JUDGMENT : Her Honour Judge Frances Kirkham : 6th December 2002. TCC Birmingham.

1. In November 2000, the parties entered into an arrangement whereby the claimant ("Baldwins") hired to the defendant ("Barr") a 50 tonne crane together with driver, to be used by Barr at a building site, namely the new football stadium at Britannia Way in Southampton. An incident occurred on 19 December 2000 in which the crane is said to have been damaged. Baldwins sought from Barr the cost of repairs and lost hire charges. A dispute between the parties concerning those matters was referred to adjudication by notice dated 25 July 2002. The adjudicator's decision is dated 24 August 2002. He rejected Barr's submission that he lacked jurisdiction and their case that they were not liable on the ground that Baldwins' driver was not competent. He decided that Barr were responsible for the cost of repairs to the crane, in the sum of £149,212.52, transport costs of £470 plus interest, and £35,702.87 in respect of lost hire charges.

2. Joint Administrative Receivers were appointed of Baldwins on 28 October 2002, pursuant to a debenture in favour of a bank who act as trustee for a consortium of lenders.

3. This is an application by Baldwins to enforce the adjudicator's decision that Barr should pay Baldwins £185,385.39 plus interest as awarded by the adjudicator and Baldwins' costs of £18,192 excluding VAT and to require Barr to reimburse the adjudicator's fees which Baldwins have paid. Barr defends the application on the ground that the adjudicator lacked jurisdiction because the contract between the parties was not a construction contract within the meaning of Section 104 (i) (a) of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA"). If the contract does not fall within the scope of s.104, there was no adjudication within the meaning of s.108 and the decision would thus be unenforceable. Barr do not suggest that the decision is not apt for summary judgment on any other ground.

4. If Baldwins are successful, Barr apply for a stay of execution of judgment.

5. In the adjudication, Barr contended that there was no contract. For the purposes of this application only, Barr accept (i) that there was a contract between the parties and (ii) that the contract incorporated the Construction Plant-hire Association ("CPA") model conditions for the hiring of plant. Save to that limited extent, Barr reserves its position fully. Reference in this judgment to the contract must be read in that context.

6. It appears that a telephone call was made from Barr to Baldwins concerning hire of a crane plus driver. On 1 November 2000, Baldwins raised a booking form in the name of Barr. The site address given was the new football stadium in Southampton. The scope of the service to be provided was shown simply as provision of a 50 tonne crane. Baldwins' booking form makes reference to the CPA model conditions and to Baldwins' own general conditions. The booking period was shown as Thursday 2 November 2000 to Friday 2 November (presumably intended to be a reference to Friday 3 November). In fact, Barr retained the crane and driver until the incident on 19 December 2000.

7. Barr raised a purchase order dated 1 November 2000. This refers to a 50 tonne mobile crane and notes that the overtime rate was to be £6 per hour. There is no specific mention of a driver in either Baldwins' booking form or Barr's purchase order, but there are clear references to the operator's overtime rate.

8. Mr Lowe of Barr signed an acceptance sheet. There are issues arising from that document which are not relevant to the application for summary judgment, given Barr's concession as to the existence of a contract between the parties for the purposes of this application, but which concern the issue whether the parties contracted and, if so, how and on what terms, and are thus relevant to the question of any stay. These include issues as to the date of the document and when it was signed, but it is not disputed that the sheet shows the site address as the football stadium in Southampton and it records some hours worked by the crane driver.

9. It would be unrealistic not to conclude on balance that Barr hired the crane plus operator in order to undertake construction work at the stadium. There can be no doubt from Baldwins' booking form and Barr's purchase order that it was intended that there be hire of crane plus driver for use at the stadium site. The only purpose can have been for use in the operation which Barr were carrying out at that site,

namely construction of a new stand. It appears from photographs that Barr were using the crane to lift pre cast concrete sections into place at the time the accident occurred. Mr Hargreaves for Barr did not suggest that Barr did not know that the crane was to be used at the football ground or that the crane and driver were to be used as directed by Barr. Barr do not challenge Baldwins' evidence that the crane and driver were to be used by Barr to lift pre-cast concrete members into place.

10. Relevant sections of HGCRA provide as follows:

104(1): In this part a "construction contract" means an agreement with a person for any of the following -

(a) the carrying out of construction operations..

(b) arranging for the carrying out of construction operations by others, whether under sub- contract to him or otherwise;

(c) providing his own labour, or the labour of others for the carrying out of construction operations.

105(1): In this part "construction operations" means, subject as follows, operations of any of the following descriptions -

(a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);

(e) Operations which form an integral part of or are preparatory to, or are ,for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision roadways and other access works:

105(2): The following operations are not construction operations within the meaning of this Part -

(d) Manufacture or delivery to site of-

(i) building or engineering components or equipment,

(ii) materials, plant or machinery, "

11. Clause 8 of the CPA conditions provides that if a driver is supplied with the plant then he *"shall be under the control of the Hirer (here, Barr) and ... shall for all purposes in connection with their employment be regarded as servants or agents of the Hirer".* Baldwins' own general conditions provide at paragraph 19 that those general conditions are to be read in conjunction with the relevant CPA conditions. These include the relevant CPA conditions in question here.

12. It is common ground that a contract for mere plant hire is not a construction contract within HGCRA. Baldwins' case is that the labour element in the contract is crucial. The crane plus the labour provided by Baldwins was an integral part of the building works being carried out by Barr in the construction of the football stadium. The supply of a mobile crane plus labour is clearly an operation within the scope of section 105(1)(e) because it is one which forms an integral part of, or is preparatory to, or is for rendering complete, works of *"... construction, alteration, repair, maintenance ..."* etc, being Barr's works in building the stadium. This was a contract for the hire of a crane with operator for use by Barr in construction operations i.e. construction of a new football stadium and thus a construction contract.

13. Barr's case is that this was a contract for mere hire and thus outside the scope of HGCRA. It was not a contract for the carrying out of construction operations within the definition in section 105(1)(e). Whilst s 105(1)(e) contemplates that there will be ancillary operations, those operations, in order to qualify, still have to be operations. Here, the contract did not require or specify the carrying out of construction operations. There was nothing in the contract which specified that Barr was to use the crane in connection with the construction of the new stadium. That is not surprising for a contract for hire. The crane could have been used in a location other than the football ground, and for a purpose other than a construction project. Mr Hargreaves submits that the test here is what the contract was for. It was not, he submits, a contract for labour. The surrounding circumstances cannot change a contract for hire into one for construction operations.

14. Barr relies also on the eiusdem generis rule of construction. Mr Hargreaves submits that the wide words in subsection 105(1)(e) must be construed eiusdem generis those items contained in the list which follows the wide words. The wide words are: *"operations which form an integral part of; or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection."* The items in the list are: *"site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works."* Mr Hargreaves submits that the *'genus'* is something along these lines: "building or engineering operations ancillary to construction operations." A contract for the hire

of a crane does not come within the genus, once again because it is a contract which does not specify the carrying out of any operations at all, still less building or engineering operations. In this respect, Barr relies upon **Statutory Interpretation - A Code** by Bennion (3rd Edition) pp. 954-959.

15. Alternatively, Barr contends that the contract comes within the exceptions in subsections 105(2) (d)(i) and (ii) because it was a contract for:
    (i) The delivery to site of building equipment and/or
    (ii) The delivery to site of engineering equipment and/or
    (iii) The delivery to site of plant; and/or
    (iv) The delivery to site of machinery

    and in none of these cases did the contract provide for the installation of that equipment, plant or machinery. The contract was for delivery of plant or machinery to site without provision for installation and thus falls within the exception in section 105(2) (d) (ii). Baldwins' case is that the supply of a mobile crane plus labour cannot, on a true construction, fall within any of the excepted categories described within Section 105(2). This contract was not a contract for mere delivery to site of plant. Accordingly, it is not caught by the exception in that section.

16. Clause 8 of the CPA Model Conditions provides that drivers and operators shall for all purposes in connection with their employment be regarded as servants or agents of the hirer. Barr suggest that, because clause 8 places the crane under Barr's control, this indicates that the contract was for the mere hire of plant (and thus outside the scope of HGCRA.) Mr Hughes referred to **McKonkey v Amec plc** 27 Constr LR 88, in which the Court of Appeal considered the CPA Model Conditions in the context of a claim for damages for personal injury by a person working in the vicinity of a crane. The crane driver was held not to have been competent for the purposes of clause 8 of the Model Conditions. At page 98, Balcombe LJ stated that if the owner supplied an incompetent operator, then such operator was not to be regarded as the servant or agent of the hirer, and the owner remained vicariously liable for the operator's negligence. Mr Hargreaves submits that McConkey is of no assistance in determining whether the contract here was a construction contract for the purposes of HGCRA. I do not derive assistance from that case.

17. I do, however, find helpful the decision of the Court of Appeal in **Williams v West Wales Plant Hire Co Ltd and others** [1984] I WLR 1311. The court there considered Regulation 3 of the Construction (Lifting Operations) Regulations 1961 which sets out the duties of contractors and employers to comply with various requirements with respect to the safety of plant and equipment to which the Regulations apply, including a crane. In **Williams**, the owners of a crane had hired the crane together with a driver to a builder for the purpose of the crane being used in a building operation. The plaintiff driver was injured in an accident involving the crane. At issue was whether the owners were undertaking a building operation within the meaning of the Regulations. Griffiths LJ said at page 1314
    "[The owners say] that, giving the words their ordinary meaning, no one would say that the person who had hired out the crane was undertaking a building operation but that they would naturally, if asked, say that the builder was undertaking the building operation... The argument on behalf of the plaintiff on the other hand, is that to determine whether or not a person is undertaking an operation one looks at the actual work being carried on at the time of the accident, and if it appears that a contractor and/or employer is, through a workman of his, actively engaged in a building operation, he is undertaking it for the purposes of regulation 3...In my view, the plaintiff's construction is to be preferred. In this case the owners of the plant knew that they were providing it so that it could take part in a building operation. As a company they could only take part in that building operation through their employees. "

    In his judgment in that case, Dillon LJ made a clear distinction between a plant hire firm which hires out a machine with a driver and one which is hired without an operator.

18. Mr Hughes, whilst recognising that **Williams** was concerned with different regulations, nevertheless notes that the Court of Appeal there expressly drew a distinction between the two forms of hire, namely of plant alone or of plant plus an operator. It is, he submits helpful in illustrating the conceptual difference which can be drawn between a contract for mere hire and a contract for hire plus labour. He suggests that it would be an odd result if there were different answers for different

pieces of legislation. Mr Hargreaves submits that the decision in **Williams** should be distinguished because of the very different wording in the scope of the Regulations compared with the wording in HGCRA, and given the different purposes of the legislation, the purpose of the Regulations being to keep workmen safe. Mr Hargreaves submits that the courts generally treat such contracts as contracts for hire - the fact that a driver comes along is not material as a matter of language or concept. He refers me, by way of example, to the decision of the House of Lords in **Spalding v Tarmac Civil Engineering Ltd** [1967] 1 WLR 1509. He submits that the true position is that the fact that a person is involved is irrelevant. The contract here was for the hire of a "tool". That tool was then used by the contractor for the carrying out of his construction operation. But the person who hired out the tool was not the person responsible for the carrying out of the construction operation for which the tool was used. The boundary lies between the provision (by hire) of the tool and the taking up of that tool by the person using it.

19. I am referred also to the decision of the Court of Appeal in **Thompson v T Lohan (Plant Hire) Ltd and Another** [1987] 1 WLR 649, another case concerned with the hire of plant and machinery with a driver. The contract was subject to the CPA terms which provided that drivers be regarded as the servants or agents of the hirer who, alone, should be responsible for all claims arising in connection with the operation of the plant. The court there followed the decision in **Spalding**.

20. Mr Hughes has referred me to the CPA's Model Conditions for the hiring of plant which are said to take effect from July 2001. Paragraph 35 of those conditions provides that the Scheme for Construction Contracts contained in the Scheme for Construction Contracts (England and Wales) Regulations 1998 shall apply. No such provision is included in the CPA Model Conditions referred to in the contract in question here. Mr Hughes says that this reinforces his submission that a contract for the hire of equipment plus a driver, under the CPA conditions is a contract to which HGCRA applies. I do not find the comparison helpful. There is no evidence as to the reason why the Association included in their 2001 Model Conditions the provision contained in paragraph 35. The explanation could be that it was considered that the Act would not otherwise apply, or that it was considered that the Act would apply but specific reference should be made in order to avoid doubt, or there could be other explanations. In any event, specific reference in a later edition of Model Conditions does not help me to construe the meaning and effect of HGCRA in relation to a contract under previous conditions.

21. I find **Williams** of assistance in making a distinction between hire of a crane alone and hire of crane plus driver. The contract here was, and was intended to be, one for the supply of plant and labour; Barr wished to use the crane and driver as part of their operation to build the stadium. Mr Hargreaves seeks to make a distinction between a contract for the supply of plant and labour and a contract for the hire of a crane and driver. If there is any real distinction, the true position is that this was a contract for the supply of plant and labour. It is conceivable that Barr may have used the crane and driver on a different site, and such site might be an excepted site, but that was not what had been agreed here. Barr intended to and did use Baldwins' driver to operate the mobile crane to conduct a building operation. This contract for the supply of a mobile crane plus driver was a contract for an operation which formed an integral part of or was preparatory to or was for the rendering complete of work of construction, namely Barr's work in the stadium. I reject Mr Hargreaves' submission that the fact that the crane came with a driver was "incidental". Barr needed a driver. They agreed to pay for a driver. Indeed, Barr's case is that the driver was incompetent-that is at the heart of their defence on the merits. It is inconsistent to say, for the purpose of the contract, that the driver was incidental yet, for the purposes of the substantive dispute, that the driver was a critical element.

22. Section 105(1)(e) lists activities which are included in the operations which form an integral part etc of "construction operations". I reject Mr Hughes submission that the word "erection" in that sub section can be construed as referring to erection generally. It seems to me that the word can be read only within the phrase "erection, maintenance or dismantling of scaffolding". However, it is not necessary to adopt Mr Hughes' reading of "erection" to bring this contract within the scope of s 105(1)(e). I am not assisted by Mr Hargreaves' eiusdem generis analysis. The contract was for construction operations which formed an integral part of or were preparatory to or were for rendering complete construction operations as described in subsection (a). The later words in (e) do not limit that plain meaning.

23. I reject Barr's submission that the contract fell within the excepted categories described within s 105(2). The contract was not one for the mere delivery of plant to site. It was for the supply of plant and labour for use in construction operations on a building site.

24. The contract was a construction contract within the meaning of s 104. Accordingly, the adjudicator had jurisdiction. His decision is therefore apt for summary judgment.

Stay of Execution

25. Order 47 rule 1 provides that where a judgment is given for the payment of money, and the court is satisfied that there are "special circumstances which render it inexpedient to enforce the judgment ", then the court may stay the execution of judgment absolutely or for such period and on such conditions as the court thinks fit. The court has a wide discretion to stay execution of judgment. The exercise of that discretion is governed by compliance with the overriding objective set out in CPR Part 1 which requires that every case must be dealt with justly.

26. Barr seek a stay of execution on the following grounds
    - There are special circumstances because Baldwins are now in administrative receivership. In addition to the fact of the appointment of Administrative Receivers, Barr rely on information gleaned from the financial press which suggests that their financial position is poor.
    - On the merits, there is a realistic prospect that Barr would succeed before a court or arbitrator.

27. Barr say that, if they are ordered to pay the sum which the adjudicator decided Barr should pay, then what is, and is intended to be, a temporary position will become a final position because Baldwins will not be able to repay the money if it is ultimately found that Barr is not so indebted to Baldwins.

28. There are, however, also concerns as to Barr's financial position. Mr Gercke, one of the Receivers, prepared a statement in which he commented on Barr's accounts for the past three years and expressed concern that these indicated that Barr have made losses in two of the past three years and may face liquidity difficulties. If the sum which the adjudicator decided Barr should pay to Baldwins is not paid now, Mr Gercke suggests that Barr may fail to make payment.

29. Baldwins have suggested that Barr pay the amount which Baldwins claim into a separate and protected account to be held by the Administrative Receivers. At the hearing, Barr offered to pay the sum into court.

30. Barr's case is that in order to exercise discretion it is necessary to consider the merits of Baldwins' claim. They say that a court or arbitrator would take a different view from that of the adjudicator. They rely on the following grounds, namely that:
    i. the CPA conditions were not incorporated
    ii. there was no contract between the parties at all,
    iii. the CPA Model Conditions were not incorporated
    iv. there was a second contract but not on the CPA conditions or the first contract was substantially varied and the CPA conditions did not apply to the variation
    v. Barr would establish that the driver's actions caused the damage to the crane or that Baldwins failed to supply a competent driver.
    vi. Baldwins will not be able to establish causation as they failed to provide any evidence as to the condition of the crane prior to the accident
    vii. Quantum will not be established: no "meaningful" evidence as to the nature of the damage to the crane was produced to the adjudicator. The adjudicator made no enquiry into the facts.
    viii. Baldwins will not be able to show that they took steps to mitigate their loss.

31. Barr have not yet taken any step to take the matter further. They have not, for example, yet started arbitration or court proceedings to challenge the adjudicator's decision. At the hearing, Mr Hargreaves stated that Barr would undertake to commence proceedings within a month after this judgment and would consent to a position whereby money (if paid into court as they suggest) be paid out to Baldwins if proceedings were not so commenced.

32. I am referred to **Herschell Engineering Ltd v Breen Property Ltd** (unreported) 28 July 2000 and to **Rainford House Ltd v Cadogan Ltd** [2001] BLR 416. In **Herschell,** His Honour Judge Humphrey

Lloyd QC helpfully set out the matters to be taken into account when considering the exercise of discretion under Order 47 and an application for stay in the context of an adjudicator's decision, when the question of inability to repay money may amount to a special circumstance. The possibility of an error in the adjudicator's decision would not then be capable of effective correction. I respectfully adopt his observations on those matters. In **Rainford House,** Cadogan raised a counterclaim asserting that it had overpaid Rainford. The learned judge found that there was a strong prima facie case that Rainford were insolvent and drew the inference that Rainford would be unable to pay if the adjudicator's decision were found to be incorrect. He concluded that these amounted to special circumstances within the meaning of Order 47.

33. Mr Hughes submits that in no case has the court ordered a stay in circumstances where the only issue was enforcement of a debt. Further, he submits that the decision in **Rainford House** can be distinguished from the present case because, in that case, there was a counterclaim. Here there is none. The only question here, therefore, is whether to enforce the judgment debt.

34 Mr Hargreaves submits that the court should follow the approach taken by His Honour Judge Seymour QC in **Rainford House**, in which he ordered that the money in question be paid into court.

35. In undertaking the balancing exercise that is necessary in deciding whether a stay should be granted and, if so, on what terms, I first consider the question of Baldwins' financial difficulties and the doubts raised as to Barr's position. Given Baldwins' current financial position, there is a risk that what would, in other circumstances, be a temporary decision would become binding by reason of Baldwins' financial misfortune. It would work injustice to Barr if it could not recover money if it turned out that the adjudicator had been in error. On the other hand, in circumstances where the Receivers have cast some doubt on Barr's financial position, it would work injustice to Baldwins if a stay were granted without any requirement on Barr to secure the money. I bear in mind also that the grant of a stay risks defeating one of the purposes of HGCRA.

36. I have also considered Barr's arguments on the merits. It is difficult to reach conclusions on the basis of the limited evidence available to me and especially where Barr have, for the purposes of this application, conceded the existence of a contract and the incorporation of the CPA model conditions with the result that those issues have not been canvassed in detail. I wish to avoid reaching any binding conclusion. But I also bear in mind that, in the adjudication, Barr chose to concentrate on the jurisdiction point and presented little material and argument on the substantive issues. One wonders why they did not do so. Although Mr Hargreaves has raised some arguable points on the merits, if Barr were relying only on the matters they raise in connection with the merits of Baldwins' claim, I should not have found special circumstances existed. Further, as Barr have not hitherto taken any steps to commence proceedings to deal with such matters, one might have been rather sceptical about the strength of Barr's case. However, as a consequence of Barr's stated intention to commence proceedings, made through Mr Hargreaves at the hearing, some weight must be given to these matters.

37. In all the circumstances I conclude that Baldwins' financial position and the consequent potential injustice to Barr, together with Barr's stated intention to begin proceedings within a month, constitute special circumstances so that Barr is entitled to a stay, on terms. Baldwins have offered to accept that payment be made into an escrow account. Barr are willing to pay the money into court and have offered to undertake to commence proceedings within a month, failing which Barr would consent to the money being paid out of court. That is an appropriate suggestion. At the hearing I questioned whether Barr would be able to comply with such undertaking: there appear still to be issues between the parties as to whether or not they contracted and if so on what terms, so there may be difficulty in identifying the appropriate forum for any proceedings. Mr Hargreaves expressed his confidence that the parties would be able to resolve any such difficulty. It would appear, therefore, that Barr probably could comply with such undertaking.

38. There is little difference between Baldwins and Barr as to where the money should be held. I conclude that the better approach here is for the money to be paid into court. That is not intended, in any way, to doubt the integrity of the Receivers. The reason is that, as these court proceedings are already on

foot, it will be comparatively straightforward for either party to apply to the court for directions as to the destination of funds in court if the parties are unable to agree.

39. In my judgment there should be a stay of execution of the principal sum awarded by the adjudicator for a period of one month from the date of judgment on the following conditions, namely that Barr
    i. pay into court, within seven days from the date of judgment, the principal sum which the adjudicator decided Barr should pay to Baldwins; and
    ii. undertake to commence arbitral or court proceedings within one month from the date of judgment in respect of matters the subject of the adjudicator's decision; and
    iii. do so commence proceedings; and
    iv. within seven days from the date of judgment lodge at court a formal application for a stay, service to be taken as having been effected failing which the money be paid out to Baldwins.

40. I accept Mr Hughes' submission that there should be no stay in respect of the costs and fees element of the sums now claimed. Baldwins have paid all of the adjudicator's fees, including the portion which Barr would be expected to have paid. Baldwins should not be kept out of that part of their claim for any longer. In circumstances where I conclude that the adjudicator did have jurisdiction Baldwins are in my judgment entitled to be paid, now, their own costs incurred in the adjudication, for which the adjudicator awarded the sum of £18,192 excluding VAT. The stay of execution should not apply to those fees and costs.

Mr Simon Hughes (instructed by Pinsent Curtis Biddle) for the Claimant

Mr Simon Hargreaves (instructed by Masons) for the Defendant