 requires is notification to the other party of dissatisfaction with the adjudicator's award and a request that the matter be settled by arbitration. There is no time limit fixed in either clauses 8.1 or 8.2 by which arbitration is to commence after notice is served and the only time limit set in clause 8.2 is for the parties to agree on an arbitrator, which is within 14 days. But, pursuant to section 36 of the 2017 Act, the arbitral proceedings commenced on 13 July 2017, which

is the date on which the employer acknowledged receipt of the 7 July 2017 letter. In these circumstances, the parties not having "otherwise agreed", the judge had jurisdiction to refer the matter to arbitration as section 11(1) does not apply to arbitral proceedings that had already commenced before proceedings are brought in court. In this case, the contractor was merely seeking to continue arbitration, as permitted under section 11(2). But, in any event, section 11(2) also empowers a party to commence arbitration even if it had previously brought court proceedings. Even if the arbitral proceedings were not already in being as a result of the 7 July 2017 letter, the court should consider the contractor's application filed on 7 March 2018 as its first statement on the substance of the dispute. The doctrine of approbation and reprobation does not apply in a case such as this, as it is only applicable to wills, deeds or instruments *inter vivos*. Alternatively, the contractor did not approbate or reprobate the adjudicator's decision.

Discussion and conclusions on these issues

[50] Before turning to the authorities, I will first say something about the provenance of section 11 of the 2017 Act. Before the passage of the 2017 Act, where action was commenced in a matter in which there was in place a valid arbitration agreement between the parties, the position was governed by section 5 of the Arbitration Act ('the old Act'). Section 5 provided that, if any party to an arbitration agreement commenced legal proceedings against any other party to the agreement, any party to the proceedings could apply to the court, at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, for an order staying the proceedings. The section went on to provide that the court, once it was satisfied that (i) there was no

sufficient reason why the matter should not be referred to arbitration, and (ii) the applicant was ready and willing to do everything necessary to see to the proper conduct of the arbitration, "may make an order staying the proceedings".

[51] Section 5 of the old Act was an almost identical replica of section 4(1) of the English Arbitration Act 1950 ('the 1950 Act'). As the learned editors of Russell on Arbitration explained[28], the principle on which the court's discretion was exercised under that section was that –

> "Where parties have agreed to refer a dispute to arbitration, and one of them, notwithstanding that agreement, commences an action to have the dispute determined by the court, the prima facie leaning of the court is to stay the action and leave the plaintiff to the tribunal to which he has agreed."

[52] Despite the modernisation of the language and structure of section 9 of the more recent English Arbitration Act 1996 ('the 1996 Act'), the objective of the section remained largely the same, as the learned authors of a later edition of Russell on Arbitration[29] again explained:

> "Where the court action is commenced in breach of an arbitration agreement the other party may apply to stay the court action, unless he is content to forego his right to have the dispute referred to arbitration and to defend the action before the court."

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[28] Russell on the Law of Arbitration, 18th edn, page 153
[29] Russell on Arbitration, 23rd edn, para. 7-010 (page 349)

[53] However, section 9 of the 1996 Act differed in a significant respect from section 4 of the 1950 Act, in that, under section 9, on an application for a stay, made where court proceedings are commenced in a case in the face of an arbitration agreement, "a stay **must be granted** unless the court is satisfied that the arbitration agreement is 'null and void, inoperative or incapable of being performed'"[30] (emphasis mine). In other words, in the absence of either disqualifying factor, the court was given no discretion to refuse a stay.

[54] As will immediately be seen, the language of section 11(1) of the 2017 Act is in equally mandatory terms. The position under the 2017 Act is therefore that, on an application for a stay made by a party to an arbitration agreement in respect of which action has been commenced "not later than when submitting his first statement on the substance of the dispute", the court "**shall** … refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed" (emphasis mine).

[55] The paradigm case of an application for a stay of court proceedings in favour of arbitration, whether under section 11 or any of its statutory precursors, is one in which a party to an arbitration agreement files action against another party without reference to the agreement. It is in such a case that the other party, usually the defendant, will make an application to stay the action pending arbitration, the governing principle being that,

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[30] Russell, op. cit., para. 7-024 (page 358)

as far as possible, the parties' choice of an alternative method of settling disputes between them should be respected.

[56] Had this been such a case, I might have been strongly inclined to uphold the judge's finding that the 7 July 2017 letter was a sufficient request for arbitration for the purposes of clause 8.2.1 of the agreement, and that no further notice was required. It is true that, purely as a matter of construction, clause 8.1.2 and clause 8.2.1 may be taken to suggest that, as Mrs Kitson submitted, separate notices were required under each. But, from a practical standpoint, it is clear that the employer, having received the 7 July 2017 letter, can have been in no doubt that the contractor (i) was dissatisfied with the adjudicator's decision; and (ii) required the matter to proceed to the next stage of the dispute settlement mechanism, that is, arbitration. Looked at this way, I would have found it impossible to resist the judge's observation[31] that "[t]he letter is a sufficient notice as no document entitled 'Notice' is required" (in which case, as section 36 provides, the arbitral proceedings would then have been deemed to commence on 13 July 2017, the date on which the employer's attorneys-at-law received the 7 July 2017 letter).

[57] But this was hardly the paradigm case. In this case, it was the contractor who, having first intimated a desire to have the dispute arbitrated, then proceeded to file the court proceedings in relation to the same dispute, and later sought an order staying those very proceedings in favour of the arbitration proceedings which it had itself previously

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[31] Judgment, para. [11]

sought to initiate but not pursued. It is in these circumstances that Mrs Kitson submitted that the contractor, by filing court proceedings, must be taken to have waived its right to have the dispute determined by arbitration, and/or to have repudiated the arbitration clause in the agreement. This was also the basis of the submission that the contractor should not be permitted to approbate and reprobate the adjudicator's award.

[58] Mrs Kitson referred us first to the case of **Herschel Engineering Ltd v Breen Property Ltd**[32] ('**Herschel Engineering**'). In that case, the contract between the parties for the provision of electrical and other work provided for the referral of disputes, which could not be resolved amicably, to adjudication in accordance with certain statutory provisions[33]. The defendant refused to pay two invoices rendered by the claimant, who then issued proceedings in the County Court seeking judgment for the total of the invoices. The claimant having obtained judgment in default of defence, the defendant applied successfully to set it aside and was given unconditional permission to defend. However, the court stayed the proceedings for a period of 28 days to allow the claimant to consider the question of adjudication, which was raised before the judge.

[59] In short order, the claimant proposed adjudication of the dispute, but the defendant declined to take part in the proceedings. The claimant then sought summary judgment on the claim relating to the two invoices, in response to which the defendant filed a defence. Among other things, the defendant protested that "[i]t is now being

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[32] [2000] All ER (D) 559

[33] The Housing Grants, Construction and Regeneration Act 1996

vexed, harassed and put to unnecessary expense by the pendency of two actions in respect of the same subject matter, and seeks the protection of the Court against such double vexation".[34]

[60] On the hearing of the claimant's application for summary judgment before Dyson J, counsel for the defendant submitted that, by starting proceedings in the county court, the claimant waived or repudiated the benefit of the adjudication provisions in the contract. Dyson J agreed with this submission and said the following[35]:

> "I accept that a party may waive or repudiate an arbitration agreement. The issue of proceedings in court will usually amount to a waiver of his right to have the dispute that is the subject of the court proceedings determined by arbitration. The opposing party may, of course, compel him to abandon the legal proceedings by applying for a stay under section 9 of the Arbitration Act 1996. A party must nevertheless choose whether to perform his contractual obligation and refer a dispute which falls within the scope of an arbitration clause to arbitration; or whether to commit a breach of contract and refer the dispute to the courts. He cannot do both: he is put to his election."

[61] Mrs Kitson also referred us to the decision of the Court of Appeal of England and Wales in **Downing v Al Tameer Establishment and another**[36]. This was a closer case on its facts to what I have characterised as the paradigm case of an application to stay court proceedings in favour of arbitration, in that what was before the court was a

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[34] At para. 6
[35] At para. 22
[36] [2002] EWCA Civ 721; [2002] 2 All ER (Comm) 545

defendant's application under section 9 of the 1996 Act to stay court proceedings in favour of an agreement between the parties to submit their disputes to arbitration. The claimant resisted the application on the ground that, after the signing of the agreement in which the arbitration clause appeared, the defendant had wrongfully repudiated the agreement and that it was as a result of the claimant's acceptance of that repudiation that court proceedings were commenced.

[62] The judge in the court below held that the defendant's conduct had indeed amounted to a repudiation of the agreement, but then went on to hold that the claimant had not unequivocally accepted the repudiation, either by service of the writ or by correspondence, and that the stay would therefore be granted.

[63] However, the claimant's appeal was allowed and the stay was set aside. The court held that the question of whether or not a party had lost the right to arbitrate under a secondary contract such as an arbitration agreement was to be approached by applying traditional principles of the law of contract relating to the doctrine of repudiation. Accordingly, if one party demonstrated an intention no longer to be bound by the contract, it was open to the other party to accept such demonstration as repudiation and thereby bring the contract to an end. The judge in this case was correct to treat the defendant's conduct as amounting to a repudiatory breach, but ought also to have considered the claimant's subsequent issue of proceedings to be an unequivocal acceptance of the breach.

[64] In explaining the general position, Potter LJ, who delivered the only substantive judgment, said that[37] -

> "… a party may be held to have repudiated by anticipatory breach, and/or by an unequivocal rejection of any obligation to arbitrate, before such arbitration has been instituted by the other party to the agreement."

[65] And, on the question of whether the claimant had unequivocally accepted the defendant's repudiation of the arbitration agreement, Potter LJ added this[38]:

> "That being so, I consider (contrary to the view of the judge) that the position of a party issuing a writ following a repudiatory breach of the arbitration agreement is different from that of a person issuing proceedings simply to test the water. The question of whether or not the issue and service of proceedings is an unequivocal acceptance of the repudiation will depend upon the previous communications of the parties and whether or not, on an objective construction of the state of play when the proceedings are commenced, the fact of the issue and service of the writ amounts to an unequivocal communication to the defendant that his earlier repudiatory conduct has been accepted, in the sense that it is clear that the issue of such proceedings (i) is a response to the defendant's refusal to recognise the existence of the arbitration agreement or any obligation thereunder and (ii) reflects a consequent decision on the claimant's part himself to abandon the remedy of arbitration in favour of court proceedings."

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[37] At para. [25]
[38] At para. [35]

[66] The following extract from Russell on Arbitration[39] also makes it clear that, depending on the circumstances of the case, a party to an arbitration agreement may be taken to have repudiated it by commencing court proceedings:

> **"Express or implied repudiation**. A party may repudiate the arbitration agreement and if the other party accepts that repudiation the arbitration agreement will come to an end. The repudiation may be express or may be inferred from the conduct of a party who acts in a way that is inconsistent with the continued operation of the arbitration clause and evinces an intention not to be bound by it. However, a failure to comply with the general duty to do all things necessary for the proper and expeditious conduct of the arbitral proceedings is not a repudiation of the arbitration agreement. The repudiation may be by anticipatory breach of the arbitration agreement. Acceptance of the repudiation may be demonstrated by the commencement of proceedings in court.
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> **Repudiation by commencing proceedings**. A party may repudiate the arbitration agreement by commencement of proceedings in court in breach of its terms, but such breach will only be repudiatory if done in circumstances that show the party in question no longer intends to be bound by the agreement to arbitrate. Such an intention can only be inferred from conduct which is clear and unequivocal. If there was some reason for the breach, such as confusion as to the correct course, the court will not infer that the party bringing the proceedings intended to renounce the obligation to arbitrate."

[67] The authorities therefore confirm that, where a party to an arbitration agreement commences court proceedings in breach of the agreement, the other party may apply for a stay of the proceedings pursuant to section 11(1) of the 2017 Act; and, once the

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[39] 23rd edn, paras. 2-111- 2-112

preconditions to the grant of a stay set out in section 11(1) are satisfied, the judge will be obliged to grant the stay. This is the kind of case which I have ventured to describe as the paradigm case. However, there may be circumstances in which the party seeking to enforce the arbitration clause by applying for a stay will be taken to have either waived the benefit of the arbitration agreement, or, in the absence of some reason for the breach, such as confusion as to the correct course, evinced an intention to repudiate it. In either case, no stay will usually be given, once it can be shown that the other party has unequivocally accepted the repudiation. The commencement of action by the other party may in an appropriate case be evidence of an unequivocal acceptance of the repudiation.

[68] In this case, having intimated to the employer in the 7 July 2017 letter that it intended to pursue arbitration, the contractor took no further steps in that regard. As a result, the 14-day deadline for the appointment of an arbitrator by agreement between the parties elapsed. The contractor's next step was to file action against the employer on 15 September 2017. Neither the claim form nor the particulars of claim made any mention whatsoever of the arbitration clause.

[69] It is clear from the contractor's correspondence with the adjudicator and the employer in the aftermath of the adjudicator's award that the action covered precisely the same ground as would have been covered in the arbitration. Even if the contractor considered that the adjudicator's award was unclear or uncertain in scope, the appropriate course under the agreement was to refer the matter to arbitration. In these circumstances, as it seems to me, it is beyond question that the contractor by its conduct

evinced a clear intention to repudiate the arbitration agreement. In my view, this was not a case in which it could be said that the contractor was confused as to which course to follow.

[70] But even at this stage, of course, it would still have been possible for the employer to make an application under section 11(1) of the 2017 Act to stay the action. Instead, as it was also fully entitled to do, the employer opted to file a defence to the action and to counterclaim for the amounts which the adjudicator had awarded it. This was, in my view, a sufficiently unequivocal acceptance by the employer of the contractor's repudiation of the arbitration agreement. The contractor must therefore be taken to have abandoned the remedy of arbitration in favour of court proceedings. In making an order staying the court proceedings pending arbitration, therefore, the judge exercised a jurisdiction which it was no longer open to him to exercise on the facts of the case.

[71] This conclusion makes it strictly speaking unnecessary for me to consider in any detail the applicability of the doctrine of approbation and reprobation (or, as it is sometimes called, the doctrine of equitable election). In this regard, I think it suffices to refer to the following passage from the judgment of Ramsey J in **Christopher Michael Linnett v Halliwells LLP**[40] (a case also having to do with the interplay between adjudication and arbitration):

> "In my judgment, the doctrine of election prevents a party from 'approbating and reprobating' or 'blowing hot and cold'

[40] [2009] EWHC 319 (TCC), para. [116]

> in relation to the validity of an adjudicator's decision. … 'Once the Defendant elected to treat the decision as one capable of being referred to arbitration, he was bound also to treat it as a decision which was binding and enforceable unless revised by the arbitrator.'"

[72] It seems to me that, in this case, the contractor was guilty of the very thing which the rule against approbation and reprobation proscribes. For, on the one hand, it sought to challenge the adjudicator's award by the route of arbitration; while, on the other hand, it brought the court proceedings for the purpose of, as it was put in the reply and defence to the counterclaim[41], "enforcement of the decision of the adjudicator".

[73] By the end of the exchange of correspondence which took place between the contractor and the adjudicator, and the contractor and GSP in the period 10-31 July 2017[42], it seems to me that the parameters of the contractor's dissatisfaction with the adjudicator's award were reasonably clear. But, within a matter of weeks after that, having already notified the employer in the 7 July 2017 letter of its intention to have the matter arbitrated, and having also indicated that "notice of arbitration pursuant to clause 8.2(1) of the aforementioned Articles is imminent"[43], the contractor changed course and commenced court proceedings. While it may well be, as the judge surmised, that the contractor's approach was "ill-advised", it nevertheless seems to me that the contractor

[41] Reply and defence to counterclaim filed 12 December 2017, para. 3
[42] See paras [20]-[22] above
[43] See para. [19] above

must face the consequences of the capricious strategy which it chose to pursue in challenging the adjudicator's award.

[74] I should say, finally, that in arriving at my conclusion on these issues, I have not lost sight of Mr Thomas' reminder to us that an appellate court should be slow to disturb the exercise of a discretion by a judge in the court below. As this court explained in its oft-cited decision in **The Attorney General of Jamaica v John MacKay**[44], the court will only interfere with such a decision "on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'".

[75] However, in my respectful view, this was a case in which the judge's decision to stay the action in favour of arbitration was based on a mis-appreciation of the procedural history (not dissimilar to a misunderstanding of the evidence) of the case. The upshot of that history, as I have attempted to demonstrate, was that, by the time the application for a stay came before the judge, the contractor was, as a result of its own repudiatory action, no longer entitled to the benefit of the arbitration clause.

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[44] **Attorney General of Jamaica v John McKay** [2012] JMCA App 1, per Morrison JA at para. [20]; see also **Hadmor Productions Limited and others v Hamilton and others** [1982] 1 All ER 1042

[76] I would therefore allow the appeal on grounds a), c), d), and e), with the result that the stay of proceedings granted by the judge must be set aside. In the light of this conclusion, it is not necessary to deal with ground f), in which the employer complained about the nature of the condition which the judge imposed in granting the stay. So the only question which now remains is whether, as the employer contends in ground g), the judge ought to have granted the employer's application for summary judgment and other orders sought against the contractor.

Summary judgment

[77] The principal relief sought by the employer's application dated 3 January 2018 was an order for summary judgment against the contractor on the employer's defence and counterclaim. The application was made under rule 15.2(a) of the Civil Procedure Rules 2002 ('the CPR'), which permits the court to give summary judgment on a claim if it considers that "the claimant has no real prospect of succeeding on the claim or the issue". The basis of the application was that (i) the adjudicator determined that the contractor owed the employer the sums claimed in the counterclaim, *viz*, US$82,025.00 plus $616,635.61 and interest at the rate of 2% from 3 August 2016; (ii) the adjudicator did not determine that employer owed the contractor any money under the agreement; and (iii) the contractor has admitted that it is bound by the adjudicator's decision (which is in any event also binding because of the contractor's failure to advance the arbitration within the 14 days limited by the agreement for this purpose).

[78] The employer's application as originally filed also sought an order (under rule 26.3(1)(b) and (c)) striking out the contractor's statement of case on the ground that it

disclosed no reasonable cause of action and was in any event an abuse of the process of the court. But it seems to me that, in the light of the contractor's withdrawal of the claim before the judge, as Mr Thomas submitted, this aspect of the application is therefore no longer of any relevance, certainly as it relates to the claim itself. In other words, by the time the appeal came on for hearing before us, the contractor's claim for US$155,371.21, inclusive of retention of US$42,826.00, plus interest, was no longer a factor in the case. For the purposes of this discussion, therefore, I propose to focus on the issue of summary judgment, in respect of which it will, of course, be necessary to consider whether the contractor has shown any reasonable prospect of success in its defence to the counterclaim, and/or whether it is in fact no more than an abuse of the process of the court.

The submissions

[79] In support of the summary judgment point, Mrs Kitson referred us **Swain v Hillman and another**[45], in particular to Lord Woolf MR's oft-cited observation that the words "no real prospect of succeeding" on the claim or the issue "direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success"[46].

[45] [2001] 1 All ER 91

[46] See also **Cable & Wireless Jamaica Limited (T/A) Lime v Alliance Investment Management Limited and Reliant Enterprise Communication Limited** [2012] JMSC ADM 1, a decision of McDonald-Bishop J (as she then was), where the principles are carefully summarised at para. [22]

[80] Mrs Kitson also referred us to **Herschell Engineering Limited v Breen Property Limited**[47] and **Arts & Antiques Ltd v Peter Richards and others**[48], to make the point that it is now well established that, once found to be valid, an adjudicator's decision will be enforced on an application for summary judgment.

[81] On this basis, the employer therefore invited us to, in addition to allowing the appeal, grant its application for summary judgment.

[82] Submitting that this was not an appropriate case for an order for summary judgment, Mr Thomas was content to reiterate his earlier point that, in accordance with its usual practice, this court should not disturb the judge's exercise of his discretion not to grant the summary judgment application.

Discussion and conclusions on summary judgment

[83] The contractor's claim was for US$155,371.21 inclusive of the relevant retention of US$42,826.00. As I have already noted, and as Mr Thomas was at pains to point out, the claim was withdrawn. Once that was done, the only matters which remained alive were the contractor's application for a stay pending arbitration and the employer's application for summary judgment on the counterclaim. The counterclaim, as will be recalled, was for $616,635.61 and US$82,025.00, that is, the sums awarded by the adjudicator.

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[47] 2000 WL 33122359 (unreported) UKHC, judgment delivered 28 July 2000
[48] [2013] EWHC 3361

[84] In its particulars of claim, the contractor admitted owing the employer the $616,635.61. By clear implication, the contractor also admitted owing an additional amount of US$26,511.16; that is, the difference between the US$82,025.00 which the adjudicator awarded and the US$55,513.84 which, on the contractor's case, had been already deducted from payments due to it from the employer. So, the employer's counterclaim for $616,635.61 and US$26,511.16 was freely admitted on the pleadings and therefore plainly irresistible.

[85] As regards the difference of US$55,513.84, in his letter clarifying the award, the adjudicator put it completely beyond question that the sum of US$82,025.00 which he awarded to the employer was not intended by him to be subject to deduction in any respect in favour of the contractor[49]. Indeed, the adjudicator's only additional comment in that letter was that "[t]he payments to artisans and suppliers made by the [employer] on behalf of the [contractor] are recoverable by the [employer] under the contract". It therefore seems to me to be impossible to contend that the adjudicator could be taken to have meant something other than what he said in fact.

[86] As will also be recalled, the contractor's contention in the reply and defence to the counterclaim was that its claim was for "enforcement of the decision of the adjudicator", and "not re-litigation of issues determined by the adjudicator"[50]. The contractor also admitted being bound by the decision of the adjudicator. In these circumstances, the

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[49] See para. [36] above
[50] See para. [28] above

employer's counterclaim was, on the contractor's own pleading and the clear evidence, equally irresistible in relation to the difference of US$55,513.84.

[87] I would therefore conclude that the contractor's defence to the counterclaim does not have any real prospect of success. Accordingly, the employer is entitled to summary judgment on the counterclaim for $616,635.61 and US$82,025.00.

[88] The adjudicator's award included interest on the sums which he found to be due to the employer "at the relevant interest [sic] payable from the date of the Statement of Final Accounts"[51]. Clause 4.3E of the agreement stipulates for the payment of interest on overdue amounts "at the rate stated in Appendix 'A'", while Appendix A states that the rate of interest payable where none is expressly stated is 2% per month.

[89] On this basis, I think that the employer is entitled to simple interest on the outstanding amounts of $616,635.61 and US$82,025.00 at the default rate of 2% per month, from 3 August 2016 (the date of the final account) to 17 April 2018 (the date of judgment in the court below). Thereafter, any sum that is still unpaid will attract interest as a judgment debt in the usual way.

Disposal of the appeal

[90] I would therefore make the following orders:

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[51] Adjudicator's decision, para. 16.1

1. The appeal is allowed and the orders made by Batts J are set aside.

2. The appellant is granted summary judgment against the respondent for the amounts of $616,635.61 and US$82,025.00, with simple interest at 2% per month from 3 August 2016 to 17 April 2018.

3. Costs of the hearing in the court below and of the appeal to the appellant, such costs to be agreed or taxed.

An apology

[91] On behalf of the court, I wish to apologise for the delay in rendering this judgment. While the causes of these delays are well known, we fully appreciate the great inconvenience they can cause the parties.

P WILLIAMS JA

[92] I have read in draft the judgment of the learned President. I agree with his reasoning and conclusion and have nothing further to add.

PUSEY JA (AG)

[93] I too have read the draft judgment of the learned President and agree with his reasoning and conclusion.

MORRISON P

ORDER

1. The appeal is allowed and the orders made by Batts J are set aside.

2. The appellant is granted summary judgment against the respondent for the amounts of $616,635.61 and US$82,025.00, with simple interest at 2% per month from 3 August 2016 to 17 April 2018.

3. Costs of the hearing in the court below and of the appeal to the appellant, such costs to be agreed or taxed.