JUDGMENT: His Honour Judge David Wilcox : 26th February 2002. TCC.

1. This is an application by Total M and E Services Limited (Company No. 3249356 (Claimant)) for summary judgment arising out of an adjudication under the Housing Grants Construction and Regeneration Act of 1996. The Defendant is ABB Building Technologies Limited formerly ABB Steward Limited. Judgment is sought in the sum of £555,300. The award was in the sum of £462,788 which sum included £8,311 for the adjudicator's fees and expenses. These sums are net of VAT. The difference between the amount of the award for £462,788 and the sum claimed £555,300 represents a claim for the costs of the adjudication proceedings by the Claimant. That is now claimed as a head of damages.
2. The following matters are not in issue. The Defendants were engaged to undertake electrical work at Somerset House under a sub-contract with Heather Trust. On the 13th January 1999 the Defendants entered into a labour only sub-contract for electrical installation works with Total M and E Services Limited. The anticipated duration of the sub-contract was 25 weeks commencing on the 4th January 1999 and the price agreed was £250,000. The scope of the works was defined by the quotation and the Defendants identified drawings.
3. The contract prescribed no mechanism for variation, neither was there any provision in the contract governing work beyond the scope of that described in the contract, or payment for such work.
4. Substantial work beyond the original scope of works was performed by Total M and E Services Limited. It was at all times accepted by the Defendants that the additional work should be paid for, and some additional payment was in fact made.
5. The additional works were the subject of a draft final account valuation carried out by Forsyth Associates Construction Consultants on the basis that since the additional works were not the subject of the variation of the contract or a price agreed, a reasonable sum was due.
6. Total M and E Services Limited used labour provided by another company LSM (NS Management) Limited who submitted timesheets to the Defendants which were signed on site by junior personnel.
7. Messrs Charles Russell on behalf of LSM (NS Management Limited) asserted that the Defendant's contract was with them, and that as at the 12th January 2000 the Defendant owed £362,331 to LSM. They issued a Statutory Demand threatening a winding up order in the event of non payment. It was ultimately accepted that LSM had never contracted with the Defendants and that the claim as framed was misconceived.
8. The Claimants' present solicitors were thus from an early stage made aware of the necessity to correctly identify and describe the contracting parties in dispute.
9. In June 2000 the Claimants had the Defendant's draft final account which valued (a) the original work performed on the basis of it being 90% complete, (b) the additional work and (c) identified contra charges. The Claimants were invited to provide a final account if there continued to be any substantial dispute as to the amount due. They did not do so as throughout have relied upon the timesheets as indicating the additional scope and cost of work.
10. On the 3rd October 2001 Total M and E Services Limited issued a notice of adjudication in relation to the dispute arising under the contract with the Defendant. The contract provided no adjudication scheme therefore the statutory scheme under the Housing Grants Construction and Regeneration Act applied. On the 15th October 2001 the Adjudicator was duly nominated and accepted his appointment.
11. On the 11th October 2001 the Defendant solicitors wrote and made a response to the Notice of Adjudication in these terms:

    "We will, of course, respond substantively to the content of the Referral Notice shortly but make the following points:

    1. *On 13th January 1999 ABB Building Technologies (under its former name of ABB Steward Limited) (ABB) entered into a contract with Total M and E Services Limited (Total) to carry out labour only electrical works at Somerset House. It is admitted that a dispute has arisen between Total and ABB pursuant to that contract.*

2. *It is admitted that the Scheme for Construction Contracts applies to any "Construction Contract" which does not comply with the requirements of the HGCRA 1996. The Scheme implies (amongst other things) adjudication into any Construction Contract.*
3. *However it is denied … that the Respondent is indebted to the Referring Party (as particularised in … the Notice of Adjudication or at all) accordingly the Referring Party is not entitled to the remedies sought at (i) - (iv) on page 4 of the Notice of Adjudication. Specifically regarding remedy (iv), it is denied that an Adjudicator appointed under adjudication under the Scheme has any jurisdiction or power to decide upon an award costs, fees and expenses incurred by either of the parties unless the parties agree to confer jurisdiction or power upon the Adjudicator to do so. The Respondent does not so agree (and has not previously agreed) to any such jurisdiction or power being conferred upon the Adjudicator for the purposes of this or any Adjudication.*
4. *In all other respects, the content of the Notice of Adjudication is denied. For the sake of completeness and clarity, the Respondent expresses that it does not confer any jurisdiction on the Adjudicator that he does not have."*

12. On the 23rd October 2001 the Defendant's solicitors wrote to the Adjudicator and outlined their position in relation to the additional works part of the claim.
    "3. We believe that it is necessary at this early stage to raise one very important issue, namely our view that this adjudication lacks jurisdiction. We summarise our position below, but is also addressed, of course, in the Response document …
    4. *The position is simply this: the Sub-Contract dated 13th January 1999, which forms the basis of the Referring Party's claim did not contain a clause enabling the instruction of variation. The effect of this can only be that each and every item of additional work, instructed by our client, was not in fact instructed under the sub-contract. Instead, and at best, each individual instruction will have given rise to a separate collateral contract for that particular element of work.*
    5. *The effect of this is clear and is that the Referring Party has sought to refer disputes under numerous different contracts to you (namely under the original lump sum agreement and under the individual collateral contracts concerning the additional works,). This is not permissible as the Construction Act 1996 only permits the referral of one dispute (under one contract) to any one adjudication. Part 8 of the Scheme for Construction Contracts (England and Wales) Regulations 1998 … reinforces this view.*
    6. *Accordingly, could we please invite you to investigate (although not decide upon) this issue first as, if you agree with our position, this adjudication can be resolved very swiftly without incurring additional expense.*
    7. *If, of course you do not agree with our position then the adjudication will continue, and our client will continue to participate. However, such future participation by our client will be strictly without prejudice to the submission that, plainly and with respect of course, you have no jurisdiction to decide upon the matters referred to you."*

13. On the 6th November the Adjudicator wrote and told the parties that he would be proceeding with the adjudication and invited the parties to deal with the jurisdictional points at enforcement or to take the points to the Courts during the currency of the adjudication.

14. In his Adjudication Award at paragraph 31 he made reference to the Defendants' solicitors expressed view and said:- *"There are a number of grounds on which they dispute jurisdiction. For the avoidance of doubt I have not been requested to make any decision on jurisdiction nor do I make any decision on jurisdiction here …"*

15. He went on to give a synopsis to the grounds of challenge, and at paragraph 61 recorded that the Defendant had participated in the Adjudication but had reserved its position on all points concerning jurisdiction.

16. At paragraph 91 of the Award he held that he could not consider the set-offs proposed by the Defendants in the absence of a valid withholding notice under Section 111 of the Housing Grants Construction and Regeneration Act 1996. He rejected the Defendants' submission that the Forsyth report issued on the 29th June 2000 contained the essentials of a withholding notice since it was not

prepared for that purpose, and was he held a *"negotiations document"*, and it was provided to the Claimants on a 'without prejudice' basis.

17. The first matter to be considered is the Defendants' submission that the Adjudicator had no jurisdiction to adjudicate in the dispute arising out of a contract between Total M & E Services Limited and the Defendant because the reference was made in the name of Total Mechanical and Electrical Services Limited. Mr Coulson submits that these companies are different legal entities. They have nothing in common save a similarity of name. There are no common directors. They are companies registered at different times and have no connection with each other. He contends that this Court cannot give Total M and E Services Limited the benefit of an adjudication between a different company and the Defendants' by enforcing the Adjudicator's Award.

18. Mr Harding submits that this is not a jurisdiction issue at all. The Defendant company can at no time have believed that a party other than the named party to the sub-contract had commenced adjudication proceedings against it. In the course of dealings between the Defendant and its management contractor under the original sub-contract properly described in these proceedings, had confusingly used a number of styles. At all times the responsible person representing the company was Mr Deeks who was and is the Director of the Claimant company Total M and E Services Limited.

19. The uncontraverted evidence is that Total Mechanical and Electrical Services Limited was not formed or registered as a company until April 1999 after the sub-contract was signed in January 1999.

20. The Defendant has at no time expressed any doubt as to which company and personnel controlling it was party to the original contract. They have correctly asserted from the outset, when the dispute was first joined, who were the proper parties to the sub-contract making it clear to Messrs Charles Russell and their successors Messrs Kingsley Napley.

21. On the 11th October 2001 the Defendant's solicitors identified the mis-description of the Referring Party to Kingsley Napley. After the earlier mistake as to parties it is surprising that the Claimants did not either issue a fresh reference in the correct name, which might have caused a little delay, or seek to rectify the name in the reference document.

22. Mr Coulson conceded that had rectification had been sought of the Adjudicator he would have had the jurisdiction to grant the rectification provided no-one had been misled or prejudiced. His jurisdiction of course derived from the reference of the dispute under the sub-contract to him under the Act. In my judgment this question is not, as it arises, a matter of jurisdiction. It is a question involving mis-description and possible mistake.

23. In the course of the adjudication proceedings the parties elected to leave this question to this Court. I declare that the proper description of the identity of the Referring Party is Total M and E Services Limited, the Claimant in these proceedings who therefore have the benefit of the Adjudicators Award. This is a clear case of mis-description where the Claimant and Defendant at all stages were aware of the true identities of the contracting parties and no-one could be misled. Where there are similar company names, as for instance in a group of companies or where there are subsidiaries with overlapping management systems and some common directors a precise description of the Referring Party could be critical.

The Claim for the Costs of the Adjudication

24. Mr Harding contends that the costs of the Adjudication are recoverable as a damages claim. He submits that if a defendant fails to pay under a construction sub-contract to which the Act applies it is foreseeable that the Claimant would seek adjudication and properly incur costs, and thereafter seek to recover them. Mr Coulson submits that since the Statutory Scheme does not make any provision for the Adjudicator to award costs unless the parties agree otherwise the Adjudicator has no jurisdiction to order that one party's adjudication costs should be paid by the other. There is no such agreement in the present case; indeed, the entire basis of the Claimant's claim is that there was no such agreement. I agree with Mr Coulson that since the Act does not provide for the recovery of costs the claim is misconceived. Furthermore, this claim is put as a claim for damages for breach of contract arising out of ABB's failure to pay. Because the Statutory Scheme envisages both parties may go to Adjudication

and incur costs which they cannot, under the Act recover from the other side, it follows that such costs cannot therefore arise as damages for breach.

25. To permit such claim would be to subvert the statutory scheme under the Act.

Claims for works additional to the scope of the Sub-Contract

26. The sub-contract was for a lump sum of £250,000. It is common ground that there were considerable additional works performed by the Claimant and the Adjudicator's award reflected the value of such additional work. The Defendants contend that the Adjudicator had no jurisdiction to base an award upon the additional works. They submit that there is no evidence as to the true contractual basis upon which such work was performed and in respect of which payment was due. Mr Coulson submits that it could not be under a variation of the original sub-contract in the absence of a written mechanism for variation within the sub-contract. He further submits that it follows that any additional work must have been carried out under a series of separate oral agreements which would not comply with the requirements of Section 107 of the Act which provides that the Act is applicable only to agreements in writing. He contends that the Adjudication claim was fundamentally flawed as the Adjudicator had no jurisdiction to reach a series of decisions on a series of disputes under a series of separate oral agreements. If Mr Coulson's analysis is correct then under the Statutory Scheme the Claimant has no right to refer more than one dispute or more than one contract to Adjudication. See **Grovedeck v. C Demolition Limited** [2000] Build L R 181.

27. The Notice of Adjudication identifies two alternative bases of claim namely the alleged failure to pay sums due on a timesheet basis, and alleged failure to pay sums due on the basis of a contract sum plus variations. The basis upon which the Adjudicator proceeded disclosed in his reasoned award clearly was that of contract plus variations.

28. The additional work performed by the Claimant was the same type of work which was the subject of the original sub-contract and the only inference to be drawn is that the scope of the sub-contract work was enlarged. The Adjudicator in my judgment was right to proceed on the contract plus variations basis. In my judgment it is the proper analysis. It was a view held and expressed by the Defendant solicitors in their letter of the 21st February 2000 wherein they remonstrated with the Claimants' (then) solicitors

"… Your fourth paragraph suggest that despite, instructing Total M & E Services Limited to carry out additional works, the signature of the timesheets (after these instructions had been carried out, created a separate contract (or series of contracts) with your client. It is not the case our clients were entitled to and did instruct Total M & E Services to carry out additional items of work such items to be variation instructions within the remit of the "labour only sub-contract". Accordingly, these items would be valued in accordance with a contract …"

29. Mr Harding on behalf of the Claimant adopts that analysis in his submissions and contends that an oral variation of a written contract frequently occurs in the construction industry, Mr Coulson however submits that such contract would then be partly in writing and partly oral, and that the Housing Grants Construction and Regeneration Act 1996 only applies where a construction contract is in writing and is thus a contract required by law be made in writing. Section 107 provides:

"107. Provisions applicable only to agreements in writing

(1) Provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties to any matter is effective for the purposes of this Part only if in writing.

The expressions "agreement", "agreeing" and "agreed" shall be construed accordingly.

(2) There is an agreement in writing -

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by the exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in the adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References to this Part to anything being written or in writing including it being recorded by any means."

30. Mr Coulson goes on to submit that since a construction contract must be in writing it cannot be varied orally. He relies on a passage in Chitty 28 Edition Volume 1 at paragraph 21-33
"A contract required by law to be made in or evidenced by writing can only be varied by writing, although as we have seen, it can be rescinded by parol. The society relied upon for their proposition ***is Goss v. Lord Nugent*** *(1833) 5 B & Ad 58. The Plaintiff agreed in writing to sell the Defendant certain plots of land. Then action by the Plaintiff against the Defendant for the purchase money, the Defendant pleaded the title to one of the plots was defective. The Plaintiff replied that the Defendant had orally agreed to waive the defect and accept the existing title the Court held that since the contract was one required by law to be evidenced in writing by a Section 4 of the Statute Fraud the oral variation was not admissible."*

31. Mr Coulson also relied upon two other law of property cases **New Hart Builders v. Brindley** [1975] Ch. Page 42 and **McCausland v. Duncan Lawrie Limited** [1997] 1 WLR page 38 CA.

32. In **New Hart Builders** whilst there was an enforceable contract concluded and binding on the parties at some time earlier than subsequent alterations. There was no sufficient memorandum in writing of the subsequent option agreement complying with Section 40 of the Law of Property Act 1925. In **McCausland** Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 was considered. That Act repealed Section 40 of the Law of Property Act. Whereas a failure to comply with the requirements of the 1925 statute rendered an agreement merely unenforceable, under Section 2 a provision relating to the sale or disposition of land was held to be 'ineffective', thus a commercially sensible oral variation of a completion date from Sunday to the preceding Friday was held to be of no effect because it was not in writing.

33. There are no requirements as to formality in relation to construction contracts as there have been in the field of the Law of Property as under Section 4 of the Statutory Frauds, the Law of Property Act 1925 Section 40 or Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, or as in the field of Consumer Credit law as required by the Consumer Credit Act 1974 and its prescription as to the manner of variation of a regulated agreement under Section 82.

34. What has to be considered here is not the enforceability of the contract but whether the statutory adjudication scheme can be invoked in relation to a particular construction contract. That is governed by Section 107 of the Act. (supra) There is reference in sub-section 3 to an agreement made otherwise than in writing, such an agreement, provided it refers to terms which are in writing is an agreement in writing. In my judgment, the Adjudicator made his decision on the basis of dispute arising out of the single written construction contract as varied orally by the parties. The contract as varied is clearly within the provisions of Section 107 notwithstanding that it is a contract evidenced partly in writing and partly oral. The Adjudicator therefore had jurisdiction to make determinations as to the additional works.

The Defendants' set-offs

35. The Defendants maintain both a set-off and counterclaim in respect of defective and incomplete work. The first set-off in respect of defective work and the cost of plant and labour valued at £121,087.50 was relied upon by the Defendant in the Adjudication proceedings. It was a decision that on the evidence the Adjudicator was competent in law to decide. The 'without prejudice' report of the Defendants' quantity surveyor, Mr Forsyth prepared for the purposes of negotiation was held by the Adjudicator not to be a notice under Section 111 of the Housing Grants Construction and Regeneration Act 1996 and because it was served in June 2000 and so was not served within seven days of the final date for payment which was held by the Adjudicator to be in February 2000.

36. The Defendants are seeking to re-open this issue which in my judgment the Adjudicator was properly seized of. Save where questions of jurisdiction are reserved or properly arise it is not the function of this Court in enforcement proceedings to review each and every aspect of the Adjudicator's Award.

To do so would be to detract from the swift and summary nature of the scheme put in place by Parliament, see **Bouyges v. Dahl-Jansen** [2001] 73 Con LR at page 125.

37. The Defendant's second set-off in the sum of £331,777 is based upon the contention that the Claimant failed to provide a final account promptly. A draft final account was tabled by the Defendant for purposes of negotiation on without prejudice basis in June 2000 (the Forsyth draft). By December 2000 the Defendants were being pressed to settle their Trade Contract final account with Heather Trust the Employer. They reached a final settlement. Seven months later the Claimant produced their final account which in due course led to the adjudication.

38. The Defendants contend that to the extent that the Claimant is entitled to additional sums arising out of their final account they are prejudiced because they cannot now recover these sums from Heather Trust. The claim for £331,777 it is divided into two parts. The first amounts to £213,015 under recovered because of the absence of documentation or claims from the Claimants. In my judgment this is clearly wrong: even if liability was established it can only amount to the loss of a chance to establish a claim to further sum. However, it is difficult to understand the Defendants' apparent ignorance as to the extent of the work done under this labour only sub-contract since they supervised all the works, and in fact have formulated a claim under the set-off for the costs of such supervision. By June 2000 they also had Mr Forsyth's draft final account.

39. This claim is put on the basis of an implied term that the Claimant should have provided a final account in a reasonable time, namely between June and December 2000. Mr Harding submits that in the circumstances of this case there is no need to imply such a term into the sub-contract. The test for such an implication is necessity.

40. The Court does not make or improve contracts. Its:
"Function is to interpret and apply the contract which the parties have made for themselves. If the expressed terms are perfectly clear and free from ambiguity there is no choice to be made between different possible meanings. The clear terms must be applied even if the Court thinks some other terms would have been more suitable. Non-expressed term can be implied if and only if the parties must have intended that term to form part of their contract; it is not enough for the Court to find that such a term would have been adopted by the parties as reasonable even if it had been suggested to them; it must have been a term that went without saying a term necessary to give business efficacy to the contract a term though tacit forms part of the contract which the parties made themselves."

41. **Trollope & Colls v. North West Metropolitan Regional Hospital Board** [1973] 2 WLR page 601 House of Lords at page 610.

42. This contract plainly could work perfectly well without such a term. The timing of the claim and its details are not matters that need be prescribed by implication, because this was a labour only sub-contract originally for a fixed sum supported by contemporaneous timesheets for additional works and supplied to the Defendant.

43. As to the claim for loss it is curious that no signed document evidencing the settlement said to be worth £4.5m net of VAT is in existence. There is no evidence that the Defendants sought the assistance of the Claimant in negotiating the settlement with the employer. The evidence of Mr Janney from the Claimants is that the settlement was never mentioned to the Claimants by the Defendants.

44. The Counterclaim as to £331,777 only arises if a term should be implied. There is no sensible basis in my judgment which arguably gives rise to such an implication. I can reject it at this stage. Further, there is no arguable case that the alleged breach caused any loss. The evidence from Mr Janney militates against such a finding, and there is no evidence that the employer would have agreed to pay the Defendants any more. However this claim can be put it is no more than a shadowy loss of a chance at its highest.

The Award

45. In my judgment the Claimants are entitled to summary judgment in the sum of £454,477.67, plus Adjudicator's fees and expenses of £8,311.72. This totals £462,789.69 plus VAT. I give summary judgment in the sum of £462,789.69 and VAT thereon.

To what extent should there be a stay?

46. By virtue of Part 50.2 of the Civil Procedure Rules part of the former RSC Order 47 is still relevant to this consideration:

"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 to enforce the Judgment or Order or

(b) 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 a period and subject to such conditions as the Court thinks fit."

47. There is no formal stay application before me but the material in Mr Varney's second statement on behalf of the Defendants together with the submissions of Mr Coulson are sufficient to properly raise the matter before me. It is clear that from the skeleton arguments submitted Mr Harding has had sufficient time to consider the position in relation to this matter. He has not asked for an adjournment to adduce further evidence as to the financial state of the Claimant company. I am told that the Defendant company has considerable assets and a multi-million pound turnover; they would have no difficulty in satisfying the summary judgment.

48. Their fear is, that were this matter to be litigated in full and the Adjudicator was found to be substantially in error then there is risk that the Claimant company would not at the time of such judgment be able to repay monies awarded under the erroneous adjudication decision. Total M and E Services Limited are clearly not a fixed asset rich company and neither do they own quantities of expensive plant and equipment. It is not surprising. They are engaged in the business of labour only sub-contracting. I observe that on January 30th 2000 after the signing of the labour only sub-contract the Defendant obtained a Dunn & Bradsheet credit report. It showed a company with £1,000 paid up capital by its directors one of whom was Mr Deeks with whom they dealt. No accounts had been filed since 1998.

49. It is common ground that they continued to deal with them and placed considerable additional work in their way. The Defendants express the fear that should the Claimants receive the amount of the summary judgment claimed they would cut and run disposing of the monies and liquidating the company. In considering whether or not to grant a stay in a case such as this, it is a relevant consideration as to whether there is a real risk that any sums now paid by the Defendant would be irrecoverable. It is for the Court on the evidence before it, if it can to consider the degree of risk amongst all the other circumstances. In Rainford House Limited (In Administrative Receivership) v. Cadogan [2001] Technology and Construction Court 13th February 2001 HHJ Seymour QC gave summary judgment in favour of the Claimant for £77,350 under the terms of an Adjudicator's award. There was uncontradicted evidence before him, in addition to the Administrative Receivership that there were substantial trade debts owing and that management contractors had been called off the site. At page 13 of the judgment:

"The policy underlying Part 2 of the Housing Grants Construction 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 via the parties. That this understanding is correct seems to me to be clear from the terms of Section 113 of the Act" (which he then set out).

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 the intermediate paying party may end up out of pocket if called on to pay the Claimant, it is plain in my judgment that the statute is not concerned to reallocate the risk of having to endure the consequences of a trading partner becoming insolvent but simply to address the question on the footing of all parties are solvent which party should hold the sum of money about which the dispute pending the resolution of that dispute. Thus if there is a substantial chance demonstrated by the 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 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 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 a Claimant at hazard must, I think, be evaluated seriously."

50. Risk of non payment was also considered in **Herschell Engineering Limited v. Breen Property Limited**. Technology and Construction Court on the 28th July 2000. His Honour Judge Humphrey LLoyd QC. At page 3 he characterised the nature of the judgment debt based on the award:
"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 order 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 the 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. The 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 is now well established the Adjudicator's decisions will be enforced on an application for summary judgment."

At page 7: *"I am invited to draw the inference that the company would not be able to repay the money of 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 was therefore incumbent on an applicant to establish when that date is."*

At page 8: *"It is for the Defendant to re-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.*

In addition I cannot draw an inference that the 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, as 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 is still 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 the situation has not changed one iota between 1999 and July 2000 except 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 ability to repay the money or its inability to do so.

In my view on an application for a stay where a party has entered into a contract with a 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 it not an inevitable consequence of the commercial activities of the Applicant if it finds itself in the position it is in? It as at it were contracted for the result. That is not normally a ground for avoiding the consequences of a debt created by the contractual mechanism .."

51. In **Absolute Rentals Limited v. Gencor Enterprises Limited** in December 1999 I gave summary judgment in favour of the Claimant and refused a stay on the grounds of the alleged impecuniosity of the Claimant company. In that case the application was based upon late served statements which put

into question the Claimant's financial viability. At that stage it was inappropriate and unfair to come to any conclusion as to financial risk and I declined to do so.

52. Where a stay is sought the Court must consider all the circumstances. It must consider whether there are special circumstances which render it inexpedient to enforce the judgment. The risk of an inability to repay on due time is one of a number of factors to be taken account of in the balancing exercise. Where the risk is high as where there is strong uncontradicted evidence of a present inability to pay or a company is in administration a stay may be appropriate on terms safeguarding the disputed monies. The burden is clearly upon the party seeking a stay to adduce evidence of a very real risk of future non payment. The balancing exercise is of course subject to the overriding considerations of Part 1 of the CPR ensuring justice and fairness between the parties. In considering what is just and fair in an application for a stay of execution of a summary judgment under Part 24 in circumstances such as these the Court must be careful not to reallocate the commercial risks accepted by the parties who engage in a construction contract mindful of the provisions of the Housing Grants Construction Regeneration Act 1996 and subject to the general safeguards of insolvency law.

53. In this case there is evidence that the Claimant company has been tardy in filing company accounts in accordance with its statutory obligation. A search made on behalf of the Defendant company dated late January 2000, after the original contract was signed showed that no accounts were filed since 1998. The Defendants found it expedient to place further and additional work with the Claimants substantially enlarging the scope of works. There is a floating charge over the assets of the company, in relation to some present indebtedness. There is a called-up share capital of £1000. The person with whom the Defendant dealt, Mr Deeks has throughout been a director of the company. Since the company that the Defendants chose to deal with was a labour only management contractor it hardly surprising that there should be no fixed assets such as buildings or valuable chattels such as plant and machinery. Labour was supplied to the Defendants by LSM (NS Management Limited) and there is indebtedness to this company in respect of labour supplied for the additional works. There is evidence that the Claimants' credit is spent and no further credit will be given until monies are paid to LSM. Thus the capacity of the Defendant to pay in the future is directly limited to its present entitlement and use of the Adjudicator's award. Were the whole of it to be paid into Court and the Claimants deprived of its benefit the Claimants' management contractor would be in exactly the same position he would have been in had the Housing Grants Construction Regeneration Act never been enacted. They would be starved of the funds to which present entitlement has been shown and upon which they are dependent for the future progress of their business, and, which governs their earning capacity as to future obligations.

54. Since January 2000 there has been no real change in the Claimants' financial status. The Defendant is adjudged to have had the substantial benefit of the Claimants' labour measured in financial terms. The Defendants are and were, it is said a substantial multi-million pound company who clearly have ability to pay. The evidence before me as to the risk of future non-payment is not based on compelling and uncontradicted evidence. I am satisfied that there are no special circumstances which render it inexpedient to enforce the judgment. The proper order to make is to refuse the stay save that the sum of £121,087.50p plus VAT, about which there has been no adjudication on the merits (since there was held no valid witholding notice), shall be paid into Court to be held pending the hearing of the action or further order. There will be liberty to apply. The costs of the stay application will be paid by the Defendant. I will assess those costs. I would like to hear the parties as to the costs of the Part 24 application.

Mr Richard Harding (instructed by Kingsley Napley) for the Claimant

Mr Peter Coulson QC (instructed by Wragge & Co) for the Defendant