APPLICATION FOR JUDICIAL REVIEW : OUTER HOUSE, COURT OF SESSION

OPINION OF LORD McCLUSKEY : 5th July 2001.

[1] This matter comes before me by way of a motion in a petition for judicial review by the British Waterways Board. The British Waterways Board were represented on the motion roll by Mr Borland. Mr Moynahan appeared for the respondents whom I will describe as the joint venture. The person named as the first respondent has not appeared in the process. He is the person who would adjudicate if the matter were allowed to go to adjudication.

[2] There is no dispute between the parties as to the approach which the Court has to take in a matter of this kind when parties seek *interim* orders in a petition for judicial review. The Court has to be satisfied before granting any such *interim* orders that the petitioners have a *prima facie* case. It is sometimes said the petitioners have to show that there is a case to try. If the petitioners get over that hurdle, the petitioners then make their representations about where the balance of convenience lies. The respondents will also make their presentations on this matter and the Court has to resolve where the balance of convenience lies.

[3] I do not propose to summarise in any detail all the arguments that have been presented to me in relation to the main issue, namely whether or not there exists between the parties a dispute which can properly be sent to adjudication at this time. The petitioners submit that there is no "dispute" as yet between the parties, having regard to the terms of the contract between them. The joint venture maintains that there is a dispute within the meaning of section 108 of the Housing Grants, Construction and Regulations Act 1996 and that any provision in the contract that purports to redefine a "dispute" falls to be disregarded, in the light of section 108(5). I am satisfied that on that matter the petitioners have shown that there is indeed an issue to try here. Although there is, as Mr Moynahan has pointed out, authority in support of his position that there is a dispute within the meaning of the statute, it appears to me that there are substantial arguments, supported by authority, on both sides; and I could not possibly hold that there is no issue to try. If there was ample time I should rehearse the arguments which have been placed before this Court in some detail under reference to the statute, the authorities and the various other documents lodged in process. Unfortunately, however, the case has come before me in the afternoon of the last date on which I am available for some weeks; and it is essential that I should proceed to judgment without delay.

[4] Against this background I therefore turn to the arguments in relation to the balance of convenience. For the petitioners, Mr Borland submitted that the joint venture (the second and third) respondents were plainly acting in disregard of the contract, namely Clause 90 as inserted into the contract by Addendum Y (UK) 2. The terms of that document can be seen on page 6 of number 6-1 of process. This does not appear to me to be properly a matter in relation to the balance of convenience because, although there is a *prima facie* case in support of this submission, and I shall assume in the petitioners' favour at the present time that they are right on this point, I am not actually deciding this point in their favour. I cannot therefore say that it affects the balance of convenience that the joint venture, the respondents, are acting in disregard of the contract. The second argument advanced by the petitioners was that there was little, if any, prejudice to the joint venture in not proceeding with an adjudication at this juncture. The dispute was essentially one about money. The contract itself contained provisions about interest payable if payment were to be made late. It was submitted that, if the procedures envisaged by the substituted Clause 90 were followed, the maximum delay would not be likely to exceed four weeks. In these circumstances there was no material prejudice to the respondents in a four weeks delay. At a later stage in the debate, when it had been identified that there could be a financial loss to the respondents (of interest) of about £9,400, it was submitted that in the context of a claim which was for about £4.9 million this sum of £9,400 was not large enough to be a material consideration. The third argument for the respondents was that if the adjudication were to go ahead now it would be necessary for the parties to go to the expense of arguing the "dispute" and presenting the arguments of parties to the first respondent, the person charged with the responsibility of determining the adjudication. Such expenditure would be avoided if this disagreement were settled by negotiation. No

figure was put upon this expense, and, in particular, no figure was put before me to enable me to make a comparison between such expense and the figure of £9,400, representing lost interest.

[5] On the matter of the balance of convenience, Mr Moynahan pointed to the history of the dispute, which is well illustrated in document 7 lodged on behalf of the second and third respondents in the petition process. That document first of all brings out that the amount in dispute is just short of £4.9 million. It refers in detail to the history of meetings between the parties commencing in or about March of 2001 and continuing for some weeks thereafter. I was referred in this bundle to a document dated 28 May 2001 in which the petitioners were sent a copy of a recorded minute of a meeting held on 10 May 2001. That minute is also contained in the bundle and it sets forth the discussions that took place and summarises what was discussed and what was agreed and what was not agreed. In particular, reference was made to paragraph 2.2 of that document in which it was stated that the main issue in contention related to design. What is recorded in the final sentence is that the petitioners stated that the amount claimed was *"out the box"*, and the respondents disagreed. What this history illustrated, according to Mr Moynahan, was that the parties were unmistakably at issue on a matter of dispute arising out of the contract, but more importantly for the purposes of the balance of convenience argument, that the parties had engaged in discussions over a period of months and that these discussions had not resulted in a successful resolution of the issue. The sum at issue being £4.9 million, the respondents faced a substantial loss if the resolution of the dispute was not achieved at an early date. That was because the overdraft rate was between 3 and 4% above base rate. The rate of interest on any sum to be awarded in an adjudication was only 1% above base rate. Accordingly the loss even over four weeks was calculable at the sum already mentioned of £9,400.

[6] Against this background, when one looks to see the prejudice that the petitioners would suffer, it is clear that they would simply be given yet another four weeks before the matter would have to be adjudicated upon, and it is not clear to me that parties would be able to make any more use of those four weeks to reach an agreement that eluded them in the last five months or so. No quantification of any financial loss to him was offered to the Court.

[7] In all these circumstances I have come to be of the view that the balance of convenience favours the refusal of the motions which have been placed before the Court. It appears to me that both the 1996 Act and indeed the substituted Clause 90 both envisage the desirability of proceeding to a speedy resolution of matters in issue between such parties. If the matter is not already in issue, as Mr Boland argued, it could be put in issue without delay, but the resolution thereof would be delayed for some four weeks or thereby. It appears to me that, parties having had some months to investigate and consider their respective positions and to research matters, the extra cost of putting these matters in an appropriate form before an adjudicator is likely to be not very great. No estimate was given to me of what that cost was. Accordingly, as I have indicated, the balance of convenience, in my judgment, favours the refusal of the motions which have been made. I shall accordingly decline to grant these motions. I shall, however, as Mr Moynahan acknowledged was appropriate, make an order for service.

[8] The respondents' motion for the expenses of today's proceedings was not opposed. It is therefore granted.