JUDGMENT : His Honour Judge Richard Seymour Q.C : 13th February 2001. TCC.

1. By an undated agreement in writing in the Standard Form of Building Contract With Contractor's Design, 1998 Edition, and made between the Claimant, Rainford House Ltd. ("Rainford"), and the Defendant, Cadogan Ltd. ("Cadogan") Cadogan employed Rainford to undertake the construction of a house, called "Atlantis", on a site in East Road, St. George's Hill, Weybridge, Surrey. That agreement was a "construction contract" within the meaning of section 104 of Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act") and so the provisions of Part II of that Act applied to the contract.

2. In this action Rainford claims against Cadogan payment of a sum of £77,350.75 which it is said is due to Rainford under the terms of the decision of an adjudicator, Mr. Mark Edward Pontin, dated 8 January 2001 and made under the terms of Part II of the 1996 Act. By that decision Mr. Pontin determined that:-

   "(1) Within seven days of this Decision being taken up by either Party, Cadogan shall peremptorily pay to Rainford £75,133.78 (seventy five thousand, one hundred and thirty three pounds and 78 pence).

   "(2) My fees and expenses amount in total to £4,400.02 including VAT which sum shall be paid by Cadogan. In the event that Rainford have paid all or part of this sum then Cadogan shall reimburse Rainford the sum so paid concurrent with the Payment directed at (1) above."

3. The sum claimed in this action is the aggregate of the sum of £75,133.78, the sum referred in paragraph (1) of the passage quoted, an amount of £2,200.01, being one half of the amount of Mr. Pontin's fees, which Rainford had paid, and a small amount of interest. There is no dispute about how the sum claimed has been calculated, or that the effect of the decision of Mr. Pontin, if that decision is immediately enforceable, is that the sum claimed, plus some further sum by way of interest which has accrued since this action was commenced on 18 January 2001, is the sum which should now be paid by Cadogan to Rainford. The application before the Court is that of Rainford for summary judgment for the sum claimed in the Particulars of Claim, plus interest since 18 January 2001. Subject to one point it is accepted by Mr. Richard Rundell, who appeared as Counsel on behalf of Cadogan, that Rainford is entitled to the judgment which it seeks.

4. As appears from the title of the action, and is not in dispute, Rainford is in administrative receivership. Mr. Rundell submitted that for that reason, and for that reason alone, it was not appropriate for the Court to enter summary judgment for the sum claimed, although it was accepted by Mr. Rundell that, but for that point, there would be no answer to the claim for summary judgment. Mr. Rundell put before me a copy of a statutory notification dated 21st December 2000 of the appointment of Mr. M.J. Moore and Mr. N. A. Brackenbury as the administrative receivers of Rainford by "us on 21 December 2000 under the powers contained in a Mortgage Debenture dated 1 November 1993" given, apparently, by Mr. Victor Rainford, who, Mr. Rundell told me, is the managing director of Rainford. Mr. Rundell invited me to conclude that it was Mr. Rainford who had put Rainford into administrative receivership and thus that Rainford was likely to be insolvent. Mr. Simon Hargreaves, who appeared on behalf of Rainford, told me on instructions that it had not been Mr. Rainford, whom he accepted was the managing director of Rainford, who had appointed the administrative receivers. As all I know about who appointed the administrative receivers is what I have been told on instructions, or appears from the document put before me, and no other relevant evidence has been introduced, I do not feel able to reach any conclusion on this point.

5. Quite apart from the question of who appointed the administrative receivers, Mr. Rundell relied, in support of his submission that the material before me suggested that Rainford was, or probably was, insolvent, upon the evidence of Mr. Howard Beesley, a director of Cadogan, and that of Mr. Julian Clayton, an architect who is employed by the practice of John Iles Associates, which had been appointed as contract administrator in relation to the project which has given rise to this action.

6. Mr. Beesley, in a witness statement dated 31 January 2001 at paragraph 7 said:-
   "In view of the complaints and the late running of the works, the directors of Cadogan Limited required confirmation from Rainford House Ltd's bankers, (Nat West, Wakefield), that Rainford House Limited had sufficient funds and facilities to complete all contracts in progress including the Atlantis project. Written

confirmation was received. It was therefore, a considerable surprise to the directors when a director of the Alpha plant hire company telephoned on the 22nd December 2000 to inform the directors that Rainford House Limited had been taken into administrative receivership, that Alpha plant hire were owed £16,000, and requesting Cadogan Limited to pay the outstanding monies due to Alpha by Rainford House Ltd. At this time, the Atlantis contract had been determined because of lack of due diligence by Rainford House Ltd."

7. The evidence of Mr. Clayton, at paragraph 10 of his witness statement, also dated 31 January 2001, was, so far as is presently material:-
"The site agent informed me that the following subcontractors: Lillekers Bros. Ltd., David Hallam Ltd. (Pools), Hughes Building Services (Plasterers & Renderers), & David Brown (Roofing Services), had pulled off site, as they had not received payment from Rainford House Ltd even though all of this money had been paid by Cadogan to Rainford House Ltd on 10th November 2000 as part of the payment for application 13."

8. None of that evidence was contradicted or explained on behalf of Rainford.

9. Mr. Rundell drew to my attention the provisions of Part 24.2 of Civil Procedure Rules, by which it is provided, so far as is presently material:-
"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if it considers that –
(i) that claimant has no real prospect of succeeding on the claim or issue; or
(ii) that defendant has no real prospect of successfully defending the claim or issue; and
there is no other reason why the case or issue should be disposed of at a trial."

10. He also drew to my attention the decision of the Court of Appeal in the case of **Bouygues (UK) Ltd. v. Dahl-Jensen (UK) Ltd**. [2000] BLR 522, the judgments in which were handed down on 31 July 2000. In that case the defendant, which was a company in liquidation, sought to enforce by an application for summary judgment the award of an adjudicator under the provisions of Part II of the 1996 Act. At first instance the defendant was successful. On the hearing of the appeal an issue which arose was whether it was appropriate to give summary judgment in relation to the award of an adjudicator made under the provisions of Part II of the 1996 Act in a case in which the claimant was in liquidation. That issue was considered in detail in the judgment of Chadwick LJ, with which on this point the other members of the Court of Appeal, Peter Gibson LJ and Buxton LJ agreed. At paragraph 35 of his judgment, on pages 528 and 529 of the report, Chadwick LJ said:-
"Part 24, rule 2 of the Civil Procedure Rules enables the court to give summary judgment on the whole of a claim, or on a particular issue, if it considers that the defendant has no real prospect of successfully defending the claim and there is no other reason why the case or issue should be disposed of at a trial. In circumstances such as the present, where there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of an adjudication which is, necessarily, provisional. All claims and cross-claims should be resolved in the liquidation, in which full account can be taken and a balance struck. That is what rule 4.90 of the Insolvency Rules 1986 requires."

11. Mr. Rundell has drawn to my attention that a Defence & Counterclaim has been served on behalf of Cadogan in which it has been pleaded that Rainford was in breach of the contract on which its present claim before Mr. Pontin was based by failing, it is said, to proceed diligently with the building work at the property called "Atlantis" which was the subject matter of that contract. It is also pleaded that Rainford has actually been overpaid for work which it has carried out, notwithstanding the decision of Mr. Pontin, & that Cadogan has had to pay various sub-contractors which should have been paid by Rainford, in order to induce those sub-contractors to continue to work on the site. The total sums allegedly overpaid or paid to sub-contractors amount to £73,950.66. There is evidence in support of those counterclaims in the witness statements of Mr. Beesley & Mr. Clayton to which I have referred. Mr. Rundell submitted that, for the purposes of deciding whether it was appropriate to give summary judgment for the amount of an adjudicator's award, there was no difference between the case in which the claimant is in liquidation and the case in which the claimant, as here, is in administrative receivership. The critical factor, he said, was whether there was a risk of injustice to the paying party under the adjudicator's award because he was exposed to the real possibility that he would be called

upon to pay the claimant, whilst being denied the opportunity in due course to redress the balance by pursuing his own claims.

12. Mr. Hargreaves submitted that the present case was different from the circumstances in **Bouygues (UK) Ltd. v. Dahl-Jensen (UK) Ltd**. because Rainford was not in liquidation, and the approach to applications for summary judgment for the amount of the award of an adjudicator indicated in that case should only be followed in a case in which the party seeking summary judgment was in liquidation. The reason for what he submitted was a critical distinction between the case in which the claimant was in liquidation and any other case in which the claimant was, or might be, insolvent, was that in the former case, but not in the latter, there was a statutory scheme for the determination of the respective rights and liabilities of the parties. He further submitted that, if, as he submitted I should, I found that Cadogan had no real prospect of successfully defending the claim of Rainford, then there was no reason for a trial, even if I found that there were good grounds to consider that Rainford would or might be unable to meet any counterclaim which Cadogan might hereafter make out, and so the second condition in Part 24.2 of Civil Procedure Rules was not satisfied. I should, therefore, Mr. Hargreaves submitted, give summary judgment for Rainford on its claim. The submission that I should give judgment for Rainford even if I considered that there were good grounds for supposing that Rainford would, or might, be unable to repay to Cadogan any sum which might be found to be due in respect of Cadogan's counterclaims urged upon me an approach which, unless there is indeed a critical distinction to be drawn between the case in which a claimant is a company in liquidation and any other case in which there is doubt as to the financial soundness of the claimant, seemed to differ from that adopted by Chadwick LJ in **Bouygues (UK) Ltd. v. Dahl-Jensen (UK) Ltd**. While, at first sight, Chadwick LJ, in the passage which I have quoted, seems to be saying that, at least where the claimant is a company in liquidation, the existence of the regime established by Insolvency Rules 1986 was a reason for there to be a trial of the action in which the claimant was seeking to enforce the adjudicator's award in his favour, it is plain, in my judgment, that that is not a correct understanding. It seems to me that what Chadwick LJ meant was either that, in the exercise of the discretion which the Court has under Part 24.2 of Civil Procedure Rules in any case, it should not make an order which would have the effect of subverting the scheme established by Insolvency Rules 1986 for dealing with cases in which the claimant was in liquidation, or that the process for which Insolvency Rules 1986 provide for the purposes of ascertaining the net position of an alleged debtor in a liquidation should be treated as a trial for the purposes of Part 24.2 and as necessary in a case in which the claimant seeking to enforce the award of an adjudicator under Part II of the 1996 Act was a company in liquidation. If the latter is the correct understanding, obviously there is no relevant mechanism which can be considered as a trial unless the claimant is a company in liquidation.

13. As an alternative to his submission that I should not give summary judgment in this case at all Mr. Rundell submitted that, if I did give judgment, I should grant a stay of execution so as to avoid a situation in which Rainford had an immediately enforceable judgment for £77,350.75, plus whatever additional sum I awarded as interest from 18 January 2001, and Cadogan was at risk of making good its counterclaims in due course, only to find that by then there was no solvent party against which it could enforce its claims.

14. Mr. Hargreaves submitted that I should not grant a stay of execution if I gave summary judgment to Rainford on its claim because to do so would be to deprive Rainford of the benefit which it was the policy of Part II of the 1996 Act that it should have. He submitted, in effect, that, having failed to give such notice as was contemplated by section 110 of the 1996 Act, Cadogan should not be permitted to achieve the same result as if it had given such notice by being granted a stay of execution. He drew to my attention the provisions of Order 47 rule 1 of the Rules of the Supreme Court, which are still the relevant rules in relation to the grant of a stay of execution. The terms of Order 47 rule 1 are as follows:-

"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 that there are special circumstances which render it inexpedient to enforce the judgment or order, or that the applicant is unable from any cause to pay the money, then, notwithstanding

anything in Rule 2 or 3, the court may by order stay the execution of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the court thinks fit."

15. Mr. Hargreaves accepted that I had jurisdiction to grant a stay. In his oral argument, although not in his written skeleton argument in reply to the skeleton argument of Mr. Rundell, Mr. Hargreaves accepted that, if I found that there was evidence that Rainford was insolvent, that finding could amount to "special circumstances" such as to justify the grant of a stay of execution of a judgment in this case. However, he submitted that, on the evidence I should not make any such finding. He sought to support the latter submission by reference to an unreported decision of H.H. Judge Humphrey Lloyd Q.C. made on 28 July 2000 in the case of **Herschell Engineering Ltd. v. Breen Property Ltd**. A transcript of that decision was put before me. In it H.H. Judge Humphrey Lloyd Q.C. had to consider, as I may have to in the present case, the question of whether to grant a stay of execution once summary judgment has been given for the amount of an award made by an adjudicator under Part II of the 1996 Act. About the judgment debt created if summary judgment is entered in such a case Judge Lloyd Q.C. said at pages 4 to 6 of the transcript:-

"The debt which crystallises as a judgment debt is, however, one of a somewhat unusual nature, since it stems from the decision of an adjudicator which is provisional and not final and is capable of being reversed in that the ultimate tribunal (court or arbitrator) which has jurisdiction to resolve the dispute finally may take a different view. It may decide that, for example, the sum ordered to be paid was not due either in fact or in law in whole or in part, perhaps because of additional evidence or submissions, just as an adjudicator has to take account of all available evidence and submissions and is not confined to the reasons which gave rise to the dispute. The adjudicator's decision is not therefore a decision for all time that the defendant owes the claimant a particular sum of money. It is merely a decision that, at the present time and on the basis of the material then available to the adjudicator, a sum of money appears to be due. An adjudicator's decision is taken in a limited time and frequently on a limited basis and may not therefore be the correct resolution of the dispute. Unless the decision was made without jurisdiction or there is some other reason why the decision should not be enforced it is now well established that adjudicators' decisions will be enforced on an application for summary judgment.

"That judgment is not of course a decision that the dispute was correctly resolved, but only there are no grounds in fact or law under the provisions of Part II of the Housing Grants Construction and Regeneration Act 1996, as construed by the courts, for concluding that the defendant has realistic prospects of success in challenging the validity of the decision itself. Like the decision itself it is not a judgment which precludes a defendant from asserting later that the decision was the wrong answer to the dispute or from succeeding in that contention, even though the defendant did not take part in the adjudication or opposed the application for summary judgment. In my view that feature means that an application for a stay may require to be heard with some care."

16. With all of those observations I respectfully agree. However, the passages upon which Mr. Hargreaves sought to place particular reliance were, first, one at pages 10 to 11 of the transcript, in which Judge Lloyd Q.C. said:-

"What are the facts in this case? It is said that the claimant company accounts show that it is a small entity with a very small paid-up share capital of £2. Very little more in known apart from the fact that there is standard floating charge on its assets in favour of its bankers. The company was formed or began to trade in about March 1999. It entered into the contract which is the subject of this action and the adjudication in June 1999. The time had not then yet arrived when it was obliged to file any of its annual accounts.

"I am invited to draw the inference that the company would not be able to repay the money if the ultimate tribunal found in favour of the defendant. That in turn raises the question: at what stage would that decision be made? It is not a question of whether it would not be able to repay the money now, it is a question of whether it would not be able to repay the money at the time when the moment of repayment might arise. The test is, therefore, comparable to that under section 726(1) of the Companies Act 1985 (see now also CPR Rules 25.12 and 25.13 (2)(c)). on an application for security for costs. It is therefore incumbent on an applicant to establish when that date is."

17. The second passage upon which Mr. Hargreaves particularly relied was at page 12 of the transcript, and was in the following terms:-

"Secondly, Mr. Davies [Counsel] says that it is incumbent upon the claimant to establish that it will have the money either now or at a future stage. I reject that submission. It is for the applicant to make out its case. It could, for example, have obtained credit references which can frequently show whether a company is in the eyes of its own bankers good for the repayment of the disputed debt. Such evidence is sometimes material. Again, it is not for the respondent to the application to produce management or other accounts. In any event that type of financial information can all too often be unreliable as it is either self-serving or of doubtful utility. It is for the defendant to establish the proposition that if there was a judgment which did not uphold the adjudicator's decision, then the amount due under that judgment would not then be honoured by the claimant. In my view the applicant in this case has failed to do so."

18. The point as to whether it is appropriate in this case to enter summary judgment for Rainford is ultimately a short one. The policy underlying Part II of Housing Grants, Construction and Regeneration Act 1996 is, in my judgment, that there should be a swift mechanism by which a dispute under a construction contract as to who has to pay what to whom while the construction work to which the contract relates is in progress can be resolved on a binding, but interim, basis, leaving the final resolution of disputes, if that proves to be necessary, to follow at leisure, without disrupting the cash-flow of the project. 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, the material provisions of which are:-

"(1) A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.

"(2) For the purposes of this section a company becomes insolvent-

on the making of an administration order against it under Part II of the Insolvency Act 1986,

on the appointment of an administrative receiver or a receiver or manager of its property under Chapter I of Part II of that Act, or the appointment of a receiver under Chapter II of that Part,

on the passing of a resolution for voluntary winding-up without a declaration of solvency under s89 of that Act, or

on the making of a winding-up order under Part IV or V of that Act."

19. 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 re-allocate 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 that is a circumstance which, as Chadwick LJ 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.

20. Whereas in the case of a company in liquidation it is inevitable that the process contemplated by Rule 4.90 of Insolvency Rules 1986 will be undertaken, that is not the position in a case in which the claimant is a company in administrative receivership. In the latter case one cannot tell what the outcome of the receivership will be. In a case in which there is not, inevitably, a need for a determination more or less as matters then stand between the parties of the net state of accounts, in which process the correctness of the decision of the adjudicator must be evaluated, and there is not otherwise any defence to a claim to enforce the award of an adjudicator, it seems to me that the factors which led Chadwick LJ in **Bouygues (UK) Ltd. v. Dahl-Jensen (UK) Ltd.** to consider that it would not be appropriate to give summary judgment at all are not present. However, if there is credible evidence

that the claimant is insolvent, in my judgment that is a highly material matter for the court to consider in relation to any application for a stay of execution of the judgment in favour of the claimant.

21. So far as the question whether to grant a stay of execution is concerned, each case must depend upon its own facts. I agree with Judge Lloyd Q.C. that it is for the applicant for any stay to put before the court credible material which, unless contradicted, demonstrates that the claimant is insolvent. However, in my judgment it is not necessary for the applicant for the stay to go further than to put before the court evidence as to the present financial position of the claimant, so that he does not need to shoulder some additional burden of predicting when any challenge to the correctness in fact of the determination of the adjudicator will be heard or of putting before the court positive evidence as to what the financial position of the claimant will then be. Further, I do not consider that the burden which the applicant for a stay bears is that of demonstrating beyond the possibility of error that the claimant will, come the time when the correctness or otherwise of the decision of the adjudicator is determined, be unable to repay the amount determined by the adjudicator to be payable. I respectfully consider that the analogy which Judge Lloyd Q.C. drew with the jurisdiction under section 726 of Companies Act 1985 to order a company to give security for costs is helpful. When the court is invited to exercise that jurisdiction the evidence which is adduced is usually as to the financial position of the claimant company as at the date of the hearing of the application. The court is then invited to infer, and usually does, unless evidence is put before it on behalf of the company which shows a different picture, that the then position of the company will continue. In the same way, it is, in my judgment, appropriate when considering an application for a stay of execution in a case such as the present, to proceed on the basis that once the applicant for a stay has adduced apparently credible evidence which, if uncontradicted, shows that the claimant in the action is then insolvent, it is for the claimant, if it wishes the court not to draw the inference for which the applicant for the stay contends, to seek to contradict the evidence adduced on behalf of the applicant; in the absence of evidence to suggest that the position as it appears at the time the application is before the court is likely to alter the inference which should be drawn is that it will not.

22. 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.

23. The appropriate course in the present case seems to me to be to give summary judgment for the sum claimed, £77,350.75, together with appropriate interest thereon between 18 January 2001 and today, as to which I will hear Counsel, but with a stay of execution pending the trial of the Counterclaim, or further order, such stay to be conditional upon Cadogan paying the judgment sum into court not later than 4pm on Wednesday, 28 February 2001. I shall give Rainford permission to apply in relation to the lifting of the stay to cover the possibility that Rainford may be able and willing to provide security for the repayment of an amount up to £77,350.75 in the event that the Counterclaim succeeds.

Simon Hargreaves for the claimant (Walker Morris, Solicitors)
Richard Rundell for the defendant (Coleman & Betts, Solicitors)