JUDGMENT : HIS HONOUR JUDGE LLOYD QC: QBD : 28th July 2000

1. The defendant applies for a stay of execution of *a judgment* which the claimant obtained as a result of a hearing before Dyson J. on April 2000. During the course of that hearing and also after Dyson J. had given judgment on 14 April ([2000] BLR 272; 2 TCLR 473), the question of whether there should be a stay of execution of the judgment was raised. Dyson J. gave summary judgment to enforce the decision of an adjudicator, Miss Victoria Russell (who bud been appointed by TecSA - the nominating body for the purposes of the Scheme). Her decision was that the claimant was entitled to payment in respect of amounts claimed by it in invoices which it had rendered. It had been carrying out electrical work for the defendant at 17 Cornwall Gardens, London SW7.

2. At the end of his judgment Dyson J. under the heading "Should there be a stay?" said:
"To keep the claimant out of this money for several months would be contrary to the plain intent of the 1996 Act. I should add that there is no evidence that, if the defendant is successful in defending the County Court proceedings, the claimant will be unable to repay the sum awarded by the adjudicator. Had the position been otherwise, and there was a real doubt as to the claimant's ability to repay if it loses in the County Court, I would probably have granted a stay of execution pending the final determination of the County Court proceedings."

   With those observations in mind, the defendant now makes this application based upon recent searches conducted at Companies Registry which establish, so far as the defendant is concerned, that the claimant has or may have no money to repay it were payment to be made pursuant to the judgment and were it subsequently decided that the money was not due and should be repaid. The reference in the judgment of Dyson J. to County Court proceedings is a reference to the concurrent proceedings in the High Wycombe County Court, subject to a pending appeal, the hearing of which has not yet taken place.

3. The first point that has been taken is whether an application of this kind can now be made. Mr. Davies for the applicant says it may because an application for a stay may be made both under RSC Order 45 and Order 47 (which are presently incorporated in the CPR by reason of Part 50) on the basis of material which was not available to the applicant at the time when judgment was given and for that purpose he relies upon a statement in Spencer Bower & Turner and Handley on Res Judicata that judgments dismissing interlocutory applications may not be final and will not bar a further application on the grounds of res judicata, although the further application is not likely to succeed unless supported by additional evidence or a different argument. Mr. Brannigan, whist accepting that an application may be made on the basis of new material which either was not available or could not with reasonable diligence have been found, submits that the material relied on by the defendant does not change the position.

4. As regards this objection to jurisdiction, the principles are clear. An application for a stay may be renewed at any stage providing that the material is either new or is material which the applicant could not with diligence have obtained at the time when the original application was made and refused. In my judgment the material relied on here could not have been obtained by the defendant at the time of the April hearing. The real issue is really whether the contents of the material actually add anything to the case which was presented in April. I will return to that point. As there is new material the application may in principle be entertained.

5. The principles governing the grant of a way of execution are clear. Rule 40.11 of the CPR sets out the time within which a party must ordinarily comply with a judgment (14 days) unless '(c) the court has stayed the proceedings or judgment". In Schedule 1 the CPR the former RSC Order 47 provides:
"Where a judgment is given or order made for the payment of money, and the court is satisfied
"(a) that there are special circumstances which render it inexpedient enforce the judgment or order, or
"(b) that the applicant is unable from any cause to pay the money,
"then,… the court may by order stay the execution of the judgment or order... either absolutely or for such period and subject to such conditions as the court thinks fit."

   The court has a wide discretion to stay execution. The exercise of that discretion is of course controlled by compliance with the overriding objective set out in Part 1 of the Civil Procedure Rules, which

requires that every case should be dealt with justly. That includes dealing with the case in ways which are proportionate to the amount of money involved and the financial position of each party, and also, of course, ensuring that it is dealt with expeditiously and fairly. Those general principles, some only of which l have extracted, are equally applicable to steps taken after a judgment as to steps taken leading up to a judgment. So the court continues to have the same general discretion that existed prior to the inception of the "Civil Procedure Rules by virtue of that conferred by Order 47(and perhaps also by Order 45) and by the application of the overriding objective. The question therefore is: on what basis should the discretion be exercised on this application?

6. The application is in respect of a judgment debt which reflects a debt due by the defendant to the claimant. An adjudicator's decision that money is due under a contract is a decision that there is a debt which should be paid. It cannot create an obligation of a different kind which did not previously exist. This adjudication (like most) was to resolve a dispute under the construction contract. The adjudicator's decision expressed her view about the defendant's liability under the contract. An adjudicator's decision does not therefore create an obligation which has any greater legal force than the disputed contractual obligation. It upholds the existence of that obligation and in so doing if it requires the payment of money affirms, like a judgment or award, a contractual debt or obligation which must then be met, as provided by Part II of the Housing Grants Construction and Regeneration Act 1996. The court's power or powers to stay execution are not cut down in any way once the court has by its judgment recognized that debt. It is a judgment debt like any other judgment debt.

7. 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. That tribunal 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 the adjudicator to be due. An adjudicator's decision has to be 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.

8. That judgment is not of course 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.

9. The fact that the defendant did not participate in the adjudication inevitably limits its room for manoeuvre. It is most unlikely to be able to succeed on an application for a stay if it wishes to rely on anything which the adjudicator could and should have taken into account. Nevertheless the very fact that a party did not participate in the adjudication does not in itself disentitle it from making an application to stay and thus does not affect the exercise of the court's discretion on an application for a stay of execution of a judgment which enforces an adjudicator's decision. Dyson J. clearly had this in mind. It is obviously right that, for example, a court may need to consider the possibility that the party entitled to a decision might not, at the time when the tribunal ultimately seized with the underlying dispute reaches its decision, be able to repay (if that were the decision of the tribunal) the amount

which the adjudicator had thought ought to be paid. That may therefore be a *'special circumstance"* for the purposes of Order 47 or other just ground under the CPR for staying a judgment or order.

10. The possibility that repayment may be required is not theoretical since the experience of these courts has shown that, given the limitations of adjudication and indeed the ordinary susceptibilities of human nature, some decisions are ones which might well not stand in the ultimate arbitration or litigation. That does not mean that some of them are not necessarily right on the material put forward. They may however be erroneous. Some errors may not affect the result which the ultimate tribunal may arrive at because the court or arbitrator may be satisfied on the material then presented to it that the decision was right for other reasons and may thus in effect endorse it and so dispose of the error.

11. On the other hand there may be errors which are patent or which will convince the tribunal that nobody could arrive at the same conclusion as the adjudicator. That a decision may be erroneous is inherent in adjudication under the 1996 Act and is not itself a reason for staying a judgment or order. It is not in my view a special circumstance or other ground under the CPR for staying a judgment or order. Parliament has made it clear that the dominant reason for introducing a right to adjudication, in so far as its exercise may result in a decision for the payment of money, is, for example, to ensure that, for the time being, the money is paid over. Enforcement proceedings should not provide an opportunity to question the conclusions reached by an adjudicator who has acted within his or her authority, nor should applications to stay be so used unless justified by the decision or its actual or potential consequences. Parliament wanted adjudication to deal swiftly with problems as they arose during the course of the contract and which were not or could not be solved quickly by discussion (so that a dispute arose) but could be resolved by the adjudicator so that the parties could get with the contract (certainly if it were a continuing contract) and that they could devote their efforts to working to further the project or, if the project were completed or nearing completion, that they might reach an agreement on the underlying dispute between the parties on the basis of the opinion of the adjudicator. Adjudication is not just a method of debt-collecting but a means of ensuring that projects are carried out and completed by the parties working together without a dispute clouding their relationship. It seems now that in many cases the decision does prove instrumental in enabling the parties to arrive at a settlement or other conclusion of the underlying dispute and of matters on the contract as a whole. The process perhaps also enables parties either to rebuild the confidence that has been sapped and to restore the relationship that has been damaged by the reference to the adjudicator.

12. The error must therefore be one which is clear from the decision or otherwise be such that the court will be persuaded that it would not be just that payment should be made (such as a real likelihood that any payment made would not be recouped from the claimant). The court has to be satisfied that enforcement of the decision would result in such injustice to the defendant that it would not be a just way of dealing with the case consistent with the overriding objective. A stay of execution need not postpone the time of payment for an unacceptable period. If, for example, the alleged or apparent error in the decision was one which could be determined expeditiously and shortly and if the court was the ultimate tribunal then it ought to be possible for the question to be tried swiftly within a matter of weeks. Provided such a period did not add materially to the Timetable of the actual dispute the claimant's interests should not be prejudiced significantly and the purpose of the legislation should not be thwarted. In this way the adjudicator's decision would be vindicated or set aside and confidence in the system maintained. A court would clearly need to take account of all the circumstances, such as the time that had elapsed since the events giving rise to the dispute had occurred and the conduct of the parties thereafter. In my view therefore, the courts must consider, in an appropriate case, whether or not a stay of execution would be consistent with all the objectives of the legislation or whether enforcement (or its absence) might not in reality affect (for good or ill) any breakdown in the relationship or other factor which gave rise to the need to seek an adjudicator's decision.

13. These are some of the reasons which a court may have to take into account in conducting the requisite balancing exercise in deciding whether or not it would be appropriate to stay execution of a judgment enforcing an adjudicator's decision. There are other factors, some of which are mentioned in Order 47,

such as the possibility that the applicant might not be able to pay the money. A court might well come to the conclusion that there should be a stay if the result would be that the whole project would grind to a halt because the applicant main contractor was unable to pay the money and would have to go into liquidation. If that would not do the claimant any good at all and might indeed hurt others, and if there were well-founded doubts about the correctness of the decision, then a stay might be appropriate. In the same way the court must take into account the harm and prejudice done or likely to be done to the party which is entitled to the money. The claimant's financial position might be irretrievably damaged if there were to be a stay of execution.

14. All these are routine factors and were regularly considered in applications under the former Order 47. The applicant did not usually succeed in showing that they were sufficient to be treated as a special circumstance. If a defendant could show that a certificate was an overvaluation or otherwise arguably wrong then summary judgment would not be given. If it were given then the money had to be paid in the absence of special circumstances. Factors such as these are however pertinent to and are brought into sharp focus by the process of adjudication, by the possibility that an obvious error may not be capable of effective correction, as well as by the effect of an adjudication during a continuing contract (although that is not the came here).

15. 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 is 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.

16. 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. In this case, and this is also in my judgment relevant to the general exercise of discretion, the defendant, for reasons best known to itself, has not taken any steps since the decision of Dyson J. to try to retrieve the situation in which it finds itself. Although Mr. Davies says that in the course of argument l gave it good advice, l thought I was pointing out the obvious when I said that, if the defendant was really determined to put right any injustice in the decision, it would have ensured that the appeal lodged by the claimant was disposed of, either by a decision or by striking out or by pursuit in the High Wycombe County Court or in some other tribunal of its claim that the amounts awarded by the adjudicator were wrongly so awarded and that the true state of accounts between the parties are, taking into account matters in the defence already filed, quite contrary to that which the adjudicator decided. Had it proceeded diligently and with determination and had it utilised the provisions of the CPR to the full, I would have been surprised if by now it would not have been well on its way to the hearing of the appeal or of its claims. Had the proceedings been in this court the trial date would probably have been in the autumn of this year. But the defendant did not do so. Thus it is not possible to know at what stage that situation would be reached. It is clearly not in the interest of the claimant to establish the likely date of a possible order for repayment so it is not to be expected that it would provide that information. Without a terminal date it is not possible to show that the claimant will not be prejudiced by some further delay in getting paid.

17. Secondly, Mr. Davies 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. In addition I cannot draw an inference that a company, which was considered by the defendant to be worth the business granted to it by it within a few months of its formation last year, has somehow changed its nature in the course of the last year to become a company which is, at it were, teetering on the verge of insolvency either now and in the future, and will thus be unable to repay the money. On the evidence before me there has been no apparent change in the company. It still is an unknown entity in financial terms. That was the company with which the defendant contracted; that was the company which the defendant entrusted with the work. In my view that situation has not changed one iota between June 1999 and July 2000 except that the company itself has now become entitled to money due under the contract and the defendant does not wish to pay that money. That tells us nothing about the ability of the claimant to repay the money or its inability to do so.

19. In my view, on an application for a stay where a party has enters into a contract with company whose financial status is or may be uncertain and finds itself liable to pay money to that company under an adjudicator's decision, the question may properly be posed: is this not an inevitable consequence of the commercial activities of the applicant that it finds itself in the position it is in? It has, as it were, contracted for the result. That is not normally a ground for avoiding the consequences of a debt created by the contractual mechanism (which is how in the absence of express terms adjudication operates - see section 114 of the Act). It is very easy (and prudent and relatively inexpensive) to carry out a search or to obtain credit references against a company whose financial status and standing is unknown. Not to do so inevitably places a person at a significant disadvantage.

    It has only itself to blame if the company selected by it proves not to have been substantial (as opposed to a material deterioration in its finances since the date of contract).

20. In my view, whilst in principle, as I have already indicated and as Dyson J. signalled, there may well be circumstances in which an application for a stay of execution may he granted in an appropriate case, this is not such a case. This is a case in which on the face of it about a routine adjudicator's decision on a small contract where a small company is entitled to be paid some of £17,000, where it ought to have been paid that money some time since and where it ought now to be paid that money. I have to say that I regard the steps taken by the defendant as indicating no more than, as I said in argument, an element of desperation to avoid meeting its just liabilities. The application itself, and its timing suggests that the defendant, like Mr. Micawber, has been hoping against hope that something will turn up which would enable it to avoid the effect of the judgment. It has not made out a sufficient case for a stay of execution. The application is therefore dismissed.

Following argument on an application for the summary assessment of the costs to which the claimant was entitled in any event:

21. I do not think it matters very much whether the application or the assessment is on an indemnity or standard basis because on summary assessments the question is one of whether it is really reasonable in all the circumstances that a party should obtain the costs set out in its statement. lf there is a dispute about a rate (although this does not now occur very often as the paying party's statement generally discloses that comparable rates would have been sought had the application gone the other way) then the rate is fixed on a reasonable but conservative basis which normally requires no further reduction to bring it to a 'standard basis''. A similar approach is adopted where the time is disputed. If necessary a figure or reduction is rounded down or otherwise reduced individually or as a total to arrive at an amount which is reasonable overall. In many cases a figure acceptable to both parties can be arrived at in the course of discussion without undue haggling. If that cannot be achieved then in the absence of agreement a detailed assessment may have to be ordered although it is usually accompanied by an order for an interim payment the amount of which can in turn be conducive to an agreed figure emerging whereby a detailed assessment or an order for one can be avoided.

22. In this instance Mr. Davies says that the figures for attendances are high. I agree with him. The items for attendances on documents, and attending clients are, however, areas where I will not make a reduction because in a case of this kind a specific and separate application of this nature is likely to require careful and considered attention on the part of the claimant, since it has a serious effect or may have a serious effect on the claimant's business. The time for attendance on documents, however, does seem to be unduly large. The best part of a day was supposedly spent on documents on what is in essence a routine case. I therefore intend to reduce the figure to £2,500.