

JUDGMENT : HIS HONOUR JUDGE SEYMOUR. (Sitting as a Judge of the High Court) 15th February 2002.

1. There are before me two applications in different actions pending between Ashley House Plc and Galliers Southern Ltd. The main focus of the hearing before me this afternoon has been the application of Galliers Southern Ltd. in action HT0232 against Ashley House Plc for summary judgment for an amount of £162,042.43 which sum has been the subject of a decision of an adjudicator in favour of Galliers Southern Ltd.
2. Although the adjudicator ordered that Ashley House should pay that sum peremptorily, Ashley House has not done so and, in consequence, the action to which I have referred was commenced and an application has been made in that action for summary judgment under Part 24 of the Civil Procedure Rules.
3. It has been conceded on behalf of Ashley House that Galliers Southern is entitled to summary judgment in the amount which it seeks, but Mr. Jonathan Acton Davis Q.C., who appears on behalf of Ashley House before me, has submitted that in the light of the evidence before me as to the financial situation of Galliers Southern Ltd. it would be appropriate for there to be a stay of execution of the judgment which he accepts should be entered against his client.
4. Mr. Acton Davis has made it clear that his clients are prepared as a condition of the imposition of a stay of execution to pay into court the amount of the adjudicator's award.
5. The evidence which has been put before me establishes, in my judgment, quite plainly that the claimant, Galliers Southern Ltd., would be unable to repay the amount awarded by the adjudicator in the event that the challenge which has been mounted by Ashley House to that award was successful. Notice of reference to arbitration in relation to, amongst other things, the decision of the adjudicator has recently been given on behalf of Ashley House.
6. The evidence before me today includes a witness statement of Mr. Richard Molton, who is the managing director of Galliers Southern, which was made yesterday. At paragraph 12 of that witness statement, Mr. Molton says this: *"Turning now to the matter of Galliers' financial position, I observe that Jonathan Holmes, Nicholas Clark and Richard Mould ..."* I interpose that those gentlemen have all made witness statements in respect of the matters before me today on behalf of Ashley House. *"... made reference in their witness statements to Galliers' subcontractors who have not been paid, to unsatisfied county court judgments and cast doubt upon my own track record and truthfulness. I have not sought to conceal or disguise Galliers' financial position. Ashley were perfectly well aware of Galliers' trading position when they engaged Galliers. They have admitted in the adjudication and in the hearing concerning the injunction that Galliers has cash flow difficulties."*
7. Notwithstanding the valiant efforts of Mr. Pitts, who appears on behalf of Galliers Southern before me today, it is plain that the message which Mr. Molton intended to convey in para.12 of his witness statement was that the financial situation of Galliers Southern today is essentially that which it has been throughout the period since the making of the contract which has given rise ultimately to the claim in this action.
8. At paragraph 13 of his witness statement, Mr. Molton says this:
*"At paragraph 11 of his witness statement, Nicholas Clark lists Galliers' subcontractors who have told him that they have not been paid the sum stated by Galliers for work completed. Richard Mould, at paragraph 21 of his witness statement, refers to seven unsatisfied county court judgments.
"While I readily admit that Galliers owe money to these contractors, the true situation is not as mentioned in those witness statements but is as follows:
"13.1 There are a total of 14 unsatisfied county court judgments recorded against Galliers, four of which relate to contractors in the list at paragraph 11 of Nicholas Clark's witness statement."*
9. I do not think I need to read paragraphs 13.2 to 13.12 of Mr. Molton's witness statement for the purposes of this judgment. In those subparagraphs are set out details of the amounts which Galliers Southern accepts are due to the various contractors who are referred to in those paragraphs for work which has been done. It is, however, material to notice that quite a number of the amounts which it is accepted are due and owing are quite small. A number of them are less than £5,000, the lowest one seems to be an amount of £2,500.

10. In paragraph 14 of his witness statement, Mr. Molton says:
"The total indebtedness mentioned above comes to the sum of £120,332.76 exclusive of VAT."
11. Mr. Pitts, in his submissions to me, indicated that in the event that Galliers Southern had an immediately enforceable judgment against Ashley House it would intend to settle those debts. The effect of so doing would be to consume all but about £40,000 of the amount for which it is accepted that judgment should be entered.
12. In answer to a question from me as to how in those circumstances, on the evidence before me, Galliers Southern would intend to repay the amount of the adjudicator's award in the event that Ashley House was successful in the arbitration proceedings which I have mentioned, Mr. Pitts submitted, in effect, that it was not for Ashley House to complain about that risk because they, either alone or in conjunction with a company called RAP Developments Ltd., had brought about that situation themselves.
13. I should say that RAP Developments Ltd. on the material before me has absolutely no connection whatsoever with Ashley House but is an organisation which entered into a contract or contracts with Galliers Southern in respect of other projects and in relation to which it is contended that sums are due to Galliers Southern which have not been paid.
14. What I do know about the situation as between Galliers Southern and RAP Developments Ltd. is that there are pending adjudication proceedings in which RAP Developments claims against Galliers Southern an amount of the order of £ 187,000 and Mr. Molton in paragraph 17 of his witness statement of yesterday indicates that Galliers will vigorously contest that claim and will be counterclaiming an amount of £226,000 odd.
15. I have been reminded by Mr. Acton Davis of a decision of my own in **Rainford House Ltd. v. Cadogan Ltd.** [2001] Building Law Reports 416. In the course of that judgment, I said at p.422 concerning the Housing Grants, Construction & Regeneration Act 1996 this: *"I do not consider that the policy of the statute is to transfer as between the parties to construction contracts the risk of insolvency of one of the parties. That this understanding is correct seems to me to be clear from the terms of section 113 of the Act ..."*
16. The provisions of which were then set out in the judgment, and I went on:
*"If the policy of the statute is that a 'pay when paid' provision may properly be relied upon if the ultimate paying party is insolvent, so that the intermediate paying party may end up out of pocket if called upon to pay the claimant, it is plain, in my judgment, that the statute is not concerned to reallocate the risk of having to endure the consequences of a trading partner becoming insolvent, but simply to address the question, on the footing that all parties are solvent, which party should hold the fund of money about which there is a dispute pending the resolution of that dispute. Thus, if there is a substantial chance, demonstrated by objective evidence, such as the making of a winding-up order, or the appointment of a receiver, that money the obligation to pay which is actually disputed, notwithstanding that the notice contemplated by section 110 of the 1996 Act has not been given, will, if paid, for practical purposes be lost, it seems to me that this is a circumstance which, as Chadwick L.J. indicated in his judgment in **Bouygues (UK) Ltd. v. Dahl-Jensen (UK) Ltd.**, ought to be considered on any application for summary judgment. That is not to say that vague fears or unsubstantiated rumours of insolvency will merit much attention, but evidence that some third party has taken action which puts the continued financial viability of the claimant at hazard must, I think, be evaluated seriously."*
17. At p.423 in the judgment in paragraph 12 I say:
"In the present case it seems to me that the evidence put before me on behalf of Cadogan raises a strong prima facie case that Rainford is currently insolvent. That evidence has not been contradicted or explained. I think that I should draw the inference that the present financial position of Rainford as revealed by the evidence put before me will not change, so that I should conclude that Rainford will be unable to repay the amount for which I think it appropriate to give judgment in the event that it is hereafter found that the decision of Mr. Pontin was incorrect."
18. The decision in **Rainford House v. Cadogan Ltd.** is not a decision which technically speaking is binding upon me even though it is my own decision. Nonetheless it might have been anticipated that I would be likely, subject to any submissions which were made to me to the effect that the circumstances of the present case were materially different or that I had overlooked some material consideration in coming to

the conclusions which I expressed in **Rainford House v. Cadogan**, that I would adopt the same approach in dealing with the issues before me today.

19. Mr. Pitts has not sought to persuade me that there are material differences between the circumstances of **Rainford House v. Cadogan** and the circumstances of the present case beyond his submission that, on the evidence in the present case, the parlous financial condition of Galliers Southern has been brought about by the failure of Ashley House to make payment to Galliers Southern of sums which it ought to have paid.
20. For the reasons which I have indicated already in this judgment, I do not accept that submission. It seems to me that on the evidence, and in particular the witness statement of Mr. Molton himself of yesterday, it is plain that that is not the case.
21. I also have been reminded in the witness statement of Mr. Richard Timothy Mould, dated the 12th of this month, of various matters which were urged upon me by Mr. Molton himself at hearings which took place on the 2nd and 9th November of last year in relation to the other action in which there is an application before me today, which is HT02101.
22. During those hearings, Mr. Molton indicated to me quite plainly that the likely consequence of the failure of Ashley House to make payment of sums which Mr. Molton was contending were due would be that Galliers Southern would be unable to continue trading. That indeed in substance, although the evidence was not particularly satisfactory about it, seems to be what has come to pass.
23. In these circumstances, it seems to me that it is appropriate, whilst entering judgment for Galliers Southern against Ashley House in the sum of £ 162,042.43, to order a stay of execution of that judgment upon terms that that amount be paid into court no later than 4.00 p.m. on Friday next, the 22nd February.

Mr. J. Acton Davis Q.C. (instructed by Messrs. Parker Bullen) appeared on behalf of the Claimant.

Mr. T. Pitts (instructed by Messrs. Hannah & Mould) appeared on behalf of the Defendant.

MR. A.DAVIS: *My Lord, I am grateful. I do not think anything more turns upon the wording of the judgment. I ask for my costs.*

JUDGE SEYMOUR: *Before we come to that, I think it would be appropriate to discharge the injunction simply so that there is not an order hanging about which continues until further order. The fact of the matter is, the effect of the order which I make in the other action is that there is no immediately enforceable judgment as long as your clients comply with the condition.*

MR. A.DAVIS: *My Lord, I understand that. My only concern is that, regardless of that, Southern may go off and issue a winding up. If through my learned friend they have made clear that they will not do so then there is no reason why the judgment should not be discharged.*

MR. PITTS: *My Lord, may I just take instructions? My clients will have to give an undertaking not to issue winding up proceedings against Ashley House.*

JUDGE SEYMOUR: *Mr. Acton Davis, do you want a formal undertaking, that is to say in substitution for an injunction or are you content with that indication of intention?*

MR. A.DAVIS: *I would be happier with a formal undertaking.*

JUDGE SEYMOUR: *What is being sought is a formal undertaking, Mr. Pitts.*

MR. PITTS: *My Lord, whilst my clients are happy to give a formal undertaking, I would have thought that it would be unnecessary, in particular that they are seeking an undertaking in open court here today. In any event, any reason for a winding up order proceeding does not exist.*

JUDGE SEYMOUR: *As long as they understand that, because it is correct, then I do not think it is appropriate to insist on a formal undertaking, Mr. Acton Davis, and I will simply discharge the injunction. But I make clear in doing so -- because I know that Mr. Molton and Mr. Dyer are present in court -- that if a winding up petition should be presented, however misconceived, and if it should be necessary for Ashley House to seek a remedy in order to prevent the advertising of such winding up petition, then the overwhelming probability is that such remedy will be afforded promptly and at the expense of at least Galliers Southern and possibly them as individuals.*

MR. A.DAVIS: *My Lord, that is very helpful. My Lord, I then turn to deal with the costs of today. I simply ought to remind your Lordship that the preparation was necessary because it was only today that it became apparent that there was no issue on lack of funds. Your Lordship said in your Lordship's judgment that the witness statement was dated yesterday. It is not actually, it is dated today.*

JUDGE SEYMOUR: *I had simply taken the date off the front sheet.*

MR. A.DAVIS: *My Lord, I ought to have made that clear. The witness statement came through today at 10 o'clock and is in fact dated today, so we had to go to the expense of preparing all that evidence when we had invited them to concede the point and they failed to do so. So, my Lord, I ask for my costs ...*

MR. PITTS: *My Lord, I will deal with costs in two ways. Firstly, it is my submission that costs should be reserved for the reason that if Galliers are successful in the arbitration then the money should have been paid today and it is inequitable that they should be penalised for the costs of today.*

As to the schedule, the bulk of the figures I cannot really comment upon, save that work on documents does seem to be extraordinarily high, given that it seems to be a regurgitation of the documents that were presented at the previous two hearings in November. I cannot really see how the 22 odd hours can really be justified.

JUDGE SEYMOUR: *Is that the only point you want to raise on the detailed quantification?*

MR. PITTS: *Yes.*

JUDGE SEYMOUR: *Mr. Acton Davis, perhaps you can help me with the number of hours spent on documents.*

MR. A.DAVIS: *My Lord, it is part of the difficulty of the format of the form that there is attendance on individuals, opponents, others, site inspections, and there is work done on documents and if it is not attendances it has to become work done on documents and in fact it is all the preparation, all the obtaining of the evidence which becomes work done on documents. Perhaps more accurately it ought to be in "Other work not covered above", but that is the explanation.*

JUDGE SEYMOUR: *It is preparing the witness statements and that sort of thing?*

MR. A.DAVIS: *Yes, and obtaining evidence.*

MR. PITTS: *My Lord, even in that case it does seem extremely high. The bulk of the bundles are in existence from November. There are three handwritten supplementary witness statements served this morning, four relatively short witness statements that have been prepared. In my submission, it is high.*

MR. A.DAVIS: *My Lord, my friend forgets that, whilst, of course, some of the adjudication material is exhibited the real work done was done on obtaining the evidence that his clients do not have any money. There were the Dunn & Bradstreet searches and so on and the obtaining of the information about county court judgments. My Lord, that is what took the time and that is what was entirely new.*

JUDGE SEYMOUR: *A point which occurs to me is this. Are your clients registered for VAT, Mr. Acton Davis?*

MR. A.DAVIS: *Yes.*

JUDGE SEYMOUR: *So they will be able to recover the VAT.*

MR. A.DAVIS: *Yes.*

JUDGE SEYMOUR: *This is always a somewhat rough and ready process, the assessment of costs on a summary basis. An assessment which is said to result in a precise arithmetical figure, particularly one which is accurate down to 10p, suggests a degree of scientific investigation which is inaccurate. I am going to assess the costs at a round figure to make clear that I have not undertaken any detailed line by line consideration of these figures and I am going to assess your costs, Mr. Acton Davis, at £13,500.*

MR. A.DAVIS: *And that is to be paid within 14 days in accordance with the usual practice.*

JUDGE SEYMOUR: *Yes.*