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Construction Act Review

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INSOLVENCY ISSUES

Introduction

At the time of writing, the economic climate is volatile and parts at least of the construction industry are in decline. There are a number of pointers towards a period of recession and in these uncertain circumstances it is appropriate to review aspects of insolvency which relate to the Housing Grants, Construction and Regeneration Act 1996 (the HGCR Act).

Particular issues relating to the determination provisions in standard JCT contracts in the event of the contractor's insolvency have been considered recently in Construction Act Review (CAR).[1] Insolvency generally was previously considered in CAR in 2002.[2]

The following topics are revisited:

(1) the use of statutory demand/winding-up petition as an alternative to adjudication, where there is a debt pursuant to the payment provisions of a construction contract;

(2) the use of statutory demand/winding-up petition as a means of enforcing an adjudicator's decision;

(3) stay of execution, where summary judgment is given in respect of an adjudicator's decision;

(4) particular considerations in relation to liquidation, receivership and administration.

Statutory demand as an alternative to adjudication

In some circumstances, a party to a construction construction will assert in relation to its claim to a sum due under the contract that there is no defence; it is simply an indisputable debt. The claimant in this position may consider pursuing its claim either by serving a statutory demand or presenting a winding-up petition. This may be a more direct and possibly a more cost-effective course than conducting an adjudication and

[1] See *Sections 109, 110 and 111 Revisited: the Melville Dundas Case* at (2007) 23 Const.L.J. 444 and *Section 111 and Melville Dundas Revisited: the Pierce Design Case* at (2008) 24 Const.L.J. 95.

[2] (2002) 18 Const.L.J. 39. See also (2006) 22 Const.L.J. 378, a CAR issue dealing in detail with the case law on stay of execution when judgment is given to enforce an adjudicator's decision.

then proceeding to enforce the adjudicator's decision, or *a fortiori* than court or arbitral proceedings.

The rationale for such a course is that if there is a debt, which is unpaid, the explanation is that the debtor is unable to pay its debts as they fall due, the test for insolvency under s. 123(1) of the Insolvency Act 1986. Failure to pay a debt is evidence of inability to pay the debt.[3] A statutory demand is not necessary; the creditor may proceed directly to present the winding-up petition, but a statutory demand which is not met provides evidence that the debtor is unable to pay its debts as they fall due.

In relation to the Housing Grants, Construction and Regeneration Act 1996 ("the HGCR Act"), it is submitted that the statutory demand/winding-up petition route may be considered particularly in respect of a certified sum where there is no notice of withholding. The Court of Appeal has made it clear that where the construction contract has a certification procedure, the certificate determines what is due to the contractor, a matter which has to be determined under section 110 of the HGCR Act.[4] Therefore, unless and until a tribunal decides otherwise, there is no argument that the amount certified is the amount due. If the paying party does not agree with the certified sum, it must nevertheless pay; it may in the longer term go to adjudication or other tribunal in accordance with the construction contract, to challenge the amount of the certificate. If there is no effective notice of withholding, the sum certified is in the meantime an undisputable debt. No set-off or withholding is valid in respect of the debt established by the certificate without a valid and effective notice of withholding; that is the effect of s.111 of the HGCR Act.

While winding up of a debtor company is not in the interests of the creditor, the debtor may bow to the pressure imposed by the statutory demand or the threat of the presentation of a winding-up petition. In a straightforward case, this is a route for consideration at least. In particular, this route is a matter for serious consideration where there is either no counterclaim, no counterclaim that overtops the claim or no genuine and serious counterclaim

The position becomes more complicated, however, where although there is an undisputed debt and no effective notice of withholding, the debtor nonetheless asserts an effective set-off or cross-claim which would extinguish or overtop the claim. This could occur where for example the debtor's cross-claim arose after the date on which an effective notice of withholding could have been served.

The way in which the courts approach this issue is illustrated in *Re A Company (No 1299 of 2001)*[5] and *Re Environmental Services*.[6] In *Re A Company*, there was an undisputed debt and the creditor had locus standi to present a winding up petition.[7]

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[3] *Re Taylor's Industrial Flooring* [1990] B.C.C. 44 (CA).
[4] *Rupert Morgan Building Services (LLC) Ltd v Jervis* [2004] 1 W.L.R. 1867, CA.
[5] *Re A Company (No.1299 of 2001)* [2001] C.I.L.L. 1745, Ch D.
[6] *Re Environmental Services Ltd* unreported, November 14, 2004.
[7] For the circumstances of the debt, see the earlier edition of CAR at (2002) 18 Const.L.J. 39.

Having established this threshold point, the court went on to consider whether or not, as a matter of discretion, to refuse to make a winding up order.

This involved a consideration of the principle laid down by the Court of Appeal in the *Bayoil* case,[8] which is that where a company has a genuine and serious cross-claim, which it has not been able to litigate, the petition should be dismissed or stayed unless there are special circumstances.

It was held that the "pay up, litigate later" regime of the HGCR Act did not constitute special circumstances that gave the debt an exceptional status.[9] That would not be consistent with *Bayoil*, which also concerned a "pay up, litigate later" regime (in the context of shipping law and imposed by case law rather than statute).[10] The matters for consideration are accordingly normally whether the debtor has a genuine and serious cross-claim, and, if so, whether it has not been able to litigate it.

In *Re A Company*, whether there was a genuine and serious cross-claim was not clear and the decision was not based on this consideration. The decisive factor was that the the debtor had been able to litigate its cross-claim, but had failed to do so. The judge stated:

> "What is required by the [*Bayoil*] guidelines in my view is a reasonable opportunity to litigate the cross-claim to the point of obtaining an enforceable order for payment. Had [the debtor] sought to establish the cross-claim by arbitration or litigation, it is perhaps improbable that it would have obtained an award or judgment by now. An adjudication order under s. 108(2), which would have been enforceable pending definitive resolution in arbitration or litigation, can however be obtained in a shorter time frame…it seems to me probable that an adjudication award could have been obtained by now."[11]

The judge, Mr David Donaldson Q.C., accordingly found, applying the *Bayoil* principle, that being able to litigate a cross-claim includes bringing the cross-claim in adjudication and accordingly the time needed to have the reasonable opportunity to litigate the cross-claim is relatively short.

The same approach was taken and the same principles were applied in *Re Environmental Services.* It was found on the facts there was an amount due and no valid, effective withholding notice. Applying the *Bayoil* principles, there was on the facts a genuine and serious cross-claim and again the decision turned on whether the debtor had been unable to litigate its cross-claim. On the facts, the judge, Hart J, was "narrowly satisfied" that the debtor had not had a reasonable opportunity to litigate its cross-claim and so he did not allow the petition to proceed.

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[8] *Seawind Tankers Corporation v Bayoil S.A.* (1999) Lloyd's Rep. 210 (CA).
[9] The regime of the HGCR Act was relevant to the debt itself: see the earlier edition of CAR at (2002) 18 Const.L.J. 39.
[10] The same view was taken in *Re Environmental Services* (above), *i.e.*that the regime of the HGCR Act did not constitute special circumstances.
[11] *Re A Company (No 1299 of 2001)* at para 19.

In conclusion on this issue, a creditor will need to consider whether there is a genuine and serious cross-claim. If so, proceeding with the winding-up route is potentially problematical. The creditor may still succeed if the debtor has had a reasonable opportunity to bring the claim in adjudication or otherwise but has not done so.

From the debtor's point of view, if it has a cross-claim, it must consider pursuing it with demonstrable dispatch if it wishes to resist the presentation of a winding-up petition. The cross-claim must be genuine and serious and sufficient to extinguish or overtop the creditor's claim.

Statutory demand as means of enforcing adjudicator's decision

The use of a statutory demand or presentation of a winding-up petition where a creditor has the benefit of an adjudicator's decision awarding money in its favour seems *prima facie* an attractive course since there is a clear debt with the statutory backing of the HGCR Act. In a straightforward case, the threat of winding up may produce results.

There are two main potential complications for consideration. The first is the same as that considered above in relation to claims for sums due under a construction contract, namely where the debtor asserts a set-off or cross-claim. The second is where the debtor asserts a challenge to the validity of the adjudicator's decision.

An added factor is that the Technology and Construction Court (TCC) judges have made it clear that summary judgment is normally the appropriate course for enforcement of an adjudicator's decision. In a straightforward case this is a relatively quick and cost-effective process. The issue here is whether the potentially even more straightforward process of serving a statutory demand may be an advisable route.

In *Jamil Mohammed v Bowles*[12], in *Parke*[13] and in *Guardi Shoes*,[14] it was held, unsurprisingly, that an adjudicator's decision creates a debt. In *Jamil Mohammed v Bowles*, an application to set aside a statutory demand failed. There was no cross-claim. In *Guardi Shoes*, the creditor had obtained judgment as well as an adjudicator's decision. The debtor, Guardi, allegedly had cross-claims but these had not been pursued in accordance with the contractual machinery, although Guardi had had the opportunity so to pursue them. Guardi's application for an order restraining the creditor from advertising a winding-up petition failed.

It would accordingly seem clear that the statutory demand/presentation of winding-up petition route may be taken as a means of pursuing a debt created by an adjudicator's decision.

[12] *Jamil Mohammad v Dr Michael Bowles*, unreported, December 1, 2002.
[13] *Parke v The Fenton Gretton Partnership* [2001] C.I.L.L. 1712.
[14] *Guardi Shoes Ltd v Datum Contracts* [2002] C.I.L.L. 1934.

However, in *Parke v Fenton Gretton Partnership*,[15] the debtor with an adjudicator's decision against him succeeded in setting aside a statutory demand. He, however, had started proceedings in the Technology and Construction Court which would have the effect, if successful, of reversing the adjudicator's decision. There was a genuine cross-claim which gave rise to a triable issue.

Most recently, the issue arose obliquely in *Harlow & Milner*,[16] in which Judge Coulson (now Coulson J) gave summary judgment to enforce an adjudicator's decision. He also had to deal with an application by the claimant for costs incurred in bankruptcy proceedings when a statutory demand was set aside by consent and the issue of costs was reserved to a TCC judge. The background to this was that the claimant apparently originally sought to enforce an adjudicator's decision by statutory demand and bankruptcy proceedings and then switched to summary judgment in the TCC.

In deciding to make no order as to the costs of the bankruptcy proceedings, Judge Coulson made some *obiter* comments, which appear to be intended to discourage the use of the statutory demand/winding-up petition route:

> "…it is not easy for me to understand why the bankruptcy proceedings were issued. In my judgment the appropriate way of enforcing the adjudicator's decision was to issue enforcement proceedings in the TCC. If the proceedings had been issued in June, the Claimant would have had his money in July, and a good deal of time and costs would therefore have been saved. Of course I quite accept what Mt Mort says, that the issue of a bankruptcy petition was not of itself the wrong way of enforcing these proceedings. On the other hand, given that there is a procedure expressly tailored by the TCC to allow the prompt and efficient enforcement of adjudicators' decisions, the court has to consider very carefully an application for the costs of other proceedings, commenced in addition to the enforcement claim, particularly in circumstances where, in the end, it was the enforcement route that has proved to be the right course…"[17]

The writer has no quarrel with the judge's approach to or decision on the question of the costs of the bankruptcy proceedings. Here the judge also quite rightly recognized that the issue of a bankruptcy petition was not wrong as a method of seeking to "enforce" the adjudicator's decision, *i.e.* as a means of seeking to exert pressure to obtain payment. However, the judge appears, somewhat inconsistently, to move away from this position in the following *obiter* passage:

> "It is important that all parties to adjudication realise that save in exceptional circumstances, the most efficient way of enforcing the adjudicator's decision is by enforcement proceedings in the TCC. Other ways of enforcing such decisions (such as, for instance, bankruptcy proceedings) are something of a blunt

[15] *Parke*, above.
[16] *Harlow & Milner Ltd v Teasdale* [2006] EWHC 54 (TCC).

[17] *Harlow & Milner*, above, at para 16.

> instrument and raise potential issues which have little or nothing to do with the decision which is at the heart of any enforcement application. Ordinarily, therefore, the issue of a statutory demand will not be the appropriate means of enforcing an adjudicator's decision."[18]

While there is some force in this, it should be borne in mind that the route Judge Coulson warns against in this obiter remark without any express consideration of authorities, was successfully taken in *Jamil Mohammed v Bowles* and *Guardi Shoes*. What "potential issues" are raised will depend on the facts of the case. Judge Coulson's remarks also beg the question of what the exceptions will be to the position applicable "ordinarily". As indicated above, it is submitted that a major factor will be whether there is a counterclaim.

The other interesting issue is whether there is any challenge to the validity of the adjudicator's decision, which would normally be a challenge on the basis of either want of jurisdiction or breach of the rules of natural justice. In the *Jamil Mohammed* case, the adjudicator's decision was treated as a debt regardless of a jurisdictional challenge; on the basis that until a challenge was successfully made in court, the decision was binding. It is doubted if this is correct. If an adjudicator's decision is a nullity by reason of lack of jurisdiction or breach of the rules of natural justice, the sum awarded does not, it is submitted, constitute a debt and the Companies Court should, it is submitted, grant an order setting aside a statutory demand or restraining the presentation of a winding-up petition. This was the approach taken, correctly, it is submitted, to setting aside a statutory demand in *Oakley v Airclear*[19], where the adjudicator's decision which was said to be the basis for the debt was found to be a nullity as the adjudicator was not validly appointed.

In conclusion on the issue of the statutory demand/winding-up petition route to enforce an adjudicator's decision, it may in straightforward cases be effective, but creditors should consider whether there may be any effective challenge to the validity of the decision and whether there is any genuine or arguable cross-claim; and should consider whether it may be more effective and/or quicker to apply for summary judgment in the TCC.

Stay of execution

Where a claimant succeeds in obtaining judgment in court to enforce an adjudicator's decision, often on summary judgment, the respondent may apply for a stay of execution. This type of application is normally made where the defendant asserts it will in effect overturn the adjudicator's decision by taking the matter to final resolution in court or arbitration and that the claimant will be unable to repay the amount due under the judgment. Or the defendant may assert that it otherwise has a substantial claim against

[18] *Harlow & Milner*, above, at para 18.
[19] *William Oakley v Airclear Environmental Ltd* [2002] C.I.L.L. 1824.

the claimant and that the claimant will be unable to repay the amount due under the judgment.

The case law available at the time was reviewed in CAR in 2002[20] and a further comprehensive review of the extensive subsequent case law was undertaken in CAR in 2006.[21] Here the writers summarise the main principles and refer briefly to the case law since the last review in CAR.

A stay of execution is sought by relying on RSC Order 47, which remains part of the CPR by operation of Part 50. Rule 1(a) provides:

> "Where a judgment is given or an order made for the payment by any person of money and the court is satisfied on an application made at the time of the judgment, or order, or at any time thereafter by the judgment debtor or other party liable to execution –
>
> > (a) that there are special circumstances which render it inexpedient to enforce the judgment or order…
>
> …the court may by order stay the execution of the judgment or order…either absolutely or for such period and subject to such conditions as the court thinks fit."

The rules that the courts apply are accordingly in wide terms and the discretion is wide to allow for a wide range of differing facts. To the extent that the cases referred to below formulate principles, they are not generally binding at first instance, with the exception of the *Bouygues* case[22] in the Court of Appeal. The principles applied in the TCC to applications for a stay of execution where summary judgment is given to enforce an adjudicator's decision were helpfully summarized by Judge Coulson (now Coulson J) in the *Wimbledon* case[23]:

> "a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.
>
> b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.

[20] (2002) 18 Const.L.J. 39.
[21] (2006) 22 Const.L.J. 378.
[22] *Bouygues United Kingdom Ltd v Dahl-Jensen United Kingdom Ltd* [2001] 1 All E.R. (Comm) 1041; [2000] B.L.R. 522; [2001] 3 T.C.L.R. 2; (2000) 73 Con. L.R. 135; [2000] C.I.L.L. 1673, CA.
[23] *Wimbledon Construction Co 2000 Ltd v Derek Vago* [2005] EWHC 1086 (TCC).

c) In an application to stay the execution of summary judgment arising out of adjudicator's decision, the court must exercise its discretion under Order 47 with considerations a) and b) firmly in mind (see *AWG*).[24]

d) The probable inability of the claimant to repay the judgment sum (awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see *Herschell*).[25]

e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see *Bouygues* and *Rainford House*).[26]

f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

(i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see *Herschell*); or

(ii) The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see *Absolute Rentals*).[27]

One point this analysis does not address is the likelihood that the adjudicator's decision will ultimately prove either not to be correct or to be subject to some adjustment in the light of factors not available to the adjudicator. This, it is submitted, is a factor in exercising the discretion. The clear case *par excellence* is *Bouygues*, where the adjudicator's decision was plainly and obviously wrong.[28]

Where the party in whose favour judgment has been given to enforce an adjudicator's decision is in liquidation or receivership, then as Judge Coulson states, a stay of

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[24] *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd* [2004] EWHC 888 (TCC).

[25] *Herschel Engineering Ltd v Breen Properties Ltd (No.2)* [2000] B.L.R. 272; [2000] 2 T.C.L.R. 473; (2000) 70 Con..L.R. 1; (2000) 16 Const.L.J. 366, QBD (TCC).

[26] *Bouygues*, above; *Rainford House Ltd v Cadogan Ltd* [2001] B.L.R. 416; [2001] C.I.L.L. 1709;HT 01–014, QBD (TCC).

[27] *Absolute Rentals Ltd v Gencor Enterprises Ltd* [2000] C.I.L.L. 1637; (2001) 17 Const. L.J. 322; HT 99, QBD (TCC).

[28]

execution is normal, although, as stated above, the applicant for a stay will have, it is submitted, to make a credible case for reversing the effect of the adjudicator's decision.

Where the party in whose favour judgment has been given to enforce an adjudicator's decision is not in formal insolvency, the applicant for a stay will usually attempt to demonstrate insolvency or at least an inability to repay by an analysis of the company's current financial position. Much of the case law is not particularly enlightening, as it consists of many examples of applications of this type supported by no or little adequate evidence. Many of these applications look like last ditch attempts to avoid the effect of an adjudicator's decision, which have been tacked on to the end of a case consisting mainly of a jurisdictional or natural justice challenge, with little attention paid to the necessary evidence. The correct position, it is submitted, is that such an application can succeed provided that compelling evidence is provided.[29] As the cases demonstrate, it is difficult in practice to provide such evidence.

Since the comprehensive review of the case law in 2006[30] there have been some developments.

In *McConnell*,[31] Jackson J would have been inclined to grant a stay of execution of McConnell's judgment, as McConnell was based in Victoria, Australia, but for McConnell's offer of a bond. The application for a stay was based on two grounds: the defendant had a good prospect in future proceedings of clawing back much of the money awarded by the adjudicator and McConnell was an Australian company, whose UK office had closed down since the parties had contracted. It would now be more time-consuming and expensive to enforce any judgment or abitral award obtained against McConnell. Jackson J found that a bond as offered in correspondence would meet the defendant's concerns, but that the matter could be brought back before him in the event of the parties being unable to agree the wording of the bond.

Treasure,[32] *Ale Heavylift*,[33] *William Verry*[34] and *Multiplex*[35] are further examples of applications for a stay refused on the facts; *A.R.T.*[36] is an example of a hopelessly bad point being taken in support of an application for a stay (unsuccessfully); *Hart*

[29] This view is supported by the *Ale Heavylift* case in the passage quoted below.
[30] (2006) 22 Const.L.J. 378.
[31] *McConnell Dowell Constructors (Aust) Pty Ltd v National Grid Gas plc* [2006] EWHC 2551 (TCC).
[32] *Treasure & Son Ltd v Martin Dawes* [2007] EWHC 2420 (TCC).

[33] *Ale Heavylift v MSD (Darlington) Ltd* [2006] EWHC 2080 (TCC).

[34] *William Verry Ltd v Camden London Borough Council* [2006] All E.R. (D) 292.

[35] *Multiplex Constructions (UK) Ltd v Mott Macdonald Ltd* [2007] EWHC 20 (TCC).
[36] *A.R.T. Consultancy Ltd v Navera Trading Ltd* [2007] EWHC 1375 (TCC).

Investments[37] is a case where, on the principles explained in *Bouygues* in the Court of Appeal, if the adjudicator had been found to have jurisdiction (which was not the case), Judge Coulson (as he then was) would not have granted judgment because the successful party in the adjudication was in liquidation.

In *Ale Heavylift*, Judge Toulmin stated:

> "In [*Wimbledon*] His Honour Judge Coulson Q.C. set out the principles to be applied where a claimant, as in this case, may appear to be in an uncertain position financially, but is not in insolvent liquidation or administrative receivership. He includes in his considerations the consideration that the claimant's financial position is the same, or similar, to the financial position at the time the relevant contract was made. I respectfully agree with him that the financial considerations which should be taken into account are those set out in his judgment, but in my view they do not absolve the court from considering all the circumstances as set out in Order 47 RSC in the course of exercising its discretion whether or not to order a stay of execution absolutely or for such period and on such conditions as the court thinks fit."[38]

Company in liquidation

The permission of the court is needed to bring a claim in adjudication against a company in liquidation. Clearly in any event this would be an unlikely course for a party to take, on commercial grounds.

A company in liquidation may bring a claim in adjudication. Where the responding party has a set-off or claim of its own, however, the adjudicator's decision will be of little effect, as the parties' claims and cross-claims will be set off against one another in accordance with Rule 4.90 of the Insolvency Rules.[39] The court will not usually enforce an adjudicator's decision in these circumstances.[40]

Where a company in liquidation brings a claim in adjudication and the responding party does not have a set-off or claim of its own, the company in liquidation is entitled to enforce the adjudicator's decision in its favour. This was the position in the *Fastrack* case, where the claimant seeking to enforce an adjudicator's decision had gone into liquidation by the time of the enforcement hearing.[41]

Company in receivership

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[37] ref
[38] *Ale Heavylift*, at para 88.
[39] See *Bouygues*, above. An account of the case and the law on this point is set out in CAR at (2002) 18 Const.L.J. 39.
[40] See *Bouygues*, above and *Hart Investments*, above.
[41] *Fastrack Contractors Ltd v Morrison Construction Ltd* [2000] B.L.R. 168; (2000) 16 Const. L.J. 273; [2000] C.I.L.L.1589, TCC.

There is no rule preventing a claim in adjudication against a company in receivership, although it would not normally be advisable on commercial grounds.

Where a company in receivership brings a claim, again no special rules apply. Security for costs is not an issue as costs are not normally payable in adjudication. However, payment of the adjudicator's fees and expenses may be an issue. The adjudicator will not wish to be merely an unsecured creditor and will want an agreement with the receiver(s) personally for payment of his fees and expenses. In *Faithful & Gould*, the adjudicator sought such agreement but the receivers neither agreed nor disagreed. The adjudicator made his decision, which went against the company in receivership; the receivers were held personally liable for the adjudicator's fees.[42]

In the event of an adjudicator's decision being enforced by the court giving judgment in favour of a company in receivership, a stay of execution may be granted (see above).[43]

Company in administration

The permission of the administrator or the court is needed to bring a claim in adjudication against a company in administration. Under s. 11(3)(d) of the Insolvency Act 1986:

> "During the period for which an Administration Order is in force no other proceedings and no execution or other legal process may be commenced or continued and no distress may be levied against the company or its property except with the consent of the administrator or the leave of the court and subject, where the court gives leave, to such terms as aforesaid."

An adjudication against a company in administration is an "other proceeding" for the purposes of this provision. "Other proceedings" means either legal proceedings or quasi legal proceedings such as arbitration.[44] Adjudication has been held to be "a quasi legal proceeding such as arbitration".[45]

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[42] *Faithful & Gould Ltd v ARCAL Ltd (in receivership)*, unreported, 2001, No. E190023, QBD (TCC).

[43] See also *Rainford House Ltd v Cadogan Ltd* [2001] B.L.R. 416; [2001] C.I.L.L. 1709; *Baldwins Industrial Services Plc v Barr Ltd* [2003] C.I.L.L. 1949.

[44] *Re Paramount Airways* [1990] BCC 130.

[45] *A. Straume (UK) Ltd v Bradlor Developments Ltd* [2000] 2 T.C.L.R. 409, Ch D; (2000) B.C.C. 333; (2000) 75 Insolv. B. 8; [1999] C.I.L.L. 1520; (1999) 10(9) Cons. Law 20, QBD (TCC).; *Canary Riverside Development v Timtec International*, unreported, November 9, 2000; *Joinery Plus Ltd (in administration) v Laing Ltd* [2003] B.L.R. 184; (2003) 87 Con. L.R. 87; [2003] B.P.I.R. 890.

The consent of the administrator is unlikely to be forthcoming and the issue has occasionally come before the court. In the *Straume* case, the court did not give leave, although finding the considerations finely balanced. Bradlor was in administration and Straume had either a set-off or a counterclaim. There was an adjudication brought by Bradlor, so that to the extent Straume had a set-off, it could run it as a defence in that adjudication. A complication was apparently a contractual provision preventing Straume from setting off.

Without the administration, Straume would simply have been able to bring its claim separately, but in these circumstances the only way to do so was with the leave of the court. Judge Behrens decided against leave, partly at least on the somewhat tenuous ground that leave would allow Straume to get round the contractual exclusion of set-off "by a side door". This is unconvincing because bringing a separate claim was, pursuant to the contract, the route left open after the exclusion of set-off.

The position with administration is different from liquidation; if Bradlor had been in liquidation, Straume could simply have set off its counterclaim under the Insolvency Rules, rule 4.90. Rule 4.90 applies to companies in liquidation, but not to companies in administration.[46]

The same approach as in *Straume* was taken in *Canary Riverside*. The result was also the same, in that leave to bring an adjudication against the company in administration was not given. A factor here was that the company in administration was bringing a claim in litigation against Canary Riverside, which could accordingly deal with its claims by way of defence and counterclaim in those proceedings.

A claim in adjudication may be made in the normal way by a company in administration; *Straume* is an example. Although there are impediments to making a claim against a company in administration as set out above, any claim of the responding party is likely to be dealt with by way of a defence of set-off.

A slightly different situation arose in *Joinery Plus v Laing*, giving the Technology and Construction Court (TCC) a rare opportunity to deal with the issue of the leave of the court under s. 11(3)(d) of the Insolvency Act (normally a matter for the Companies Court). Laing had paid a sum to Joinery Plus pursuant to an adjudicator's decision. Joinery Plus contended (successfully) that the decision was a nullity and that it was open to Joinery Plus to bring a fresh adjudication. Judge Thornton dealt with these issues in the TCC, naturally enough. An additional factor was that Joinery Plus had gone into administration. Two of Laing's arguments were that Joinery Plus should be restrained from starting a fresh adjudication or should repay the amount paid by Laing as a condition imposed by the court before starting a fresh adjudication.

These were matters which required the leave of the court under section 11(3)(d) of the Insolvency Act, which Judge Thornton said could be dealt with in the TCC:

[46] See *Re Isovel Contracts Ltd* [2001] All E.R. (D) 440. The case explains the long history of the insolvency set-off rule embodied in rule 4.90 and policy reasons for not extending it.

> "This is because the Insolvency Act 1986 requires the leave of the court to be obtained without specifying which court is to grant that leave. The Chancery Guide states that the court should be the Companies Court. This is a statement of practice which, although usually to be followed, is not mandatory and can be overridden if the overriding objective suggests that another court is appropriate. Clearly, in this case, it would be disproportionate in costs to require the parties to apply to the Companies Court during these ongoing adjudication proceedings for leave and I will accede to Laing's application for leave to apply…"[47]

On the facts, which included Laing's weak case on the merits and that granting leave would be likely to impede the administration, the judge declined to grant leave to Laing.

[47] *Joinery Plus* at para 104.