

Neutral Citation Number: [2005] EWHC 1086 (TCC)

Case No: HT-05-106

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20/05/2005

**Before :**

**HIS HONOUR JUDGE PETER COULSON Q.C.**

**Between :**

**Wimbledon Construction Company 2000 Limited**

**Claimant**

**- and -**

**Derek Vago**

**Defendant**

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**MISS CHANTAL-AIMEE DOERRIES** (instructed by TWM) appeared on behalf of the Claimant.

**MR SIMON HUGHES** (instructed by Mischcon De Reya) appeared on behalf of the Defendant.

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**APPROVED JUDGMENT**

**HIS HONOUR JUDGE PETER COULSON Q.C.:**

**Introduction**

1. On the 16<sup>th</sup> August 2003 the Defendant, Mr. Derek Vago, engaged the Claimant, Wimbledon Construction Company 2000 Limited, to carry out extension and refurbishment works at his house at 51, Drax Avenue, London, SW20. The contract sum was £209,941. Disputes arose between the parties and, on the 17<sup>th</sup> January 2005, the Claimant commenced an adjudication pursuant to the terms of that contract. On the 21<sup>st</sup> February 2005 the Adjudicator, Mr. Douglas Judkins, published his decision, the net effect of which was to award the Claimant the sum of £122,923.34, inclusive of VAT.
2. The sum of £122,923.34 was not paid and so, on the 26<sup>th</sup> April 2005, the Claimant commenced these enforcement proceedings. At about the same time the Defendant commenced arbitration proceedings against the Claimant in which it seems clear that many of the Adjudicator's findings in favour of the Claimant will be challenged. In these proceedings the Defendant has consented to judgment being entered and has offered to pay the sum of £122,923.34 into court. That offer has been refused. The Defendant now seeks an order that enforcement be stayed, pending the outcome of the arbitration proceedings, on the grounds of the Claimant's uncertain financial position.
3. In addition, the Claimant seeks summary judgment for £6,507.97, being the agreed value of post-contract works carried out at the property. The Defendant does not dispute this figure but maintains that he has a set-off and counterclaim in respect of alleged defects in the heating and ventilation works which, so it is said, operates as a complete defence to this element of the claim.
4. I propose to deal first with the claim for £6,507.97, and then to go on to address the important issue that arises out of the Defendant's application to stay execution. In considering these points I have been greatly assisted by the clear and concise submissions of Mr. Hughes, who appeared on behalf of the Defendant, and Miss Doerries, who appeared on behalf of the Claimant.

**The Claim for £6,507.97.**

5. The Claimant made a claim in the adjudication for £9,669.84, plus VAT, in respect of works carried out at the property after the contract had reached practical completion. The Defendant valued those works at £5,538.70, plus VAT, which made a total of £6,507.97, but he argued that the Adjudicator had no jurisdiction to consider such a claim, a submission which the Adjudicator accepted. The Claimant now seeks summary judgment in respect of the sum of £6,507.97 on the basis that it is the Defendant's own figure for the post-contract works.
6. The Defendant maintains that summary judgment for £6,507.97 should not be granted because of the existence of his counterclaim against the Claimant relating to defects in the heating and ventilation works. This cross-claim was originally valued at £8,000-£12,000 in paragraph seven of Mr. Steele's statement. The only documents which relate in any way to the alleged cross-claim are a fitter's report, from R.J. Mechanical Limited, apparently dated the 28<sup>th</sup> February 2005, and another document from R.J. Mechanical, entitled "Budget Costs", and apparently dated March 2<sup>nd</sup> 2005.
7. Miss Doerries for the Claimant argues that I should disregard the cross-claim completely because the dates of the documents are not clear. She says the fact that the budget costs document refers to a schedule of outstanding works, dated 24<sup>th</sup> January 2005, indicates that this entire cross-claim was a matter which could and should have been raised in the adjudication. I do not accept that submission. All the documents bear or refer to dates which

were after the commencement of the adjudication, and both the fitter's report and the budget costs document clearly post-date the Adjudicator's decision.

8. Miss Doerries is on much stronger ground in complaining that the nature of the counterclaim is extremely vague. There is, she says, no apparent correlation between the fitter's report and the budget costs document. Even more significantly, there is no attempt to identify how and why the items in either document could be said to constitute a breach of contract on the part of the Claimant. Furthermore, the budget costs document amounts to £4,372.21, a lot less than the amount identified in Mr. Steele's statement.
9. Mr. Hughes concedes, rightly in my view, that the counterclaim cannot be valued at more than £4,372.21 because that is the amount in the budget costs document. He contends however that the two documents to which I have referred are sufficient to defeat the claim for summary judgment, at least up to that amount.
10. In my judgment the uncertainty within the Defendant's own evidence as to what the proposed cross-claim might be worth typifies the fact that next to no analysis or particularity has been provided in respect of this proposed claim. I accept the Claimant's submissions that it is wholly unclear how or why the items in either the fitter's report, or the budget costs document, are or could be breaches of contract on the part of the Claimant. It is just not clear what, if anything, it is said the Claimant should or should not have done under the terms of its contract. It may be that in the forthcoming arbitration a sound claim in respect of such defects can be put together, but, on the very scant information available to me, I am bound to conclude that the Defendant has no real prospect of successfully defending the claim for an agreed sum by reference to this proposed set-off and counterclaim. It is simply too equivocal and uncertain. It is therefore appropriate for me to give summary judgment in respect of the claim for £6,507.97 in respect of post-contract works.
11. Mr. Hughes argued, by reference to paragraph 24.2.6 of Volume 1 of the White Book, that, even if I granted summary judgment, I should stay execution because of the existence of the counterclaim. For the reasons noted above, I do not consider that such a course is appropriate. The reasons why I have concluded that there should be summary judgment inevitably mean that I should also refuse a stay. On the material before me, there is no counterclaim with a real prospect of success. In the alternative, Mr. Hughes submitted that I should stay execution because of the financial position of the Claimant. This, of course, leads me on to the critical issue between the parties: the interaction between the adjudication process, on the one hand, and RSC Order 47, on the other.

### **The Relevant Authorities**

12. It is unnecessary for me in this judgment to set out in detail the various authorities relating to the adjudication process. Adjudication was introduced by the Housing Grants, Construction and Regeneration Act 1996 to provide a quick and inexpensive procedure whereby parties to a construction contract can be given an answer to any dispute between them within 28 or 42 days. That answer is at least temporarily binding, until challenged in substantive court or arbitration proceedings. The Scheme in the 1996 Act has now been adapted and introduced into a number of the standard forms of building and engineering contracts. In this case the contract between the parties incorporated the JCT Minor Works Form 1998 Edition, including amendments one to four. Section D of the contract set out detailed provisions in respect of adjudication, including at D7 particular provisions relating to the effect of any Adjudicator's decision:

"D 7.1. The decision of the Adjudicator shall be binding on the parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the parties made after the decision of the Adjudicator has been given.

D 7.2 The parties shall without prejudice to their other rights under this agreement comply with the decision of the Adjudicator and the employer and the contractor shall ensure that the decision of the Adjudicator is given effect.

D 7.3. If either party does not comply with the decision of the Adjudicator the other party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause D 7.1"

13. It has been said on a number of occasions by the Court of Appeal that the decision of an Adjudicator is intended to be enforced summarily. The contract provisions in this case, which I have just read, and which are by no means untypical, make that point clear. The presumption is that the successful party, the likely claimant in any enforcement proceedings, should not be kept out of its money.

14. What happens if the unsuccessful party, the likely defendant in any enforcement proceedings, is concerned that, if the sum awarded by the Adjudicator is paid out, the claimant's financial position is such that the money may never be repaid? In such circumstances the defendant will seek a stay of execution by relying on RSC Order 47, which remains part of the CPR by operation of Part 50. For today's purposes the relevant part is Rule 1(a) which provides as follows:

"(1) Where a judgment is given or an order made for the payment by any person of money and the court is satisfied on an application made at the time of the judgment, or order, or at any time thereafter by the judgment debtor or other party liable to execution –

(a) that there are special circumstances which render it inexpedient to enforce the judgment or order....

.... 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."

15. There can be no doubt that the probable inability on the part of the claimant to repay the judgment sum is a special circumstance within the meaning of RSC Order 47(1)(a). There are a number of authorities in which this rule has been considered on an application to stay the execution of a summary judgment obtained to enforce an Adjudicator's decision.

16. In **Bouygues UK Limited v Dahl-Jensen UK Limited** [2000] BLR 522 the Court of Appeal upheld the decision of Dyson J to grant Dahl-Jensen summary judgment to enforce an Adjudicator's decision, even though it was accepted that that decision contained an error. However, because Dahl-Jensen were in insolvent liquidation the Court of Appeal imposed a stay of execution. At paragraph 35 of his judgment Lord Justice Chadwick said:

"In circumstances such as the present where there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of adjudication which is necessarily provisional. All claims and cross-claims should be resolved in the liquidation in which full account can be taken and a balance struck. That is what rule 4.90 of the Insolvency Rules 1986 requires."

In that case, the Court of Appeal did not interfere with the judge's finding that summary judgment should be entered, but a stay of execution was ordered.

17. In **Absolute Rentals v Glencor Enterprises Limited** (unreported, 16.1.00), His Honour Judge David Wilcox was asked to stay execution because of questions over the claimant's financial viability. He said:

" To do so would frustrate the Scheme [under the 1996 Act]. Whilst the Claimant has admitted an irregularity in making its company returns, it asserts, in an accountant's statement, put in at the hearing, that the proper notification of directors has been made and has now been filed at Companies House. I am not in a position to judge the financial standing of either company. It is not desirable that I should on such limited evidence before me, neither is it desirable to do so on such an application. It is entirely possible that if there is any impecuniosity in the claimants it could derive from the defendant's default. I do not know what the time table for the arbitration is or what the resolution will be by the arbitrator or agreement. The purpose of the Scheme is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis by requiring decisions of Adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement whether those decisions are wrong in point of law or fact if within the terms of the reference. It is a robust and summary procedure and there may be casualties, although the determinations are provisional and not final."

18. The fullest consideration of the points which any court should take into account when being asked to exercise its discretion to stay execution of a summary judgment (obtained to enforce an adjudicator's decision) can be found in the judgment of His Honour Judge Humphrey Lloyd Q.C. in **Herschell Engineering Limited v Breen Property Limited** (unreported, 28<sup>th</sup> July 2000). It is unnecessary for me to set out here all the passages in that judgment dealing with this topic. I confine myself to two specific points.

19. First, the judge emphasised the importance of the time at which the sum would have to be repaid. At paragraph 16 he said:

"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 on an application for security for costs. It is therefore incumbent on an applicant to establish when that date is."

20. Secondly, the judge stressed the importance of looking at whether or not there had been any fundamental change in the claimant's financial position since the contract was made. In paragraphs 18 and 19 he said:

"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 within a few years 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 or in the future, or 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 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 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 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)."

21. In **Rainford House Limited v Cadogan Limited** (unreported, 13.2.01) His Honour Judge Richard Seymour Q.C., found that the defendant had raised "a strong prima facie case" that the claimant was insolvent. Indeed, the judge went on to find that "that evidence [of insolvency] has not been contradicted or explained". He therefore ordered a stay of execution.
22. In **Total M and E Services v ABB Building Technologies** [2002] CILL 1857, His Honour Judge David Wilcox refused a stay in respect of all but a small part of the summary judgment sum. He said at paragraph 54:

"Since January 2000 there has been no real change in the claimant's financial status. The defendant is adjudged to have had the substantial benefit of the claimant's 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."
23. Finally, amongst the authorities that were helpfully cited to me, there is the decision of His Honour Judge John Toulmin CMG Q.C. in **AWG Construction Services v Rockingham Motor Speedway** [2004] EWHC 888. In that case the judge reviewed some of the authorities to which I have already referred and concluded at paragraph 186:

“In general a court must balance (a) the intention of the legislation that adjudication should be enforced summarily; (b) the right of the successful party not to be prejudiced by being kept out of its money; and (c) in cases where there is a serious risk that the party will not be able to recover the money, that the defendant is not being seriously prejudiced in a way not contemplated by the Act which is silent as to the position where a defendant runs more than a nominal risk of being unable to recover money after trial or arbitration award.

187. A further specific consideration which is relevant in considering whether the justice of the case demands a stay is the diligence with which the applicant has pursued the substantive remedy, whether by litigation, or arbitration.”

24. Mr. Hughes submitted that the test under section 726(1) of the Companies Act 1985 relating to security for costs was also the test to be applied under Order 47. Section 726(1) requires a defendant seeking security to show “by credible testimony that there is reason to believe that the company will be unable to pay the defendant’s costs if successful in its defence”. I do not consider that I should apply this precise formulation when exercising my discretion under Order 47. That would be to fetter the exercise of that discretion unnecessarily, by reference to a statutory test which was designed to apply in rather different circumstances to these. I would also be reluctant to adopt a form of words which has been criticised in some quarters for its lack of clarity. I agree with Miss Doerries’ submission that the reference to the section 726 test in both **Herschell** and **Rainford House** was to the issue of timing, namely when the inability to repay should be measured.
25. However, that said, I do accept that the well- known guidelines as to the exercise of the court’s discretion under section 726(1) (set out, for instance, by Lord Denning in **Sir Lindsay Parkinson & Co v Triplan** [1973] QB 609) are of general application to the exercise of my discretion under Order 47. It will be remembered that one of the matters which Lord Denning required the court to consider is whether the claimant’s want to means has been brought about by any conduct on the part of the defendant. That is a matter expressly referred to by Judge Wilcox in **Absolute Rentals**.

#### Applicable Principles

26. In a number of the authorities which I have cited above the point has been made that each case must turn on its own facts. Whilst I respectfully agree with that, it does seem to me that there are a number of clear principles which should always govern the exercise of the court’s discretion when it is considering a stay of execution in adjudication enforcement proceedings. Those principles can be set out as follows:
- a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.
  - b) In consequence, adjudicators’ decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.
  - c) In an application to stay the execution of summary judgment arising out of an Adjudicator’s decision, the Court must exercise its discretion under Order 47 with considerations a) and b) firmly in mind (see **AWG**).
  - d) The probable inability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive

trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see **Herschell**).

e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see **Bouygues** and **Rainford House**).

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**); 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**).

With those principles in mind I now turn to the evidence in this case concerning the Claimant's financial position.

#### The Evidence as to the Claimant's Financial Position at the time of the Contract

27. The contract was made in August 2003. The Claimant's accounts for the financial year ending 31<sup>st</sup> May 2003 show a modest profit of £8,397 on a turnover of £320,000 odd. The Claimant's accounts for the financial year ending the 31<sup>st</sup> May 2004 show an increased turnover to £592,548 but a loss on ordinary activities, before taxation, of £68,868 and a retained loss, carried forward, of £71,632. These figures were calculated taking into account a credit figure of £65,000, which other evidence has explained was the stated value of this claim when these accounts were prepared. The Adjudicator of course awarded the Claimant nearly twice that figure. In addition there is a figure in the accounts of £135,050, said to be a short term loan from a director. Mr. Hughes points out, rightly in my view, that there is a surprising lack of evidence surrounding the detail of this loan. It is not clear from the accounts who made the loan, or on what terms it was made, although other evidence indicates that it was made by Mr. Doig, the principal director of the Claimant company.

#### Present Concerns

28. In addition to the lack of evidence relating to the director's loan, the Defendant has a number of other concerns about the Claimant's financial position. The Defendant has obtained a financial status report from Experian, dated 24<sup>th</sup> February 2005, and based on the accounts up to the 31<sup>st</sup> May 2004, which describes the Claimant as "a maximum risk company" and gives a warning that all credit transactions should be supported by a director's guarantee. The Defendant also relies upon a letter dated 4<sup>th</sup> May 2005 from an independent firm of accountants, Dover Childs Tyler, who, again on the basis of the accounts up to the 31<sup>st</sup> May 2004, conclude that:

"The balance sheet of the company shows a negative balance of £71,630 which indicates that the company's liabilities exceed its assets by that sum and therefore the company is technically insolvent. In view of this I would be extremely concerned about the company's ability to repay the sum of £122,000 and indeed the whole viability of the company based on the information provided."

29. On the 9<sup>th</sup> May the Defendant's solicitors wrote to the Claimant's solicitors referring to the accounts up to the 31<sup>st</sup> May 2004 and their concerns over Mr. Doig's loan which they said could be withdrawn at any time. The letter goes on:

"If he were to provide our client with an unequivocal written undertaking that he will not call in the loan in whole or in part until after the arbitrator's award has been satisfied then this would go some way to dealing with the concerns our client has."

There does not appear to have been a reply to that letter, other than a notification on the 10<sup>th</sup> May that the Claimant's solicitors were taking the Claimant's instructions on the points raised.

### **Future Prognosis**

30. In answer to the evidence relied on behalf of the Defendant, the Claimant has served a statement from Eileen Barry with a number of exhibits. The most significant new information provided by Miss Barry is the set of accounts showing the position up to the 11<sup>th</sup> May 2005. These accounts demonstrated an operating profit of £3,791, compared to the operating loss the previous year. This has also served to reduce the retained loss to £67,958. In addition, there is now an allowance for the adjudication claim in the sum of £104,000 described as "the directors' best estimate of the amount" the Claimant will receive for the work carried out on behalf of the Defendant. These accounts also show additional loans from directors (£72,501) and related parties (£51,000).
31. In addition, the Claimant's accountant, David Stafford, has provided a letter dated 11<sup>th</sup> May which endeavours to answer many of the concerns raised by the Defendant's solicitors. As to this particular contract Mr. Stafford says:

"At the 31<sup>st</sup> May 2004 Wimbledon Construction has spent £130,000 on extras at Drax Avenue going to adjudication. Stock and work in progress are valued at the lower of cost and net realisable value and any value deducted from cost of sales. Had there been no dispute over extras at Drax Avenue turnover would have been £150,000 more (including £20,000 mark-up) and profit £85,000 more."

A little later he deals with the accounts generally and he says this:

"Whilst the 2004 accounts show a negative balance of £71,630 this is solely due to the non payment of work carried out at Drax Avenue that is in dispute. This work had to be funded by the director and is the sole reason for the £135,050 advance during the year. If the additional profit had been made, as in note 2(a) above, the company would have had net assets of circa £15,000."

He then goes on in the letter to deal with the new accounts to which I have already referred and the profit of £3,674. He concludes by saying:

"We do not consider that this company is insolvent."

### **Other Companies**

32. There is evidence adduced by both sides relating to the financial position of two other companies run by Mr. Doig, West Wimbledon Developments Limited, and West Wimbledon Developments 2003 Limited. To the extent that the Defendant referred to these other companies to infer that Mr. Doig moved, or may move, sums from one to another in order to avoid his liabilities, I reject that suggestion. There is no credible evidence to support it. Similarly, the fact that the Claimant is apparently relying in these proceedings on the payment to West Wimbledon Developments Limited of £624,196.22 in respect of the sale of a property in Cambridge Road in London is, in my judgment, also meaningless, given that there is no evidence of West Wimbledon Development Limited's overall financial position and what

difference this payment may make to it. Whilst I note that Miss Barry suggested £82,000 of this sum will be paid to the Claimant in respect of "invoiced building work done on behalf of the development company on this property" no other documents have been provided to support this suggestion. Accordingly it seems to me that the position of these two other companies is irrelevant to the question that I have to decide in respect of the Claimant's financial position.

### **Advance Payments**

33. The final piece of evidence said to be relevant to the Claimant's financial position is the point made at paragraph five of Mr. Steele's statement that, during the currency of the contract, the defendant made a payment of £40,000 which had not been certified to assist the Claimant's cash flow difficulties. Miss Barry's statement at paragraph five rejects the suggestion that these sums were paid as a result of cash flow difficulties. Instead she says, on instruction, that these monies were payments in advance provided that specific parts of the property were completed by certain dates.
34. It is not possible for me to resolve this factual dispute on the evidence that I have. However, even if Mr. Steele were right and the money was paid early to ease cash flow difficulties on the part of the Claimant, I would attach very little weight to such evidence when considering whether or not the Claimant company would probably be unable to repay the judgment sum in nine of twelve months' time. Advance cash payments of the sort referred to are a very common feature of the construction industry in the UK.

### **Findings**

#### **A) Probable Inability to Repay the Judgment Sum**

35. On the basis of the evidence before me, the Defendant has not demonstrated a probable inability on the part of the Claimant to repay the judgment sum, if that is the outcome of the arbitration process, in nine to twelve months' time. After a poor year up to the 31<sup>st</sup> May 2004 the Claimant company has made a modest profit up to the 11<sup>th</sup> May 2005 just as it did in the year up to the 31<sup>st</sup> May 2003. It is not therefore even technically insolvent now, and, given that the Claimant is now making a modest profit once again, I could not possibly conclude that it would probably be unable, at the appropriate time, to repay the judgment sum if it had to.
36. In particular, it seems to me that Mr. Stafford's letter of the 11<sup>th</sup> May 2005, which I have quoted extensively in paragraph 31 above, is the clearest possible statement that the Claimant company is not insolvent and that accordingly the Defendant cannot show that it would probably be unable to repay the judgment sum.
37. I do accept that the nature and extent of the loans from the directors and others was a legitimate source of concern as far as the Defendant was concerned. However, the mere fact that the directors (and others) were making loans to this company does not demonstrate that it would probably be unable to repay the judgment sum in nine to twelve months' time. Again, I consider that Mr. Stafford's letter provides a complete answer on this point. Furthermore, it seems to me that it might be said that, on the contrary, such loans demonstrate a high degree of practical faith in the future of the company on the part of the directors, and that faith might be regarded as the best possible evidence that any sums, if they had to be, would be repaid.
38. Whilst these findings are sufficient to dispose of the application for a stay, it is appropriate for me to go on to deal with two other issues in this case. Even if, which I do not consider to be the case, the evidence of the Claimant's present financial position might have led me to conclude that it was probable that it would be unable to repay the judgment sum when it fell

due, I would still exercise my discretion against granting a stay because I consider that both the factors identified in paragraph 26(f) above are present here.

### **B) Same or Similar Financial Position**

39. I am in no doubt at all that the Claimant's present financial position, and its likely position in a year's time, are the same or very similar to its financial position at the time when the contract was made. In August 2003 this was a small company making a modest profit on a modest turnover of £320,000. It remains a small company and on the basis of the accounts up to the 11<sup>th</sup> May 2005 it is again making a modest profit on a modest turnover of about half a million pounds. It has always been, and remains, dependent to some extent on loans. There has therefore been no significant change in the Claimant company, and no change in the way in which it is financed, between August 2003 and today. Accordingly, to borrow the words of His Honour Judge Lloyd in **Herschell**, the Defendant has contracted for this result. The financial vulnerability of the Claimant is, in general terms, no greater and no less than it was in 2003. It would therefore be wrong in principle for me to exercise my discretion in the Defendant's favour by granting the stay.

### **C) Problems due to Defendant**

40. As previously noted, a stay will usually be refused, on the exercise of the court's discretion, if the Claimant's financial position is the direct result of the Defendant's failure to pay the sums which are then found to be due by the adjudicator. In a general sense that cannot be the case here, because the new accounts up to the 11<sup>th</sup> May 2005 show a modest profit when due allowance is made for the sums awarded by the adjudicator, and I have found that that is a similar position to the one which existed at the time that the contract between the parties was made. But it is also clear that, during the currency of this contract, as shown by the accounts for the year ending the 31<sup>st</sup> May 2004, upon which the Defendant now relies, the Claimant suffered particular financial difficulties. Mr. Stafford in his letter attributes those specific difficulties directly to the Defendant's refusal to pay the sums later found by the adjudicator to be due. On all the evidence I am satisfied that those particular financial difficulties were due, at least in significant part, to the failure on the part of the Defendant to pay the sums which the adjudicator found were due. I am also driven to conclude that that failure has necessitated the recent director's loans, certainly at a much higher level than would otherwise have been the case.
41. The Claimant company's turnover was about half a million pounds in both the year up to the 31<sup>st</sup> May 2004 and the year up to the 11<sup>th</sup> May 2005. This contract was originally worth £209,941 and the adjudicator found its gross value, including extras, to be in excess of £300,000. In other words, this contract accounted for over half the Claimant's turnover in any one year or more than a quarter over two years. It is therefore unsurprising that the Defendant's failure to pay the sums eventually awarded by the adjudicator had a deleterious short-term effect on the Claimant's financial position.
42. Again, therefore, even if I am wrong about the Claimant's probable inability to repay the judgment sum, I conclude that the particular financial problems relied upon by the Defendant in the year up to the 31<sup>st</sup> May 2004 were largely the Defendant's own fault. That is a second additional reason why I would exercise my discretion against granting the stay in any event.

### **Conclusion**

43. I therefore give summary judgment against the Defendant in the total sum of £129,431.31 inclusive of VAT. Interest will be payable on that sum. I anticipate that the parties will be able to agree the appropriate figure. For the reasons which I have given I decline to stay execution of this judgment.

**Judgment Approved by the court for handing down**  
**(subject to editorial corrections)**

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This is to certify that paragraphs 1 to 43 have been produced according to the procedure set out in the AVTS Quality System.

Signed: \_\_\_\_\_ (Christine Kriehn)

2118/H2373



**FM60036**

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