JUDGMENT : Mr Simon Berry QC Sitting as a Deputy Judge Chancery Division ; 30th November 2001

1. In this claim the Claimant as payee claims against the Defendant (which on 14 March 1998 changed its registered name to ABB Technologies Limited) as drawer in relation to a cheque dated 22nd September 1998 in the sum of £76,838.45 together with interest. The Claimant duly presented the cheque for payment but it was dishonoured, payment having been countermanded by the Defendant.

2. The Claimant now applies under CPR Pt.24.2(a)(ii) for summary judgment against the Defendant on the ground that me Defendant has no real prospect of successfully defending the claim. In order to defeat such a Pt. 24 application the Defendant need do no more than show that it has a real prospect of success in the sense that such prospect must be other than false, fanciful or imaginary.

3. The Defendant's position is that the Claimant is not entitled to an order under Pt.24 and that, even if it is, the order must be stayed pending the determination of the Defendants Part 20 Claim against the Claimant. In regard to the application for stay and the Part 20 Claim, I should mention that on 2nd October 1998 an Administration Order was made in respect of the Claimant pursuant to Section 8 of the Insolvency Act 1986, and that the requisite leave to issue a Part 20 Claim against the Claimant has not yet been obtained.

4. The Defendant was retained as Sub-Contractor by the Main Contractor, namely Miller Construction Limited which was in turn retained by Mid Sussex District Council, being the-Employer, in relation to the construction of the Burgess Hill Leisure Centre, Burgess Hill, Sussex under a Contract incorporating the terms of JCT81 Standard Form of Building Contract with Contractor's design as amended between the parties. The Defendant sub-contracted for the supply and installation of the mechanical and electrical public health works under a contract incorporating the terms of the DOM/2 standard form of design Sub-Contract.

5 As regards the Claimant, it was retained by the Defendant as Sub-Sub-Contractor for the supply and installation of the mechanical and public health services under a written Sub-Sub-Contract dated 8 August 1997.

6. No copy of any of the above-mentioned contracts is in evidence. However, it is stated in paragraph 8 of the Defence that the Claimant's sub-sub-contract incorporated the following;

   (i) a William Steward South Western Limited Sub-Sub-Contract order ("the order") dated 8 August 1997 (William Steward South Western Limited being at the material time the agent of the Defendant):

   (ii) The written terms and conditions as printed on the Order,

   (iii) The terms and conditions as contained within the Appendix attached to the order incorporating DOM/2 which was amended to reflect the main contract amendments.

   Also, in paragraph 8 of the Defence, it is stated that the Claimant agreed to undertake the sub-sub-contract works for the sub-sub-contract tender sum of £l,642,072.40 fixed until completion of the sub-sub-contract works.

7. The Defence then goes on to set out some of the terms and conditions to which the Claimant's sub-sub-contract was subject, the material provisions of which I now set out:

   "2(l) In respect of such part of the sub-contract works as are defined overlease and are hereinafter referred to as "the sub-sub-contractor works" the sub-sub-contractor shall, except as is otherwise expressly provided by this agreement be bound by the same obligations and enjoy the same rights and benefits as those conferred upon the sub-contractor under the sub-contract.

   6(1) …the rules under the sub-contract for calculating the gross amounts due to the sub-contractor shall, mutatis mutandis, be deemed do be incorporated into this Agreement.

   6(3) The amount due under clause 6(1).... shall be paid or allowed not later than twenty four days after any amounts are paid under the sub-contract which shall be a condition precedent to the sub-sub-contractor's right to receive payment, provided that no payment shall be due under this clause unless the sub-sub-contractor has submitted to the sub-contractor by the day named in Part III of the Appendix hereto a proper and detailed application for such payments less [certain prescribed amounts]"

8. The Defence then states that the effect of clause 2(1) of the terms and conditions is that the Claimant became bound by the same obligations and enjoyed the same rights and benefits as those conferred on the

Defendant by the Sub-Sub-Contract (but I think this must be a mistaken reference to the sub-contract). Further, it is stated that, by reason of Clause 6(l), the valuation provisions of the sub-contract as set out principally in Clause 21.4 of DOM/2 apply as between the Claimant and the Defendant.

9. As regards, DOM/2 certain terms are set out in paragraph 13 of the Defence as follows:

"21.4 ... the gross valuation to be made by the contractor shall be the total of the amount referred to in Clauses 21.4.1 and 21.4.2 less the total amount referred to in Clause 21.4.3 up to and including a date not more than 7 days before the date when the first and each interim payment is due.

21.4.1.1 The total value of the sub-contract work on site properly executed by the Sub-Contractor including any work executed to which Clause 16,1 refers and including any work so executed for which a 4.6 Quotation has been accepted by the Contractor and any variations thereto which Clause 4.6.8 applies, but excluding any restoration, replacement or repair of loss or damage and removal and disposal of debris which in clauses 8B.4 and 8C.4 are treated as if they were a Variation together with, where applicable, any adjustment of that total value under Clause 37.

21.4.1.2 The total value of the materials and goods delivered to or adjacent to the works for incorporation therein by the Sub-Contractor but not so incorporated provided that the value of such materials and goods shall only be included as and from such times as they are reasonably, properly and not prematurely so delivered and are adequately protected against weather and other casualties;

21.4.1.3 The total value of any materials or good other than those to which Clause 21.4.1.2 refers where listed by the Employer under Clause 15.2. of the Main Contract Conditions and where the conditions set out in clause 15.2 have been fulfilled. Provided always that the Sub-Contractor shall observe any relevant conditions set out in the Main Contract which have to be fulfilled before the Employer will include the value of goods or materials not delivered to or adjacent to the works in notices issued under 30.3.3 of the Main Contract Conditions."

10. In paragraph 16 of the Defence it is stated that, by reason of the sub-sub-contract, the Claimant was entitled to periodic payments by reference to the gross amount under clause 6(1) of the Order. Further, as the sub-sub-contract work progressed, the Claimant submitted interim payment applications to the Defendant. The Defendant in turn incorporated the Claimant's interim payment application within its own interim payment application to the Main Contractor. Upon receipt of the Defendant's application, the Main Contractor ascertained and certified the value of sub-contract work carried out by the Defendant. The Defendant then applied this certified value (after making an agreed 11.5% discount) to the Claimant's application.

11. It is the Claimant's application for payment No. 13 which has led to the cheque being paid to it which is the subject matter of these proceedings. On 31st July 1998 the Main Contractor certified a gross sum to the Defendant, which gave rise to a payment due from the Defendant to the Claimant of £64,394.43 plus VAT, which totals £76,394.43. As a result (as it is said in paragraph 19 of the Defence) the cheque for £76,838.45 (being £65,394.43 plus VAT) was issued by the Claimant to the Defendant.

12. However, following its consideration of the amount due in respect of Payment No. 14, the Main Contractor reduced the amount then certified in respect of Payment No.14 by £55,700 by reference to a "Schedule of Mechanical Services non-compliant with Employer's Requirements of Approved Drawings". Further, in dealing with application No. 15 the Defendant identified what it claims to be "incomplete work or work not carried out but claimed for" by the Claimant, which led to a yet further reduction in the amount certified an that occasion of £86,282. These matters are spoken to in paragraphs 4 - 8 of the Witness Statement of Brian Forsyth.

13. A further witness statement has been made on behalf of the Defendant by Mr. R A. Varney. He says that, in relation to Payment No. 13 "there was due" a payment to the Claimant in the sum of £65,394.43 plus VAT. However, he then does go on to refer to the reduction which was made in relation to Payment No. 14 and to the additional and later reduction of £86,282.

14. As I have already mentioned, no copies of the contractual documents are in evidence. However, it does seem to me to be sufficiently clear, for the purposes of the Part 24 application which is before me, that under the sub-sub-contract the essential scheme was as follows. The Claimant was entitled to interim payments from the Defendant which fell to be calculated by reference to the certificate issued in relation

to the corresponding interim payment which was due from the Main Contractor to the Defendant. Any such certificate or calculation could be challenged in an arbitration under the provisions of the JCT Contract. But, if it was not so challenged, then payment of the amount so certified and calculated became due. However, any defects or omissions in the works which were not picked up in relation to one certificate could be taken into account in a subsequent certificate, which would thereby reduce the payment then due under such later certificate.

15. It is a well settled principle of law that a cheque is to be treated as cash. As Lord Wilberforce said in **Nova (Jersey) Knit Ltd v Kammgarn Spinnerei G.m.b.H** [1977) 1 WLR 713 HL at 721

[A seller] may demand payment in cash; but if the buyer cannot provide this at once, he may agree to take bills of exchange payable at future dates. These are taken as equivalent to deferred instalments of cash. Unless they are to be treated as unconditionally payable instruments... which the seller can negotiate for cash, the seller might just as well give credit. And it is for this reason. that English law .... does not allow cross claims, or defences, except such limited defences as those based on fraud, invalidity, or failure of consideration, to be made."

Also in the same case, Lord Russell said at 732-3

"It is my opinion well established that a claim for unliquidated damages under a contract for sale is no defence to a claim under a bill of exchange accepted by the purchaser: nor is it available as set-off or counterclaim. This is a deep-rooted concept of English commercial law. A vendor and purchaser who agree upon payment by acceptance of bills of exchange do so not simply upon the basis that credit is given to the purchaser so that the vendor must in due course sue for the price under the contract of sale. The bill is itself a contract separate from the contract of sale. Its purpose is not merely to serve as a negotiable instrument, it is also to avoid postponement of the purchaser's liability to the vendor himself, a postponement grounded upon some allegation of failure in some respect by the vendor under the underlying contract, unless it be total or quantified partial failure of consideration."

16. Mr. Simon Hughes, for the Defendant, submits that he has at least a realistic prospect of being able to show that there has been a total or partial failure of consideration or that all or part of the sum contained on the face of the cheque had not become due and payable under the terms of the sub-sub-contract. He relies on the fact that, as was revealed by the subsequent certificates, no money at all was due at the time of Payment No. 13 as a result of the defective and incomplete work which had been carried out by the Claimant. He also relies on the fact that condition 21.4.1.1 of DOM/2 refers to the fact that the valuation which is required to be made should be of the "total value of the sub-contract work on site properly executed by the Sub-Contractor" (emphasis supplied).

17. Mr. Hughes principally relied on **Foreman v Wright** (1951)11 CB 481, which was followed in **Thoni G.m.b.H & CO,K.G v R.T.P. Equipment Ltd** [1979] 2 Lloyds LR 282 CA. In **Foreman v Wright**, Jervis C1 said at 492:

"Want of consideration is altogether independent of knowledge either of the facts or the law, I apprehend a man might say, that, in adding up an account he erroneously supposed himself to be indebted in 100L, whereas in truth I0L only was due : that, in the case of a bill or note, would a good plea of want of consideration except as to 10L".

As regards the **Thonl Case**, it was held that there was an argument that the true state of account between the parties would reveal that there was only 400,897 Austrian schillings due from the defendants to the plaintiffs, in which case there was:

"no consideration for the bill [of one million Austrian schillings] except to the extent of 404,897 Austrian schillings"

I am of the view that these authorities are of no assistance to the Defendant. My reasons are as follows.

18. First, it is important to note that both **Foreman v Wright** and the **Thoni Case** were concerned with circumstances in which, as was expressly referred to in **Foreman v Wright**, the drawer of the bill had made an error in "adding up an account". In such circumstances, there would be a partial failure of consideration because the "antecedent debt or liability" (as to which see section 27(1) of the Bills of Exchange Act 1882) was not and never was the full amount of the bill; and the deficiency was, to use the word which appears in the above cited dicta in the speech of Lord Russell in the **Nova** Case, a "***quantified*** *partial failure*" (emphasis supplied).

19. Secondly, in the instant case, there has been no question of the drawer making a mistake in adding up an account or even adding up the work done for which payment was required to be made. Rather, the Defendant paid by way of cheque, in accordance with the payment scheme which was prescribed by the sub-sub-contract, an amount which was due in circumstances where the amount of the payment to be made fell to be calculated by reference to a certificate. The error, if one was made (and even if it was as to whether or not work done had been "properly executed"), was not that of the Defendant. rather, it was an error made by the Main Contractor when giving his certificate. And beyond this, it was an essential element of the payment scheme which was prescribed by the sub-sub-contract that errors in a valuation on which a certificate was founded could be taken account of later in subsequent certificates, which is quite inconsistent with the notion that they could be used to justify the countermanding of a cheque making a payment pursuant to an earlier certificate.

20. Thirdly, it may well be the case that the errors made have been quantified for the purpose of certifying Payments subsequent to Payment No. 13, but that is as far as it goes. As far as concerns Payment No. 13, the position is that, albeit that the Claimant may have been in breach of the sub-sub-contract, any claim at the time when the cheque was issued was unliquidated and unquantified. The mere fact that a subsequent certificate throws up errors in an earlier certificate, and that it does so in time for a cheque paid in respect of the earlier certificate to be countermanded, cannot change the fact that the quantification reflected in the subsequent certificate is for the purpose only of that later certificate. This is all the more so in a case, such as the present one, where it is unclear whether the defective and incomplete work was carried out only between Payments No. 12 & 13 or whether this had occurred even before payment No. 12.

21. Mr. Hughes also relied on **Saga of Bond Street Ltd v Avalon Promotions Ltd** (1972)2 QB 325CA in which Salmon LJ appears to suggest (at p.328) that the Court has a general discretion to decide whether in a particular case on its particular facts to give judgment on a bill of exchange in circumstances where the Defendant does have a defence in respect of the obligation which gave rise to the payment. However, and quite apart from the fact that this too was a case which could be said to be one where the shortfall in bottles of scent which were to be supplied could be said to give rise to a quantified partial failure of consideration, it does not seem to me that the notion of some general discretion can be in any way consistent with the approach of the House of Lords in the **Nova** Case to which no reference is made in the judgments in the **Saga** Case.

22. For these reasons, I am of the view that the Claimant does succeed on its Part 24 application.

23. However, the Defendant further submits that, if Judgment is entered against it, then judgment ought to be stayed pending the hearing of its Part 20 Claim. To this question I now turn.

24. It is alleged in the Part 20 Claim that the Claimant abandoned the site on or around 23rd September 1998 and on the same day by letter purported to determine the sub-sub-contract. The Defendant contends that this amounted to a repudiation of the contract, which repudiation was accepted on or about 25th September 1998. The Defendant claims against the Claimant the sum of £76,582.57 which it claims to have overpaid the Claimant and it also claims damages in respect of (i) a sum in excess of £100,000 incurred in dismantling and removing defective work carried out by the Claimant; and (ii) a deduction of £545,844 deducted by the Main Contractor from sums due from it to the Defendant as a result of delay and defective work which is attributable to the Claimant. These are also matters which are verified in the Witness Statement of Brian Forsyth.

25. Mr. Felling, who appears for the Claimant, submits that there ought not to be stay on the ground that the Claimant is in administration. He relies on two matters.

26. First, Mr. Pelling relies on **Brown, Shipley & Co. Ltd v Alicia Hosiery Ltd** [1966)1 Lloyds LR 668 CA in which it was held that it is only in "exceptional circumstances" (per Lord Denning MR at p.669) that a stay should be granted in bills of exchange matters. Mr. Pelling submits that it is signal that there is no suggestion in the authorities that the fact that the Claimant is in administration represents a relevant exceptional circumstance.

27. Secondly, Mr. Pelling relies on rule 4.90- of the Insolvency Rules 1986. Broadly, the effect of this is that, where a company has gone into liquidation and there have been mutual dealings between it and a creditor, an account is to be taken of what is due and sums due from one party shall be set off against the other. Mr. Pelling accepts that, if the Claimant was in liquidation, then this rule would apply to the circumstances of the instant case: **Willment Bros v N W Thames R.H.A.**(1984)26 Build L.R 51. But Mr. Pelling goes on to submit that the practical effect of granting a stay in this case would be equivalent to extending the scope of rule 4.90 so as to apply it not only to a company in liquidation, but also to one in administration.

28. Mr. Pelling submits that rule 4.90 is the latest version of a provision that has been on the statute books since the days of Queen Anne and existed at common law for a good time before that (see **Derham on Set Off** 2nd Ed. pp 158-166). However, as Mr. Pelling also submits, it is important to note that the justice of insolvency set off is not as obvious as is sometimes assumed. He relies on the fact that Lord Hoffmann has observed that:
"*Although it is often said that the justice of the [Insolvency set off] rule is obvious, it is worth noticing that it is by no means universal"*. See **Stein v Blake** [1996] 1 AC 243 HL at 251 F.

29. Mr. Pelling submits that insolvency set-off favours a creditor who, as well as being a creditor, also owes money to the insolvent party. Under rule 4.90, such a creditor is effectively paid the debt owed to him in full up to the value of the debt he owes. Other creditors must prove for the debts owed to them and be paid according to the dividend. Insolvency set-off' has been described as "a major invasion of the *pari passu* principle" (**Wood on English and International Set-off** (1989) at p271).

30. Thus, by way of example, take a company in liquidation, C, which has two creditors, A and B. A has an action for damages against the company worth £100 but also owes the company £100. B, on the other hand, is simply owed £100 by the company. A sets off the debt against the damages, and ends up neither paying nor receiving anything. His debt is effectively paid in full. However, assuming that the dividend is 50p in the pound. B is only paid £50 of the £100 owed to him and thus ends up £50 out of pocket. Moreover, A's gain is at B's expense: the effect of A's set-off is to reduce the pool of money available for H and the other creditors and therefore to diminish the dividend (see **Derham on Set-off** (2nd Ed. at p.154).

31. Mr. Pelling submits that it is not at all clear why a creditor who also owes money to an insolvent company should simply by virtue of this fact be specially favoured in this way. The rule can be said to be, in this sense, rather arbitrary.

32. Nonetheless, insolvency set-off under rule 4.90 makes this the law in liquidation, as it has been for centuries. But the Defendant would, in effect, like the court to extend this rule to companies in administration. Obviously, this would be in the interests of the Defendant. But it is not easy to see why it is also just. The Defendant made a payment which falls to be treated as though it had been made in cash. If in fact cash is paid to an insolvent company, then if the person making such cash payment had a claim against that insolvent company, such person would have to prove its claim in the liquidation along with the other creditors and receive only a dividend. Why, Mr. Pelling asks rhetorically, should the Defendant be able to secure an advantage over the other creditors in this respect by route of a stay simply because it managed to cancel its cheque?

33. Mr. Pelling further submits that rule 4.90 is clearly limited to companies in liquidation. Had Parliament wished to apply it to companies in administration, it could have done so. It did not. He submits that, in the circumstances of the instant case, there is no ground in law or in justice for extending the principle of insolvency set off beyond the circumstances to which Parliament has said it shall apply, namely liquidations. Moreover, the purpose of the administration order was to enable there to be a more advantageous realisation of the Claimant's assets than would be effected on a winding up: see the express terms of the Administration Order dated 2nd October 1998 and section 8(3)(d) of the Insolvency Act 1986. Mr. Pelling submitted that "more advantageous" means that more money can be made available far the unsecured creditors generally. For the reasons which appear in paragraphs 30 and 32 above, Mr. Pelling submits that it would frustrate this purpose if the court were, in effect, to allow insolvency set-off in this case.

34. In my view, Mr Pelling's submissions are convincing and compelling. In particular, they make it even more difficult for Mr Hughes to find a sufficiently "exceptional" reason in the circumstances of the instant case - which, apart from the fact that the Claimant is in Administration, has no unusual or exceptional features - as to why there should be a stay.

35. Mr Hughes has referred me to **Hofer v Strawson** (1999) 2 BCLC 336. However, that was a case which concerned the express power of the Court to set aside a statutory demand under rule 6.5(4) of the 1986 rules in the case of a "counterclaim, set-off or cross demand". Further, it is clear that Neuberger J was heavily influenced by the fact that the person with the potential counterclaim could well be bankrupted if no setting aside order was made. Mr Hughes also relied on **Herschel Engineering Ltd v Breen Property Ltd** (2000) BLR 272, but this seems to me to turn very much on the facts of that case and provide no relevant, helpful statements of principle.

36. In addition, Mr Hughes relied upon **Rainford House Ltd v Cadogan Ltd** (2001)All ER (D) 144. However, this was a case which involved a determination under Part 11 of the Housing Grants, Construction and Regeneration Act 1996 in relation to monies due under a house building contract. As HH Judge Richard Seymour QC said, the "policy" of the Act was very much in point, and that did not prevent a stay being ordered. Again, this was a decision very much on the facts of the case and within the context of an Act which evinced a recognisable and distinguishable policy.

37. For the above reasons, I decline to order that my judgment on the Claimants Part 24 application be stayed.

Alexander Pelling (instructed by Hammond Suddards Edge)
Simon Hughes (instruxted by Wragge & Co)