

BAILII Citation Number: [2005] EWHC B1 (TCC)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25th November, 2005

Before :

HIS HONOUR JUSTICE CHRISTOPHER CLARKE

Between :

TERA CONSTRUCTION LTD
- and -
YUK TONG LAM

Claimant

Defendant

Tape transcription by Exigent Group Limited
Vigilant House, 120 Wilton Road, London SW1V 1JZ

MS. FIONNUALA M^CCRENIE appeared on behalf of the CLAIMANT
MS. KATE VAUGHAN-NEIL appeared on behalf of the DEFENDANT

JUDGMENT

MR. JUSTICE CLARKE: This is an application by the Claimant, Tera Constructions Limited, which I will call Tera, for summary of judgment to enforce the decision of an adjudicator made on 13th October this year by which the Defendant, Mr. [Yung Ton] Lam – whom I will refer to as Mr. Lam – was ordered to pay the Claimants £40,308 together with interest of £4,490 and the RIBA nomination fee of £282, making a total of £45,080 on or before Thursday, 27th October.

The matter arises in this way: Tera is a small company carrying out traditional building work. Mr. Lam employed Tera to demolish a house and to construct two new houses at Croxdale Road, Berkhamsted, under a JCT Minor Works Agreement dated 26th August 2003. That agreement was administered by a Mr. Shannon of Shannon & Leach Surveyors, who acted as contract administrator. The commencement date of the contract was the 1st October 2003. The completion date, subject to extensions, was the 30th April 2004. The contract sum was £385,000.

On the 1st September 2004, the contract administrator notified Tera that in his view it was entitled to an extension of time, pursuant to Clause 2.2 of the agreement, of five weeks, making a completion date of the 4th June 2004.

According to the adjudicator, practical completion took place on the 17th September 2004, upon which date half of the retention, that is to say 2.5%, was due to Tera. Mr. Lam took possession of the houses on the 19th September 2004. According to him he did so, although the work was not complete, against a promise by Tera that they would make a concerted effort to complete within a few days. On the 5th November 2004, Tera submitted, pursuant to Clause 2.2 of the agreement, details of variations and causes of delay in order for the contract administrator to assess a reasonable extension time to the contract period, which Tera submitted would be eleven weeks.

On the 6th November 2004, Tera submitted to the contract administrator, pursuant to Clause 4.5.1.1 of the agreement, details of the work completed in order for him to compute the final certificate. Tera submitted that the variations were to be valued at £84,042.80 and that the final account was £488,963.56, with a final sum due of £53,865.37 together with the £2,404.15.

On the 3rd December 2004, the contract administrator issued a certificate for payment that certified a gross valuation of £461,296.80. He had issued a letter on the 2nd December 2004, setting out details of the computation, which Tera claims to be incorrect. Under this certificate, £40,068.19 was due on the 17th December 2004. On the 10th December 2004, Mr. Lam issued a withholding notice under Clause 4.4 of the agreement, and said that a payment of £2,702.48 would be made by the 17th December against the certificate and in the event, no payment was in fact made.

On the 18th January 2005, Mr. Lam gave Tera a notice to complete, pursuant to Clause 7.2.1 of the agreement, following an earlier conditional notice of the 10th January 2005.

On the 25th January 2005, the contract administrator sent a letter setting out why Tera was not, as he thought, due an extension of time as requested and why certain sums were omitted from the draft final accounts and stating that defective works were outstanding.

On the 22nd August, 2005 Tera served a notice of intention to refer a dispute to adjudication, which I will refer to as 'the notice', and an application to the RIBA for nomination of an adjudicator. Mr. David C. Watkins was duly nominated as an adjudicator on the 26th August, and on the 2nd September a referral, to which I will refer hereafter as 'the referral', was forwarded to him. That referral was amended on the 6th September.

On the 13th October, the adjudicator issued his decision to the effect that I have described. Under supplemental condition D7.1 of the agreement, the decision of the adjudicator is binding on the parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing. In the present case, the arbitration clause has been crossed out of the agreement, and any dispute in default of agreement must be determined by legal proceedings.

Under supplemental condition D7.2, the parties agree, without prejudice to their other rights under the agreement, to comply with the decision of the adjudicator and to ensure

that it is given effect. The notice recited the facts to which I have referred, and declared that a dispute existed in respect of:

- (1) the extension of time due to Tera;
- (2) the valuation of the works;
- (3) the sum due on the penultimate certificate toward payment;
- (4) the extent of defects/snagging works not made good;
- (5) the provision for access by the employer;
- (6) the grounds for withholding sums due to be paid on the penultimate certificate for payment.

The notice also contained a summary of issues which read as follows:

- (a) Tera seek a proper determination of the extension of time due for the contract works that they allege is eleven weeks in total;
- (b) Tera seek a proper determination of the value of the works that they allege is as set out in their draft final account submitted on the 6th November 2004;
- (c) Tera seek a sum due on the penultimate certificate for payment of £53,865.37 plus VAT of £2,404.15, to be paid in accordance with the terms of the agreement, and to which is to be added interest on late payment of sums due;
- (d) Tera seek an undertaking the employer will grant reasonable access to complete the defects/snagging;
- (e) Tera seek the recovery of the full amount of the RIBA nomination fee for the appointment of the adjudicator for the employer;
- (f) Tera seek interest on all overdue monies under the terms of the agreement;
- (g) Tera seek a decision that the employer be found liable for the whole of the adjudicator's costs in this reference.

The referral was a somewhat lengthier document. It made clear:

- (a) that the contract administrator had purported to award an extension of time of five weeks, when Tera claimed that they were entitled to eleven weeks, and gave Tera's reasons for seeking that extension; and
- (b) set out Tera's case on snagging;
- (c) set out Tera's on the withholding notice.

The referral ended up by seeking a decision of the adjudicator on twenty matters.

On the 13th October, the adjudicator issued his adjudication. In it, he rejected a challenge to his jurisdiction that had been made, and decided that he would deal with all the matters referred to him in the referral. In his adjudication he decided, amongst other things:

- (a) that the date of practical completion was the 17th September 2004;
- (b) that an extension of time of eleven weeks was due, with a sum of £7,711 for additional loss and expense;
- (c) that the withholding notice of the 10th December 2004 was valid;
- (d) that the notice of determination was invalid;
- (e) to deduct a sum of £1,630 in respect of snagging works, that being a figure accepted by Tera; he declared himself unable to carry out an inspection which would have permitted him to decide which of the alleged defective and outstanding works were admissible under the contract, a matter to which I shall subsequently return;
- (f) that the RIBA fee for the nomination of an adjudicator was a cost of the adjudication process that Tera was entitled to recover;
- (g) that an interim certificate should have been issued by the 1st October 2004, fourteen days after practical completion, payable by the 15th October 2004, of £465,857, less a retention of £11,646, so that £11,646 by way of retention should have been paid by that date; and that interim certificate 14 of the 3rd December 2004 should have been in the gross sum of £468,826, as a result of which £42,572 was payable thereunder;
- (h) he determined the interest due in consequence of his previous findings;
- (i) he determined that Mr. Lam should bear his fees and disbursements.

The purpose of adjudication is to provide a speedy interim determination as to what payment is or is not due to the contractor at any given time, so that he may then be paid, without prejudice to what may be the ultimate outcome of any subsequent

arbitration or suit. The parties agree to be bound by the adjudication and to comply with it. In those circumstances, the scope for resisting summary enforcement of the adjudication is necessarily limited, and CPR 24.2(a)(1) and (b) requires the Defendant to show, in order to avoid summary judgment, that he has a real prospect of successfully defending the claim for enforcement, or that for some other reason there ought to be a trial.

Enforcement is resisted in this case on three grounds:

- (a) want of jurisdiction on the part of the adjudicator;
- (b) the existence of a claim for outstanding and defective works; coupled with;
- (c) the alleged impecuniosity of Tera.

I say "coupled with" because Ms. Vaughan-Neil for the Defendant accepted that the mere fact that the Defendant asserted a settled for counterclaim would have not of itself been sufficient to avoid judgment.

The contractual provisions for notices and referrals are contained in Clause D4 of the supplemental conditions of the contract. Clause D4.1 provides as follows, and I quote:

"When, pursuant to Article 6, a party requires a dispute or difference to be referred to adjudication, then that party shall give notice to the other party of his intention to refer the dispute or difference, briefly identified in the notice, to adjudication. If an adjudicator has agreed or appointed within seven days of the notice, then the party giving the notice shall refer the dispute or difference to the adjudicator ('the referral') within seven days of the notice. If an adjudicator is not agreed or appointed within seven days of the notice, the referral should be made immediately on such agreement or appointment. The said party shall include with that referral particulars of the dispute or difference, together with a summary of the contentions on which it relies, a statement of the relief or remedy which is sought, and any material he wishes the adjudicator to consider. The referral and its accompanying documentation shall be copied simultaneously to the other party."

As is apparent from that provision the Notice is "briefly" to identify the dispute, and the referral is to give particulars of the dispute or difference with the summary of the contentions relied on, and the relief or remedy sought. A comparison of the notice and the referral in the present case clearly shows that the former is indeed a brief statement of the nature of the dispute and the latter gives particulars and details of the contentions that are made.

Thus, as it seems to me, each of the matters identified as the subject matter of the dispute, in Paragraph 9 of the notice or referred to in the summary of issues, is developed in the referral and summarised in its conclusion. In the end, the respects in which the adjudicator was said to have gone beyond his jurisdiction boiled down to three items. Firstly, it is said that the adjudicator was wrong to decide that the Notice of Determination of January 2005 was invalid. In my judgement, the validity of the notice of determination was necessarily bound up with the question, indisputably the subject of the notice, as to whether or not there had been practical completion. Under Clause 7.2.1 of the agreement the default of the contractor must occur before practical completion in order for a notice to be capable of being served under that clause. If, as the adjudicator held, practical completion took place on 17th September, the notice in January 2005, which relied on default after that date, could not be valid. Conversely, if the notice was valid there could have been no practical completion on 17th September 2004. A determination as to the date of practical completion thus went hand in hand with the determination as to the invalidity of the notice. A determination as to that invalidity was, in my judgement, well within the scope of the notice.

If I am wrong on that it does not in any event seem to me that any want of jurisdiction to determine the invalidity of the notice affected the validity of the adjudication made by the adjudicator as to the amount due. Ms. Vaughan-Neil referred me to the case of *KNS Industrial Services (Birmingham) Limited v Sindall* – a decision of His Honour Judge Humphrey Lloyd, Queen's Counsel, of 17th July 2000, in which His Honour said this:

"There may be instances where an adjudicator's jurisdiction is in question and the decision can be severed so that the authorised can be saved and the unauthorised set aside. This is not such a case. There was only one dispute, even though it embraced a number of claims or issues. KNS's present case is based on severing parts of the adjudicator's apparent conclusions from others. It is not entitled to do so. Adjudicator's decisions are intended to be provisional and in the nature of best shots on limited material. They are not to be used as a launching pad for satellite litigation designed to obtain what is to be attained by other proceedings, namely the litigation or arbitration that must ensue if the parties cannot resolve their differences with the benefit of the adjudicator's opinion. KNS must therefore accept the whole of this decision and if it does not like it to seek a remedy elsewhere (in the absence of successful negotiation or some other form of ADR). Furthermore I do not consider that it is right to try to dismantle and then to reconstruct this decision in the way suggested by KNS for that intrudes on the adjudicator's area of decision-making."

Ms. Vaughan-Neil invited me to approach any question of severance with caution in the light of that decision. That case appears to me however to be entirely different from the present case, since in that case a claimant sought to rely on those parts of the adjudication which favoured him, but to ignore those that did not.

Secondly, it is submitted that it was outwith the adjudicator's jurisdiction for him to decide that there had been a breach of Clause 4.3 of the agreement by reason of the failure to release retention on the 4th October 2004 and for him to decide that a payment should have been made on that date. But both of those questions were in my view covered by the reference in Paragraph 9.3 of the notice to the dispute being in respect of the sums due on the penultimate certificate for payment and to be covered by Issue (c), to which I have referred. The penultimate certificate was, under Clause 4.3, the certificate due on practical completion.

Lastly, it is said that it was not open to the adjudicator to consider the value of the outstanding work. But that appears to me to be covered by Clause 9.4 of the notice and also by clause (d) together with the recital under the heading 'Brief particulars of the dispute', Item 5, which read:

"The CA" – i.e. the Contract Administrator – "prepared a list of snagging/defective works on 17th September 2004, and Tera submits that the major part of these items has been rectified. Tera further submits that they have attempted to make arrangements to gain access to the premises to rectify such other works as required by the CA, but which reasonable access the employer has denied."

In those circumstances it seems to me that even taking a strict approach to the construction of the notice as the source of the adjudicator's jurisdiction there is no reasonable or realistic prospect for the Defendant of establishing that the adjudicator exceeded his jurisdiction.

Mr. Lam, however, denies that he has a claim in respect of outstanding and defective work, said to be in the sum of £49,128 together with VAT, as supposedly explained in a Schedule compiled by the Contract Administrator. Ms. McCredie described this claim as one that was "cobbled together", and it is certainly true that it is not in the best of order.

The bulk of the claim is for the cost of snagging. Clause 2.5 of the Agreement provides as follows, under the heading 'Defects liability':

"Any defects, excessive shrinkages or other faults to the Works which appear within 24 months of the date of practical completion and are due to materials or workmanship not in accordance with this agreement, or frost occurring before practical completion, shall be notified by the architect/contract administrator to the contractor, who shall make good, entirely at his own cost, unless the architect/contract administrator shall otherwise instruct. The architect/the contract administrator shall certify the date when in his opinion the contractor's obligation under Clause 2.5 have been discharged."

Of the total claim, £31,461.16 together with VAT constitutes the estimated cost of dealing with snags as in accordance with this clause as set out in a schedule of some thirteen pages, prepared on 28th September of this year.

There are a number of other claims, the basis of which is not entirely clear. There is a claim for £2,200.00 in respect of surveying costs said to have been associated with additional snagging/defective work inspections after the 19th September, 2004 in the sum of £2,200.00. Those are said by Ms. Vaughan-Neil to have been incurred as a result of the outstanding works not having been done, though it must be open for question as to whether some of the amounts claimed constitute the cost of determining what is the outstanding work in the first place.

Item 2 is the sum of £150.00 for building costs associated with complying with a building control letter which has not, I think, been exhibited. Item 3 is a claim for £4,972.00 for certain decorations; and Item 4 is the claim for material and plant purchases of £1,392.00; and Item 5 is for certain heating costs in the sum of £1,392.00 – the precise basis upon which that is said to be the responsibility of Tera is not apparent.

There is also a claim for additional fees of the contract administrator of £7,560.00 together with VAT, which appears to be said to be attributable to various delays in one form and another and costs involved in abortive snagging and dealing with the building inspector; again the precise basis upon which that is said to be the responsibility of Tera is not immediately apparent in relation to all the items.

Dealing with the most important claim, in relation to snagging works, the position is as follows: a snagging list was drawn up on about the 17th September 2004 and some of the items in it appear to have been dealt with between then and the 1st October 2004. On that date, an inspection appears to have been carried out by Mr. Lam and the contract administrator. A list of that date identifies work which had been completed, works which were neither snagging nor part of the works, and works which could not be done as a result of the denial of access. That is Mr. Malinauskas of Tera's construction of the document. According to him he went through this list with the contract administrator and it showed, in his view, a sum of £1,630.00 as being due. It was that sum for which the adjudicator made allowance in his adjudication.

A list of outstanding items was subsequently drawn up by the contract administrator and attached to his letter of the 10th January 2005. In that letter he referred to two previous letters, to a previous letter and email of his of 2nd and 4th December 2004 respectively "listing the outstanding work items that remain to be completed on this project". The letter went on to give notice under Clause 7.21 of the contract, that unless Tera's default ended within seven days its employment under the contract would be determined, and ended by saying: "for the avoidance of doubt, we attach the lists of outstanding items and also include the items notified by the employer in his withholding notice dated the 10th December 2004."

The aggregate of the items referred to as additional outstanding items in the list attached was £18,890.00. As I have said, a further inspection took place on the 28th September of this year, as a result of which, a claim for £31,461.16 plus VAT is now put forward.

So far as Tera's financial position is concerned, Mr. Lam contents that Tera is in a precarious financial position such that no order should be made, or at least not one that makes him bound to make payment forthwith. The latest filed accounts, which are for the year ending 31st August 2003, show Tera to have net assets of £76.00 and to have only one shareholder, with a £1 share, namely Mr. Malinauskas.

In addition, since the company was incorporated on the 30th August 2002 it has had a number of County Court judgements registered against it in 2005, of which four remain unsatisfied, totalling some £7,677.00. Tera's trading telephone number is apparently not answered by someone in person, but goes on to an answerphone without a company name. That is the gist of the evidence filed by Mr. Lam.

In response, Mr. Malinauskas in his written statement, states that Tera has some seven to fifteen employees and uses sub-contractors. Its premises are on two floors with 2,200 square feet of space, the ground floor being used as a joinery shop. He indicates that there was, in the middle of this year, a change of accountants from Charltons to another firm, whose address became the registered office, but that there has recently been a change back to Charltons, whom he described in his statement as being due to file the overdue accounts by the end of this week. I was, however, told that they are not to be filed until next week. A letter has been produced from those accountants which records that the company is trading, and that its turnover in the accounts for the year ended the 31st August 2004 was £477,894.00. Beyond that, the letter contains no relevant information.

He also, Mr. Malinauskas also says that the reason why Tera had suffered financial difficulty was because of Mr Lam's failure to make payments under the agreement, and that it was that which led to the County Court judgements. These judgements do indeed all postdate the date of practical completion, at which time according to the adjudication, Tera should have received a sum of £45,000.00.

Equally significantly, there were during 2005, six judgements recorded against Tera, two of them, they being the earliest in time – in the sum of £8,219.00 and £3,796.00 respectively have been paid off. According to Mr. Malinauskas's evidence, Tera has four current contracts for the sums of £185,000, £258,000, £43,000 and £13,000, respectively.

What course then should the Court take in light of the position that I have described? The essential question, as it seems to me, is whether, although there is, as I hold, no defence to the claim for enforcement, there ought for some reason to be a trial; that is a matter of discretion in which it is necessary to consider broad questions of justice and the underlying purpose of the adjudication regime. Ms. Vaughan-Neil invites me to stay any judgement that I might make in whole or in part against, if necessary, payment in of an appropriate amount and the fixing of a stringent timetable for the pursuit of Mr Lam's claim.

I have come to the conclusion that this is a not an appropriate case in which to grant a stay. I reach that conclusion for these reasons:

Firstly, the adjudication system is designed to give a summary, albeit not final remedy, whereby the contractor can obtain payment as it becomes due as the contract proceeds. The adjudicator has held that practical completion took place over a year ago. Payment should then have been made against the certificate that should then have been issued. It does not seem to me appropriate, in the absence of special circumstances, to hold up such payment on account of counterclaims that are said to have arisen thereafter.

Secondly, there seems to me to be considerable doubt as to both liability and quantum in relation to the principal part of Mr Lam's claim. So far as liability is concerned, it is Tera's case that they were willing to deal with the snags that existed, but were prevented from doing so and were denied access to the works from the 15th October 2004. It is common ground, as I understand it, that they were denied access from the date of the notice of termination.

There is contemporaneous support for Tera's stance in the form of the letters of the 26th and 30th November 2004 (at pages 176 and 175 of the bundle) and the reference in the letter from Tera of the 5th November 2004 (on page 180 of the bundle) and to the fact that on the 15th October it was made plain that no further access would be given to either property.

So far as quantum is concerned, it is noticeable that the claim has risen from the £18,000 that was put forward at the beginning of January to a sum in excess of £31,000 that was put forward on the 28th September. I find it somewhat surprising that the claim has increased by so large an amount over that period.

Thirdly, the contention that nothing should be paid because of the amount that is due on account of snagging is a matter that could have been raised in the adjudication. Notice of adjudication was given on the 29th August; the inspection which produces the figure of £31,500-odd took place on the 28th September. It seems to me that contentions in relation to snagging could have been raised within the adjudication.

In fact, what appears to have happened according to the adjudicator is that he suggested that there should be an inspection of the works and that the scope of his jurisdiction should be extended to allow him to carry out such an inspection in order, as he put it, "hopefully to provide a basis for bringing the dispute to a final conclusion", in order that he might review the outstanding items on the snagging schedules and thereby making the argument as to which was the latest addition of them irrelevant.

He records in paragraph 8.21 of his adjudication that it was the Respondent, that is to say Mr. Lam, who raised an objection in regard to how he intended to proceed and that he had therefore dealt with the snagging on the basis only of the submitted documentation. He therefore was only able to record, as he said at Paragraph 8.31 that:

"In the absence of any detailed cost submission from the Respondent, I had no alternative but to deduct the sum of £1,630 accepted by the Claimant."

Thirdly, it is true that on the material available to the Court, Tera does not appear to be in good financial shape and there is significant material that the Court does not have to hand in the form of recent accounts, even in draft, revealing either the profitability or the net asset status of the company. In short, it is not clear what the present position of the company is, but it is not shown to be insolvent.

There is evidence that its financial difficulties have been caused by the non-payment of the amounts which are the subject of their adjudication. There is evidence that the County Court judgments which were entered against it in 2005, after payment should have been made on practical completion, are ones that Tera has endeavoured to pay off in which it has been partially successful. There is also no evidence that Tera is in a worse position now than it was when the agreement entered into. In *Herschel Engineering Ltd v Breen Property Ltd* (reported 28th July 2000), His Honour Judge Lloyd said this at Paragraph 19:

"In my view, on an application for a stay where a party has entered into a contract with company whose financial status is or may be uncertain and finds itself liable to pay money to that company under an adjudicator's decision, the question may properly be posed: is this not an inevitable consequence of the commercial activities of the applicant that it finds itself in the position it is in? It has, as it were, contracted for the result. That is not normally a ground for avoiding the consequences of a debt created by the contractual mechanism (which is how in the absence of express terms adjudication operates – see section 114 of the Act). It is very easy (and prudent and relatively inexpensive) to carry out a search or to obtain credit references against a company whose financial status and standing is unknown. Not to do so inevitably places a person at a significant disadvantage. It has only itself to blame if the company selected by it proves not to have been substantial (as opposed to a material deterioration in its finances since the date of contract)."

Those observations seem to me to be apposite in the present case. Further in *Absolute Rentals Limited v Gencore Enterprises Limited* (16th July 2000), his Honour, Judge David Wilcox sitting in this Court said of the circumstances then before him, the following, and I quote:

"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 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 on the 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 is within the terms of the reference. It is a robust and a summary procedure and there may be casualties although the determinations are provisional and not final. (See *Bouygues (UK) Limited v Dahl-Jensen (UK) Limited*, TCC, Dyson J, judgment of the 17th November 1999 at Paragraph 35)."

I respectfully agree. Taking all those matters into consideration, it seems to me, I regard it as inconsistent with the underlying purpose of the adjudication system and not necessarily for the purposes of doing justice for me to grant a stay of the judgement in the present case and accordingly, I decline to do so and propose to enter judgement for the sum now claimed.

MS. MCCREDIE: And quickly, My Lord, may I ask for the payment on a certain date. My client has been asking for his money for well over a year, as Your Lordship has noted. My Lord, I have been instructed to ask for the more usual fourteen days. I'm not entirely that in fact it's even possible for the money to be paid within seven days. Right. I have been told that it was released last week, that it's in a 21-day notice account.

MR. JUSTICE CLARKE: What is it?

MS. MCCREDIE: The money, the judgment sum has been applied for, and so it's not actually going to be available within seven days. It will be available within fourteen days. That's what I have been told.

MR. JUSTICE CLARKE: Well, I am prepared to grant fourteen days, which is a normal time, normal period; but I don't see why it should be any longer.

MS. MCCREDIE: No, My Lord, I'm not seeking any longer.

MR. JUSTICE CLARKE: Fourteen days.

MS. VAUGHAN-NEIL: [My Lord, I ask for my costs inasmuch as cost structure should be decided.]

MR. JUSTICE CLARKE: Yes.

MS. VAUGHAN-NEIL: [unclear]

MR. JUSTICE CLARKE: Yes.

MS. VAUGHAN-NEIL: Inasmuch as I can particularly assist you in...

MR. JUSTICE CLARKE: Well here, it says if anything, *au contraire*.

MS. VAUGHAN-NEIL: My Lord, [unclear] would just be the costs as much in principle. As far as the quantum is concerned, the only observations that I would make are: first, it's not clear to the Defendant whether Ms. Benton-Jones is in fact a trainee or an assistant. If she was only a trainee then I would query whether she should have charged herself out as Grade 3 rather than Grade 4. Sorry, I don't know if my learned friend wants to respond to that.

MR. JUSTICE CLARKE: That must be discoverable.

MS. MCCREDIE: I'm discovering it and unfortunately missed some of what my learned friend was saying. My instructing solicitor is a solicitor and she is not a trainee.

MR. JUSTICE CLARKE: Not a trainee. All right, thank you.

MS. VAUGHAN-NEIL: And My Lord, bringing other quantum [unclear], it's always slightly embarrassing commenting on other barristers' fees, is that if it's the case that, as appears from the text that my learned friend fee is solely in respect of the hearing, rather than for example as in my case for advice and documents separate from the hearing, then I would just observe that it's quite a bit higher than mine and our level of call is not at all dissimilar; she is two years more senior than I am. But I don't want to labour that point; it's always a slightly embarrassing point to take.

Beyond that, I don't have any other submissions to make on the schedule of costs.

MR. JUSTICE CLARKE: But as your schedule, you presumably have got a schedule of costs.

MS. VAUGHAN-NEIL: I'm sorry, My Lord, you haven't seen mine, have you? I'm so sorry.

MR. JUSTICE CLARKE: No, I haven't.

MS. VAUGHAN-NEIL: I had forgotten that you didn't have it in front of you.

MR. JUSTICE CLARKE: Right. But a portion of what is on your schedule is described as 'Fees for advice/documents'. [unclear]

MS. VAUGHAN-NEIL: My Lord, yes. That will be reference to advice that I gave as to the merits and involvement that I had in preparation of the witness statement and I was given a [barrage], a volume of documents that appears before you today. So that is what that first figure relates to, and then the second one is, as you can see, my fee for today's hearing specifically.

MS. MCCREDIE: That's a perfectly dissonant point for my learned friend to take [unclear] – but in fact, if you compare the two sums, they are about the same and I wasn't briefly just for today. I did advise on the particulars of claim, the application of the witness statements and so forth, as can be seen probably from the section that deals with tenants and council. [unclear] And the costs overall are not dissimilar to the Defendant's. [unclear] And I obviously don't know what my learned friend did to earn the two separate fees, but as I say, if you add them together they are pretty well the same.

MR. JUSTICE CLARKE: They are simplified...

MS. MCCREDIE: [unclear] I don't know if I can assist you further.

MR. JUSTICE CLARKE: No, you can't. Well, it seems to me that I am going to assess these at the figure that is contained in your schedule, at £11,612.08 in total. I do say it because the difference between the two schedules is not very great. The cost for counsel *in toto* is almost identical, and it seems to me that in a case of this kind the Claimant's have marginally more to do than the Defendants – including, for instance, paying the Court fees; and that in those circumstances there is no particular reason to pare down the total in question.

MS. VAUGHAN-NEIL: My Lord, a further small point which I know is a novel thing for me to suggest, but I have said to my client that I will raise it before you: his concern about the Defendant putting itself into voluntary liquidation is such that he is keen for me to invite you to make some provision in the order, in your order today, that that is not done. Now I am not quite sure how such an order could be formulated, but I raised it because of the strength of his concern. He wants to avoid – understandably – wants to avoid a situation where he pursues the claim to which we have referred today but ends up with a meaningless judgement or indeed has no sensible claim to pursue at all because the Claimant is already in liquidation.

It may be that his fear is unfounded, but if there is [unclear] then perhaps that's all the more reason why the Claimant would be willing maybe to give an undertaking not cynically to put itself into liquidation in order to avoid any further litigation that might ensure arising out of this dispute. Sorry to raise it at five o'clock on Friday afternoon.

MR. JUSTICE CLARKE: No, not at all. What do you say?

MS. MCCREDIE: Well, My Lord, it is entirely novel. I resist it; would you like me to address it any further?

MR. JUSTICE CLARKE: No. I'm afraid I don't think I can assist you. It seems to me, the logic of my decision is that the judgement should be in the form that I have given it, without a stay. I don't think one can then go on to make some form of order precluding voluntary liquidation, even if one could satisfactorily draw up its terms, which I very much doubt. Good, thank you both very much.