**JUDGMENT : HIS HONOUR JUDGE PETER COULSON QC**: TCC. 9th February 2007

**Introduction**

1. By a contract dated 15th October 2002, incorporating the JCT Standard Form of Building Contract 1998 Edition (with Contractor's Design), Berry Creek Overseas Development Limited ("Berry Creek") engaged G. Middleton Limited ("Middleton") to carry out extensive building works at a house called Blue Orchard in Courtenay Avenue, Highgate, London N6. The parties fell out and their disputes went to arbitration. The arbitrator, Mr. Anthony Bingham, provided two Awards relevant for present purposes. Award 4 dated 25th October 2006 was in Middleton's favour in the sum of £318,487.48. Award 5, which dealt with interest, costs and arbitrator's fees, was dated 27th November 2006. That was also in Middleton's favour in the sum of £130,180.99. Thus a total of £448,668.47 was found by the arbitrator to be payable by Berry Creek to Middleton. No part of that sum has been paid by Berry Creek.

2. There were a number of different applications originally set down before me today. The first was and remains Middleton's application to enforce those two Awards in the total sum of £448,668.47 pursuant to s.66 of the Arbitration Act 1996. The second was Berry Creek's application for permission to appeal the Awards. However, that application is no longer pursued and has been discontinued. That leaves the third application, which is Berry Creek's application for a stay of enforcement (alternatively a stay of execution) as to the sum of £216,015.94 pending the resolution of Berry Creek's own claim for alleged overpayment, which is itself connected with a separate valuation dispute on a separate building project. It is this last application which has generated the debate before me this morning.

3. Accordingly, I shall set out below the principles relating to the enforcement of an arbitrator's award before going on to consider in detail the reasons why Berry Creek contend that they are entitled to a stay.

**Principles of Enforcement**

4. Section 66 of the Arbitration Act 1996 Act provides as follows.

*"66. Enforcement of the award.*

*(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.*

*(2) Where leave is so given, judgment may be entered in terms of the award.*

*(3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.*

*The right to raise such an objection may have been lost (see section 73).*

*(4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950..."*

5. Enforcement is therefore a matter of unfettered discretion. The grounds on which the court might exercise its discretion against enforcement or execution include the arbitrator's lack of jurisdiction (expressly provided for in section 66(3) of the 1996 Act), and the limited defences available at common law. Examples of these might include a situation where the award was so defective in form or substance that it was incapable of enforcement or where enforcement would be contrary to public policy. However, none of these situations arise here.

6. Different considerations can apply if the losing party seeks a stay of execution. Pursuant to RSC Order 47.1(1)(a), the court has a discretion to stay the execution of a judgment where there are "special circumstances which render it inexpedient to enforce a judgment".

7. In connection with the proper operation of RSC Order 47.1, Mr. Hughes QC, who appeared on behalf of Berry Creek, properly drew my attention to this paragraph in volume 1 of the White Book 2006 at p.2005: *"A stay of execution of a judgment, including a foreign judgment duly registered in England, cannot ordinarily be granted simply because the judgment debtor brings a cross-claim in another action against the judgment creditor, or at any rate in the absence of special circumstances rendering it inexpedient to enforce the judgment (**Wagner v. Laubscher Brothers & Co.** [1970] 2 QB 313 CA)"*

8. RSC Order 47 is often relied upon by the losing parties in adjudication in support of their application for a stay in circumstances where, so it is said, the evidence demonstrates the probable inability of the claimant to repay, at the end of the full trial, the sum awarded on an interim basis by the adjudicator. The principles relevant to the granting of a stay in such circumstances are summarised in ***Wimbledon Construction Co. v. Derek Vago*** [2005] BLR 374. A number of those principles are relevant to the general exercise of the court's jurisdiction under RSC Order 47. Those include the points summarised at paragraph 26(f) of the judgment in **Wimbledon** as follows:

*"(f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:*

*(i) The claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see **Herschell Engineering Limited v. Breen Property Limited** (Unreported) 28th July 2000 TCC; or*

*(ii) The claimant's financial position is due, either wholly or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see **Absolute Rentals v. Glencor Enterprises Limited** (Unreported) 16th January 2000 TCC."*

9. More widely, there are a number of reported cases where the existence of a separate claim by the losing party, which cuts across the entire basis of the original award which the claimant is seeking to enforce, may, on the well-known principles set out in ***American Cyanamid v. Ethicon*** [1975] AC 396, give rise to a stay.

10. Thus, in ***Hillcourt v. Teliasonera AB*** [2006] EWHC 508 (Ch), Evans-Lombe J stayed the judgment entered on the basis of an arbitration award in Hillcourt's favour, arising out of Telia's failure to undertake the required refurbishment of the property pursuant to an agreement for lease. Telia had later become aware of information that caused them to issue their own proceedings seeking rescission of the lease. They were also seeking to set aside the original award on the basis of the new information. Similarly, in ***Schofield v. The Church Army*** [1986] WLR1 328, a plaintiff was prevented from taking money out of court paid in by his previous employers, despite an industrial tribunal's ruling that he had been unfairly dismissed. The order was imposed as a result of a separate cross-claim by the employers, which the industrial tribunal had had no jurisdiction to decide, alleging theft. It was said that this raised a serious issue which had yet to be tried. Both decisions were expressly based upon the decision in ***American Cyanamid***.

**The Claim for a Stay**

11. It is Berry Creek's case that the arbitrator's Awards 4 and 5 proceed on the basis that, although Berry Creek had paid a total of £2,315,466 to Middleton, only £1,854,466.52 could be ascribed to the work at Blue Orchard. Thus, it is said, £460,999.58 (being the difference between the two figures) had been paid for what the arbitrator called "other enterprises". On behalf of Berry Creek, Mr. Igor Galogre deposed to his belief that part of this sum related to work carried out by Middleton on Flat 10, 39 Hyde Park Gate ("the Knightsbridge flat"), but that the maximum value of that work was only £244,983.64. Thus, he said, Middleton had been overpaid in respect of the work at the Knightsbridge flat by £216,015.94 (being £460,999.58 less the £244,983.64) and a stay of execution and/or judgment is sought in respect of that sum.

12. On a proper analysis of this position, I have concluded that there are six separate reasons why I should exercise my discretion against granting the stay that is sought. I deal with those six reasons as briefly as possible below.

**Reason 1: The Basis of the Stay Application**

13. On behalf of Middleton, Mr. Burr submitted that the whole basis of the claim for a stay was flawed in principle, because Berry Creek's argument, which I have summarised at paragraph 11 above, was based on picking apart the Awards themselves, referring to specific paragraphs whilst ignoring others, relying on some paragraphs which set out the arguments of the parties rather than containing any relevant findings, and emphasising certain limited extracts from the evidence, including a schedule that was produced by Middleton and which formed no part of the Award itself. I have concluded that Mr. Burr is correct in this submission. In a case such as this, where the arbitrator has produced detailed Awards, and where no point is taken, either as to his jurisdiction or as to an appeal, it would be wrong for the court to embark on a detailed analysis of precisely how and why the arbitrator had reached the decision he did on an application to stay. For this purpose, the principal thing that matters is the sum which the arbitrator concluded should be paid by Berry Creek to Middleton in relation to the work at Blue Orchard. How he arrived at that sum is irrelevant.

14. However, I should say that, to the extent that it is appropriate for the court to enter into any such analysis, I do not accept Mr. Galogre's statement of the position. Award 4 contains the following key elements:
    - A gross valuation of the work carried out by Middleton at Blue Orchard in the sum of £2,172,954.
    - A deduction for the previous payments made by Berry Creek to Middleton in respect of Blue Orchard in the sum of £1,854,466.52.
    - A balance therefore being due and payable by Berry Creek to Middleton of £318,487.48.

15. The Award does not depend in any way upon any other figures to arrive at the £318,487.48. Thus, Mr. Galogre's starting point for the stay application, which is an alleged gross payment figure of some £2.3 million, is ultimately irrelevant to Award 4, and the calculation which the arbitrator undertook in arriving at the total sum due to Middleton. In many ways, it seems to me that the principal problem for Berry Creek with their present application is that it is based on a figure which formed no part of the arbitrator's Awards.

**Reason 2: The Assumed Overpayment**

16. Mr. Galogre's statement proceeds on the central assumption that there was a payment by Berry Creek of more than £400,000 which did not relate to Blue Orchard, of which only about half can be attributed to the work on the Knightsbridge flat leading, he says, to the inevitable conclusion that Middleton must have been unwittingly overpaid by Berry Creek. I do not accept that central assumption. One of the principal reasons for that can be found within Award 4 itself.

17. The arbitrator found in Award 4 at page 29 of 30 that: *"Berry Creek has paid over and above the certified sums in the full knowledge that other enterprises were underway in the background and was including in the cheques for those enterprises. Doubtless, they are wholly legitimate even if shrouded in some mystery and perhaps some curiosity. The employer's Ms. Galogre and Mr. Galogre would not pay on Blue Orchard a sum or any sums for Blue Orchard they had no intention to pay. Both Ms. Galogre and Mr. Galogre appeared highly competent business people."*

18. It seems to me that this was a finding that Ms. Galogre and Mr. Galogre, the individuals behind Berry Creek, were not the sort of people to make overpayments, and that they made the payments in relation to the other enterprises in what the arbitrator calls "the full knowledge that these enterprises were underway". He calls them "highly competent business people". He also found that Ms. Galogre was "familiar with payment certification",

and that, having engaged both a Project Quantity Surveyor and an Employer's Agent, she *"would not be short of advice"*. In those circumstances it seems to me that the suggestion now that, in some way, the Galogres made extensive overpayments of hundreds of thousands of pounds without realising it, cuts across these specific findings that the arbitrator made.

19. In addition, it is right to point out that in the arbitration, although ultimately irrelevant to the arbitrator's Award 4 itself, there was a dispute as to whether Berry Creek were paying Middleton sums which were then being paid on to Mr. Galogre himself. Mr. Galogre, as I understand the findings in the Award, admitted that he was an employee of Middleton. Whilst it does not appear, as I have said, that this point was of any relevance to the arbitrator's ultimate decision, it is clear that there was in play at least one other possible reason (in addition to the work at the Knightsbridge flat) for the payments to Middleton. It is therefore not right to assume that all of the other payments must relate to the Knightsbridge flat.

20. Thus, it seems to me that Berry Creek's application for a stay is based on an assumed overpayment which is not only unsupported by any real evidence but actually runs counter to the findings made by the arbitrator. On those grounds, I am not persuaded on the material before me that it can safely be submitted that there is a serious issue to be tried in relation to the alleged overpayment.

**Reason 3: Proceedings in respect of the Alleged Overpayment.**

21. A third important factor in my decision not to grant a stay is that, until the day before yesterday, there were no proceedings on foot by which Berry Creek were claiming back the alleged overpayment. This is to be contrasted with the factual position in the authorities on which Mr. Hughes QC relied. In ***Schofield,*** for example, the employers' cross-claim, based on the allegation of theft, had been added earlier to the action by way of a formal set-off and counterclaim. In ***Hillcourt,*** Telia's claims based on an entitlement to rescind the lease were also pleaded at an early stage by way of counterclaim, and there was also the separate claim by Telia to have the judgment set aside under s.68 of the 1996 Act. In the present case, by way of contrast, there was no existing cross-claim in relation to the alleged overpayment prior to Wednesday of this week. I have already pointed out in argument that, as a result of that, Mr. Galogre's statement, which deposed to the fact that as at 19th January 2007, such proceedings had already been initiated, was quite wrong. Mr. Hughes QC submits that that was a slip and that the statement meant to say that such proceedings were in the process of being initiated. I accept that explanation. However, as I pointed out to him, the mis-statement was a little unfortunate, particularly given that, on any view, proceedings in respect of the alleged over-payment, if this was really something about which Berry Creek were serious, could have been issued months ago.

22. As I have said, these new proceedings were eventually issued on Wednesday. It is difficult not to conclude that they were only issued then because of the hearing before me today, on the basis that their commencement would strengthen Berry Creek's application for a stay. That therefore is a further reason why, so it seems to me, I should not be persuaded on the material that I have that there is a serious issue to be tried. My doubts are strengthened by a number of the points taken by Mr. Reynolds in his third statement about the new particulars of claim, including (but not limited to) Berry Creek's reliance on unilateral valuations from a Dr. Champion, which will plainly be the subject of major dispute if that action proceeds.

23. Accordingly, the fact that Berry Creek waited until two days ago before commencing these proceedings, notwithstanding the fact that the alleged overpayment had been apparently identified months ago, is a separate reason why it seems to me I should not exercise my discretion in favour of Berry Creek.

**Summary: Reasons 1, 2 and 3.**

24. Reasons 1, 2 and 3 cause me to doubt whether it can properly be said that the over-payment claim gives rise to a serious issue to be tried. Now let us assume that I am wrong about that, and that there is a serious issue to be tried, by reference to the existence of a separate dispute on a separate contract in relation to the Knightsbridge flat. Even on that assumption, I would not grant a stay because, so it seems to me, to do so would be quite contrary to the balance of convenience. In my judgment, Reasons 1, 2 and 3, set out above, would apply again, with even more force, in relation to the balance of convenience. It seems to me that, in the present case, the balance of convenience clearly favours the enforcement of the existing Awards on the Blue Orchard contract, and letting Berry Creek take their chances on their belated (and separate) claim in relation to the proper valuation of the work at the Knightsbridge flat. I should say that it seems to me that this is the critical difference between this case and ***Hillcourt*** and ***Schofield***. In both ***Hillcourt*** and ***Schofield***, claim and cross-claim arose out of precisely the same transaction. In the present case, to the extent that the dispute in relation to the Knightsbridge flat is raised by Berry Creek by way of a cross-claim, it obviously does not arise out of the same transaction. They were entirely different contracts for entirely different work. A stay would not be appropriate as a matter of principle. Furthermore, for the reasons outlined below, there are also issues as to who the contracting parties might have been in respect of the contract for the Knightsbridge flat. That brings me on to Berry Creek's status and role.

**Reason 4: Berry Creek's Status and Role**

25. First, as to the Knightsbridge flat, the evidence appears to be that at the time that the works were carried out, the flat was owned by a company called Tengate Limited. I am told that Tengate are owned by a company called Sorcelle Incorporated. Sorcelle Incorporated are apparently related both to Tengate and Berry Creek and they are apparently all owned or controlled by the Galogre family. However, given that the flat at Knightsbridge is owned by other companies, it is unclear how or why Berry Creek themselves have any interest in the property at all, and therefore unclear precisely how they can claim the sums that they say have been overpaid to Middleton.

26. Furthermore, as I have pointed out, all of these companies are not only related but they are registered in the British Virgin Islands. In consequence of that, Middleton's solicitor, Mr. Reynolds, deposes to Middleton's concern "that there is a deliberate attempt to avoid payment of sums found due by the Arbitrator's awards". I consider that this concern is far from fanciful, particularly as no part of the sums due under Awards 4 and 5 have been paid. Even the sum of £244,983.64, in respect of which no stay is sought, has not been paid by Berry Creek to Middleton. That is a point to which I shall return below. For these reasons, too, I consider that the balance of convenience favours the enforcement of the arbitrator's Awards.

**Reason 5: Middleton's Financial Position.**

27. The uncertainties surrounding the various companies associated with Berry Creek are to be contrasted, so it seems to me, with the position in relation to Middleton. They are a company in a relatively modest way of business, carrying out construction work and based in Cumbria. I am told that they have been in existence for about 27 years. It seems to me therefore that, in order for me to exercise any sort of stay, I would have to be persuaded on the evidence that, if the sums awarded by the arbitrator were paid, there was good reason for thinking that Middleton would be unable to repay them, or any part of them, at the conclusion of any trial concerned with the valuation of the works carried out at the Knightsbridge flat. That is the remaining issue under RSC Order 47. I therefore turn to address that point.

28. In my judgment, there is no cogent evidence that, if the time ever came for Middleton to pay back to Berry Creek all or part of the sums awarded by the arbitrator, they would be unable to do so. The most up-to-date evidence as to their financial position is set out their financial statements to 31st May 2005. They show a profit in both 2004 and 2005, with a healthy balance of £341,634 brought forward as at 31st May 2005. I regard the small annual loss figure for 2005 of £354 as being neither here nor there. Although accounts have not been provided for the year up May 2006, and plainly they should have been, I would be reluctant to make an adverse finding against Middleton on that ground alone.

29. In making his criticisms of Middleton's financial position, Mr. Hughes QC relies on a Dunn & Bradstreet report which was only served yesterday, although the report itself appears to be dated 26th January 2007. That gives Middleton a rating of 04, and the proforma sheet at the front of the report states that this "represents a high risk of business failure". However, it is plain that the report is based on outdated information, because it only sets out the accounts up to 2004. It is not therefore a report on the position up to May 2005. Furthermore, it appears to be difficult to explain how and why Dunn & Bradstreet have reached that conclusion, apart from the fact that Middleton are obviously a company in a relatively modest way of business, and thus susceptible to cash flow problems and the like. Clearly, that on its own cannot amount to credible evidence that Middleton would be unable to pay any sums as they fell due.

30. In the round, therefore, taking all those pieces of evidence together, I have concluded that there is insufficient evidence to conclude that Middleton would be unable to pay any part of the judgment sum, should the dispute in relation to the Knightsbridge flat be decided in Berry Creek's favour.

31. If, however, I was wrong about that, I am in no doubt at all that:

    (a) Any financial problems experienced by Middleton from 2004 onwards can be linked directly to Berry Creek's failure to pay the sums now awarded by the arbitrator, and which have apparently been outstanding for some time. These are huge sums for a company like Middleton. In accordance with the principles that I summarised from ***Wimbledon v. Vago*** in paragraph 8 above, this would not entitle Berry Creek to a stay, because they would be the authors of Middleton's misfortune.

    (b) There is, I conclude, no significant difference between the accounts and financial position of Middleton at the start of the Building Contract, that is to say the information in the Dunn & Bradstreet report for the year ending 31st May 2003, and their position now. They are a small builder depending on regular payments for survival. That is a separate reason why, in accordance with the principles taken from ***Wimbledon v. Vago*** and summarised in paragraph 8 above, I would not exercise my discretion in favour of granting a stay.

32. For the reasons set out in paragraphs 24-31 above, I find that, pursuant to RSC Order 47.1, there are no special circumstances which render it inexpedient to enforce the Awards.

**Reason 6: The Escrow Account**

33. The sixth and final point which I have taken into account in the exercise of my discretion is not of the same significance as the other five, but it is not to be discounted entirely. As I have noted above, the claim for a stay is in respect of less than half the sum awarded by the arbitrator. The balance of £244,983.64 has not been paid, despite the repeated requests by Mr. Reynolds. Indeed, the balance has not even been put into an escrow account. Mr. Hughes QC told me today that Berry Creek have instructed their new solicitors that such an account should now be set up. However, it is impossible not to concur with Mr. Burr's submission that, like much else that Berry Creek have endeavoured to do over the last few days in relation to this application, this statement of intent is too little too late, and designed simply to improve their position on the stay application today. It does seem to me that the very least that Berry Creek should have done was to set up an escrow account in relation to the balance due, and they have not done so.

**Summary**

34. Middleton have Awards in their favour in the total amount of £448,668.47. There is no dispute that the arbitrator had the necessary jurisdiction to award that sum to Middleton. The only argument for a stay is based on a

separate claim which does not arise out of the Awards, or the contract with which the Awards were concerned; which claim I consider to be unsupported on the evidence and, if anything, contrary to specific findings within the arbitrator's Awards; which was only made the day before yesterday, despite the fact that it had been apparent to Berry Creek, on their own case, for months; which faces difficulties because of the issue as to the identity of the right company to make the claim in the first place; and which would, at most, give rise to a figure which, should the situation ever arise, Middleton would, as I find on the evidence, be capable of repaying. In all those circumstances, I decline to exercise my discretion in favour of the stay.

35. Accordingly, I will make the following orders:

(a) Berry Creek's claim HT-06348, which was the claim for permission to appeal, be discontinued, and for the avoidance of doubt it should stand dismissed with costs;

(b) Berry Creek's application for stay of execution be dismissed. I will hear the parties on costs;

(c) Middleton's application to enforce the Awards of the arbitrator is allowed in full in the sum of £448,668.47. To that must be added a figure for interest. I will again hear the parties on costs.