JUDGMENT : His Honour Judge Humphrey Lloyd Q.C. 27th June 2001. TCC.

1. I have two applications, both for summary judgment (from both parties), and an application by the defendant for a stay under section 9 of the Arbitration Act 1996. Essentially the issue between the parties is whether the claimant contractor is to be paid an amount of liquidated damages to which the defendant employer considers that it is entitled. In order to reach a decision on that question it is necessary to go back in the history of the events. So far as I can, I shall therefore deal with the arguments advanced by the parties as they arise in chronological order and therefore not necessarily in the order in which Mr. Harding (for the claimant) and Mr. Mort (for the defendant) have so ably presented them to me.

2. The contract was basically on the standard form JCT 81 with Contractor's Design. It concerned the redevelopment of the former head Post Office in Wind Street, Swansea, to provide housing for the defendant Housing Association as well as commercial and other uses. It was dated 19 October 1998, and had been amended to take account of the Housing Grants, Construction and Regeneration Act 1996. The contract was also amended to provide for sectional completion and in other respects. The documents were assembled imperfectly. The result is far from easy to determine.

3. Practical completion was achieved about 31 July 2000. A payment application, No. 19, was made in the autumn of last year. In it the contractor claimed money for direct loss and expense, money in respect of the valuation of variations, money in respect of measured work, and also certain adjustments in relation to the expenditure of provisional sums. The contract had finished late. Accordingly, at that time, there was also an argument about whether or not the contractor was entitled to an extension of time.

4. On 19 January 2001 a notice of adjudication was issued on behalf of the claimant contractor by its solicitors. It stated in paragraph 5*: "There are matters in dispute as follows:*
   - *(i) The Referring Party's entitlement to direct loss and/or expense pursuant to Clause 26 of the Contract;*
   - *(ii) The Referring Party's entitlement to extensions of time pursuant to Clause 25 of the Contract;*
   - *(iii) A proper valuation of variations carried out by the Referring Party pursuant to Clause 12 of the Contract;*
   - *(iv) The proper valuation to be ascribed to measured work;*
   - *(v) Release of retention;*
   - *(vi) Expenditure of provisional sums."*

   Paragraph 6 then said: *"Without prejudice to the Referring Party's right to add to the remedies sought in its Referral, its claims are set out in the Application (attached), or as assessed in adjudication ...".*

   It may be noted that the claimant did not refer any dispute about the validity of the notice which the defendant had given of its intention to withhold liquidated damages due on the claimant's failure to complete on time, although the amount of such damages might be affected by any decision relating to an extension of time.

5. The adjudicator was Mr. Weekes. He was appointed by the President of the Royal Institution of Chartered Surveyors. His jurisdiction was challenged during the course of the adjudication on a number of grounds, with which I am only concerned with one: whether he was the right person to have been appointed. Curiously, it seems to have been accepted by the parties that they would be happy with Mr. Weekes by whomsoever he had been appointed.

6. The reason for this dispute arises because the use of the sectional completion supplement led to the need to name, in s.S1.1, or for the purpose of cl.1.1, an adjudicator. The text on p.79 of the bundle of contract documents says only "the President or Vice-President of the Chartered Institute of Arbitrators" which must be a reference to the appointing body. However, other amendments made, e.g. on p.135, had the effect of deleting those words as there was then no provision to which they referred or could sensibly be attached. So, in a nutshell, there is a question as to whether the Chartered Institute of Arbitrators had the right to appoint an adjudicator, or whether there was in effect an ineffective provision for adjudication so that the Scheme for Construction Contracts would apply. (Mr. Weekes was appointed pursuant to the Scheme.)

7. In my view the unfortunate manner in which the contract documents were compiled destroyed any intention that the adjudicator should be appointed by the Chartered Institute of Arbitrators and the provisions in relation to adjudication as set out in the JCT form became inoperative as they were struck out on pp.127 onwards. Thus the Scheme took effect as the contract did not meet the requirements of section 108 of the HGCRA. Mr. Weekes was rightly appointed.

8. The second question is whether the adjudicator had jurisdiction to deal with more than one dispute, or, put another way: was more than one dispute referred? Paragraph 8(1)of the Scheme provides: "The adjudicator may, with the consent of all parties to those disputes, adjudicate at the same time on more than one dispute under the same contract"

   Did the notice of adjudication refer more than one dispute? I have said before that in dealing with adjudications one must approach the interpretation of any document in a sensible manner and to try to give effect to its intentions, whilst bearing in mind the purposes of adjudication and the presumed intentions of the parties to be inferred from the contract, including the Scheme as it is part of the contract (see section 114 of the Act) and adjudication is fundamentally a contractual form of dispute resolution.

9. Paragraph 8(1) of the Scheme clearly precludes the reference of more than one dispute, without the requisite consent of the other party or parties. Such consent was not given in this case as the defendant's participation in the adjudication proceedings was subject to its protest about the jurisdiction of the adjudicator on this and other grounds, as fully set out by Mr Mort in his submissions. The reason is that it would not normally be practicable to decide more than one dispute fairly within the period required. On the face of it, the notice given by the claimant referred to six separate matters.

10. A notice of adjudication has to be put in its context. I have done so briefly. I agree with what was said in **Fastrack Contractors Ltd v Morrison Construction Ltd** [2000] BLR 168 by His Honour Judge Thornton QC said (at page 176):
    "During the course of a construction contract, many claims, heads of claim, issues, contentions, and causes of action will arise. Many of these will be collectively, or individually disputed. When a dispute arises, it may cover one, several or many of one, some or all of these matters. At any particular moment in time, it will be a question of fact what is in dispute. Thus the "dispute" which may be referred to adjudication is all or part of whatever is in dispute at the moment the referring party first intimates an adjudication reference. In other words, the "dispute" is whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference. A vital and necessary question to be answered, when a jurisdictional challenge is mounted, is: what was actually referred? That requires a careful characterisation of the dispute referred to be made. This exercise will not necessarily be determined solely by the wording of the notice of adjudication since this document, like any commercial document having contractual force, must be construed against the background from which it springs and which will be known to both parties."

    When the context is examined, it is plain, in my judgment, that the real dispute was about what payment ought to have been made as a result of application No. 19. That contained various elements - valuation of measured work, valuation of variations, provisional sums, direct loss and expense, etc. Those elements were therefore reflected in the notice of adjudication. The notice was therefore valid in referring the dispute about the payment to be made which could not be decided without considering each such element.

11. Mr Mort submitted, with reason, that the reference in (ii) to an "entitlement to extensions of time" does not fit into that analysis. However "loss and expense" under the JCT forms which is part of a dispute about an interim or progress payment may not properly be ascertainable or determined until any right to extension of time is also determined. If only prolongation is being claimed, as opposed to disruption, the right to an extension of time may run hand in hand with the right to loss and expense, provided that each stems from the same relevant event and no other cause, and the event therefore which gives rise to a claim for an extension of time and, if such an extension is justified, to money payable under the contract in consequence of that event and the extension.

12. So, in my judgment, in this kind of notice, the entitlement to extension of time is included as a necessary and indispensable precursor to the direct loss or expense and, as it may be, the establishment of a proper or new rate or price, to enable the rules for valuation of variations to be properly applied, or indeed, perhaps, for the adjustment of rates of prices for measured work. Accordingly, giving the notice a benevolent interpretation, I would hold that this notice did not refer more than one dispute. It referred a single dispute, namely, "How much should I be paid?", or, "Should I have been paid on application 19?" Had the notice not been directed to such a single question then it would have referred more than one dispute. A notice that refers more than one dispute is invalid. The appointment of an adjudicator in consequence of it is similarly invalid, unless the other party has nonetheless clearly and knowingly accepted the notice or the appointment as valid so that there is consent for the purposes of paragraph 8(1) of the Scheme.

13. The next point is: did the adjudicator really do what he was being asked to do? Again, it is unfortunate that the notice did not say clearly that the contractor was claiming was what ought to have been paid. That was not said in so many words, at least until the submissions were made in the adjudication itself. The adjudicator's decision, however, was also not expressed in quite those terms. Giving it a sensible interpretation, and trying to give effect to its purpose and to the aims of adjudication, in my judgment the adjudicator in arriving at his conclusions on the various elements was saying, in effect: "That is what you should have been paid in response to application 19". Indeed, that is precisely how the defendant apparently read the decision, since, within a few days after the issue of the decision, either in its original form on 21 March, or in the corrected form of 22 March, certificate 20 was issued on 23 March which met the requirements of the decision in relation to payment, ie the claimant contractor got the certificate to which it was entitled, in the opinion of the adjudicator. Thus I do not consider that any point arises about the validity of the decision in terms of the dispute or in terms of what it is seeking payment. The adjudicator was entitled therefore to arrive at his decision about the extension of time as it affected the payment and, thus also, the amount of liquidated damages to which the defendant claimed to be entitled. The claimant has to accept the consequences of its own reference on this point.

14. But, and this is the next point that arises, what is the legal nature of the adjudicator's decision? I was referred to the decision of His Honour Judge Hicks QC in the case of **VHE Construction plc v. RBSTB Trust Co. Ltd.** (2000) 70 Con LR 51. At para.65 (on page 65 of the report) Judge Hicks said, in relation to a claim of a residual right to set off liquidated damages, that there was no such right against an adjudication decision. *"In the first place the right under cl.24.2.1 is to deduct from moneys due or to become due 'under the contract'. The money in question here was not payable under the contract, in the sense contemplated by that clause, but by way of compliance (albeit contractually required) with the adjudicators' decisions."*

    He then goes on to amplify his reasoning. Mr. Harding submitted that Judge Hicks held that the adjudicator's decision itself created a debt, and that is the cause of action upon which a claimant can claim. In other cases (see eg **Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd** [2000] BLR 207) I have held (without having been referred to **VHE**) that the cause of action is the right or obligation in dispute, i.e. here, the unmet claim for payment on application 19 and the right to a further certficate. That is the right under the contract which has or had not been honoured by the defendant, thereby giving rise to the dispute about a cause of action for, for example, a sum due under the contract. Mr Mort submitted that this was the correct approach.

15. Assuming that Mr Harding is right in his reading of this paragraph of the judgment of Judge Hicks QC (which is also concerned with submissions designed to avoid section 111 of the HGCRA) I adhere to the view that I previously expressed. The Scheme (and, so as far as I am aware, other standard forms of contract) does not confer on an adjudicator a right to adapt, vary or otherwise modify a contract. Under the statutory Scheme an adjudicator has to decide a dispute under the contract (and in other schemes, disputes arising out of or in connection with the contract). It is a decision about to the rights and liabilities of the contract which are questioned. Thus paragraph 20 of the Scheme expressly provides for the review of a certificate that has been issued (sub-para (a)) and for the adjudicator to decide a person "is liable to make a payment *under the contract* ... [emphasis supplied] and, subject to section 111(4) of the

Act, when that payment is due and the final date for payment". His decision does not create or modify a right or liability except, perhaps, in one respect.

16. I agree with Mr Harding that since the Scheme (see paras 20 (b) and 21) provides for the time for compliance with an adjudicator's decision to be set, it or the adjudicator's decision may alter the time within which, for example, a payment might otherwise have had to have been made, where an adjudicator decided that there had been an under-payment or under-certification. The purpose is of this is clear. If an adjudicator were merely to decide that a different certificate should be issued or a different payment should be made the paying party could properly take the view that it would have the contractual period in which to honour the decision. Hence the statutory provisions make it clear that it has not to have that time. Indeed it may have had it already, and more, and that therefore a shorter period of time may be appropriate. Thus the Scheme permits the time within payment is to be made to be altered. Indeed if the decision does not set a time compliance is immediate which in my view shows that the decision does not affect or create a new cause of action. The scheme is an implied term of the contract. As part of the contractual scheme it therefore modifies the ordinary contractual relationship. Only to that extent might one say that there has to be, as it were, in the words of Judge Hicks, compliance with the adjudicator's decision other than in accordance with what would otherwise be the strict terms of the contract. The scheme and the other contractual terms have to be read together.

17. The words "due under the contract" mean what is due on facts and on a proper application of the contractual terms. The adjudicator decides that issue. The decision establishes what is due under the contract. The parties have agreed to accept the decision as binding (section 108(3)of HGCRA and paragraph 23(2) of the Scheme) so, unless otherwise agreed by them or determined by a court or arbitral tribunal, each agrees that, for example, the amount to be paid is and was due, and each must act accordingly and accept any assumptions upon which the decision must have been based. As Chadwick LJ said in paragraph 26 of his judgment in **Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd** [2000] BLR 522 at page 525:

"The adjudicator's decision, although not finally determinative may give rise to an immediate payment obligation. That obligation can be enforced by the courts. But the adjudicator's determination is capable of being reopened in subsequent proceedings. It may be looked upon as a method of providing a summary procedure for the enforcement of payment provisions due under a construction contract". [Emphasis supplied]

If, for example proceedings are necessary to enforce the award the defendant cannot be allowed heard to allege that the decision was incorrect, i.e. that the claimant has not got a right or cause of action as some necessary fact or aspect of the law is missing, and is in effect temporarily estopped by its agreement from doing so. But ultimately the claimant will, if necessary, have to establish its right and cause of action. If the decision was itself a cause of action then it would supplant any cause of action. The decision is not an arbitral award nor can it be equated to one. An action to enforce an adjudicator's decision is an action to enforce the right or liability which has been upheld by the decision.

18. The next point is the real issue: is the claimant entitled to all the money the subject of the adjudicator's decision. All the money that was certified in certificate 20, bar the amount in dispute on liquidated damages, has in fact been paid. Is the claimant entitled to the amount for liquidated damages? That amount now reflects the adjudicator's view about the extension of time that was sought by the claimant so the claimant is bound to accept that conclusion in these proceedings since it was part of the dispute which it referred.

19. The original decision had to be corrected. That was done on 22 March. On 23 March the employer wrote a letter to the contractor saying:

"I write to advise that work was not completed within the extended contract period and I am therefore writing formally to inform you that liquidated and ascertained damages will be deducted from the payment due to you under certificate Number 20 issued on the 23rd March 2001.

"Damages totalling £130,359 apply."

The contract, as I said, was amended. The defendant employer had issued a valid notice under clause 24.1. Clause 24.2.1 reads as follows:

"Provided the Employer has issued a notice under clause 24.1 and provided, before the date when the Final account and Final Statement ... becomes conclusive as to the balance due between the parties by agreement or by the operation of clause 30.5.5 or clause 30.5.8, the Employer has informed the Contractor in writing that he may require the payment of, or may hold withhold or deduct, liquidated and ascertained damages then the Employer may not later than five days before the final date for payment of the debt due under clause 30.6: Either:

1 *require in writing the Contractor to pay to the Employer liquidated and ascertained damages at the rate stated in Appendix 1 (or at such lesser rate as may be specified in writing by the Employer) for the period between the Completion Date and the date of Practical Completion and the Employer may recover the same as the debt; or;*

2 *give a notice pursuant to clause 30.3.4 or clause 30.6.2 to the Contractor that he will deduct from monies due to the Contractor liquidated and ascertained damages at the rate stated in Appendix 1 (or at such lesser rate as may be specified in the notice) for the period between the Completion Date and the date of Practical Completion."*

A number of points arise. First, it is now clear that it is not suggested that cl.24.2.1 does not comply with s.111(1) of the HGCRA or that the notice does not comply with s.111(2). However, do the terms of the letter satisfy cl.24.2.1? It is first submitted that they do not because the letter said that liquidated damages would be deducted and not paid. There is nothing in that point. The letter expresses a clear intention to recover liquidated damages. If money is or will be due then clause 24.2.2 would be appropriate but money is not due then the clause 24.2.1 is appropriate. It really does not matter whether the word "recover" or "deduct" is used since a misapprehension as to the true position in fact or law will not stand in the way of an clear intention. In any event, for all practical purposes, on 16 May 2001 a letter was sent which satisfies the requirements of cl.24.2.1. It starts off boldly:

"Your Client is liable to pay or allow liquidated and ascertained damages in the event of late completion of any section of the Works, pursuant to Clause 24.2 and appendix 1 of the above contract. Although extension of time has been granted, your Client still failed to complete the four sections of the works within the contract period as extended. In the circumstances you client is now liable to pay liquidated damages to the employer in the sum of £130,359.00. (This assessment of your Client's liability, and/or entitlement to extension of time, may of course be the subject of review in arbitration or litigation).

We are instructed that no payment has been made. So far as we are aware your Client has not served a notice of the type described in Section 110 (2) of the Housing Grants, Construction and Regeneration Act 1996, nor has your Client served a withholding notice conforming with Section 111 (2) of the 1996 Act or at all. Further, your Client has made no allowance for this sum in the proceedings brought in the High Court (Claim Number HT 01 00115). So far as we are aware there is no explanation as to why this amount has not been paid.

Our Client's primary case is that it is entitled to deduct liquidated damages from such amount as is otherwise due to your Client under the Contract. In the alternative, but without prejudice to our Client's primary case, if for any reason our Client is not entitled to deduct liquidated damages then proceedings are necessary for the recovery of this sum, either in a future adjudication and/or in arbitration or litigation."

That letter was followed by the counterclaim in these proceedings, which was served with the defence at the end of May 2001. So that even if the letter of 23 March is not a notice for the purposes of point 1 or 2 of cl.24.2.1, the letter of 16 May satisfies the requirements of 24.2.1.

20. Was the letter of 23 March given within the five days mentioned in clause 24.2? The adjudicator's decision was issued on 21 March, but it was corrected on 22 March. The time for payment for the purposes of the contract and clause 24.2 would have expired on 29 March. It seems to me that I cannot say that the defendant does not have realistic prospects of success in maintaining that an effective notice was given within the five days prescribed by the opening words of cl.24.2.1 sufficient to enable it to rely upon its letter to resist payment of the amounts due under the decision. Clause 24.2 (and section 111) are drafted on the basis that the person who wishes to withhold money will know of the likely date of

payment and can act. There is no such certainty in the case of an adjudicator's decision since until it issued the time for compliance will not be known. It is of course possible for a pre-emptive notice to be given (and to have been given).

21. In my view the defendant has realistic prospects of success in maintaining that it gave an effective notice, particularly having regard to the fact that underlying all this was the fact that all along it had made it very clear that it wanted to recover liquidated damages. It had served its notices under cl.24.1, and as required by cl.24.2.1 and, in my view, it would be manifestly unjust also to deprive the defendant of an opportunity of maintaining that it was not obliged to pay the full amount of the adjudicator's decision.

22. However, even if I am wrong on this part, and even if the letter of 23 March 2001 did not satisfy the requirements of cl.24.2.1 so that the adjudicator's decision became payable in full, nevertheless the letter of the 16 May 2001 satisfies the requirements of cl.24.2.1.1 so that the counterclaim is a viable counterclaim. No defence to it has been shown and there is in any event, given the adjudicator's view on the extension of time there is in these proceedings no realistic prospect available to the claimant for resisting payment on that counterclaim so that, in practical terms, subject to questions of costs, the result will be the same. The defendant is plainly entitled to summary judgment dismissing the claim so that it can safely keep the liquidated damages. Even if the claimant were entitled to judgment, the defendant would undoubtedly be entitled to a stay of execution or it would be entitled to set off the amount due on the counterclaim against the debt due on the claim so that, in practical terms, the claimant will not get the money that it is seeking.

23. I now deal with the question of the stay of the counterclaim sought by the claimant. As I have indicated, the defendant advanced the counterclaim on 31 May 2001. It sought summary judgment at the same time. The claimant has also sought summary judgment on its application, and at the same time sought to have the counterclaim struck out. I assume, against the defendant's case, that there was an arbitration agreement. It is not necessary to make a finding at this stage. It is said that there has been a step in the proceedings for the purpose of s 9(3) of the Arbitration Act 1996 sufficient to preclude the claimant from maintaining that the dispute on the counterclaim should be referred to arbitration.

24. In my judgment, there has been a step by the claimant. The actions taken by the claimant to invoke the assistance of the court to enforce the adjudicator's decision which was intimately connected with the subject matter of the counterclaim and to have the counterclaim struck out were not taken without prejudice nor in the latter case, at the same time as an application under s.9, which has followed later. On the established authorities, particularly the case of **Turner & Goudy v. McConnell** (1985) 30 B.L.R.108, referred to by Mr. Mort at the end of his submissions, if filing an affidavit in reply to an application for summary judgment is a step then, a fortiori, the application to invoke the assistance of the court to dispose of a claim or counterclaim must be a step. It is inconsistent with the right to have a dispute arbitrated and must be regarded as a step in the proceedings. The application for a stay will be dismissed.

25. Therefore, for the reasons that I have given, the claimant's application for summary judgment on its claim is dismissed as the defendant has realistic prospects of success. The defendant's application for summary judgment on the counterclaim is allowed and, as I said, the application for a stay, if it does not now fall by the wayside, is dismissed.

Mr. MORT: My Lord, I am grateful. I would hope that the effect of your Lordship's decision is to bring the entire proceedings to an end, but that must depend -- if we succeeded on ----

JUDGE LLOYD: Well, not really, because all I have said is the claimant is not entitled to summary judgment on the claim. Then technically that claim still succeeds, does it not?

Mr. MORT: Yes. Your Lordship gave judgment on the counterclaim.

JUDGE LLOYD: Yes. The effect of it, in practical terms, is that there is nothing further to deal with.

Mr. HARDING: Yes, that is right.

JUDGE LLOYD: And it might be said to be an abuse of the process of the court if the claimant were, for example, to build on the existing proceedings to claim something more, but that is for another day. But are you asking me to dismiss the claim as well?

Mr. MORT: It would be an advantage if my learned friend could clarify what the claimant's position is, and then all the proceedings could be dealt with today if possible. Maybe he will need to take instructions, but ----

JUDGE LLOYD: Amongst all the things that have been done, I do not think -- have you at the moment actually asked for a dismissal of the action by way of a summary judgment?

Mr. MORT: No, my Lord.

JUDGE LLOYD: A defendant's summary judgment application?

Mr. MORT: No, we have not applied to strike out the claim.

JUDGE LLOYD: No, you have just asked for summary judgment, but it comes to the same thing, yes. So technically it is dead. I would, if necessary, apply a stay on the claim.

Mr. MORT: Obviously, my Lord, what we would hope to achieve today would be to ----

JUDGE LLOYD: But let us just get the orders quite straight, shall we, because really all I think we are dealing now with is costs, because I made the previous orders last time, did I not?

Mr. HARDING: There was an order to set aside the judgment only last time.

JUDGE LLOYD: Yes, the default judgment on the counterclaim is set aside - that was last time - and this time we are going to say claimant's application for summary judgment on claim dismissed, defendant's application for summary judgment on counterclaim allowed; judgment for defendant for £130,359, but that is all it is because you are holding onto the money, so really we do not go any further, do we?

Mr. MORT: No, that is right.

JUDGE LLOYD: And there is no interest or anything like that; it is just a formal judgment to ensure that you have now got an order of the court entitling you to resist payment.

Mr. MORT: Yes, my Lord.

JUDGE LLOYD: 4. Claimant's application for stay of counterclaim dismissed. 5. Costs. Now at last we come to costs. Now, so far as the judgment is concerned, I say that it was regular, so the cost implications of the application for the judgment have to be borne by the claimant.

Mr. HARDING: Sorry, but before we go on to costs, is the judgment for £130,000?

JUDGE LLOYD: I have just written it down. I mean, it may be wrong.

Mr. HARDING: That is the correct sum, but that is already the sum that is withheld.

JUDGE LLOYD: Yes, but I can say stayed.

Mr. HARDING: Yes, it is just that we are not happy to write a cheque for £130,000 if they already have it.

JUDGE LLOYD: No. Stay of -- do I need to say judgment actually?

Mr. HARDING: I would ask your Lordship not to, but to make ----

JUDGE LLOYD: I mean, having withheld the money, you have got it.

Mr. MORT: My Lord, what I was going to propose, or what I thought we were going to do, was to say something like which judgment is satisfied by -- is satisfied by the defence of the claim.

JUDGE LLOYD: Yes, that is a good idea - judgment saying but not to be enforced as already satisfied by defendant not paying balance of adjudicator's -- I will say balance of certificate 20. Correct?

Mr. MORT: Yes, my Lord. I think for it to be effective there needs to be some link between the judgment and the claim.

JUDGE LLOYD: All right, whatever you like, but I must say is not to be enforced and as to why; I think I must record why.

Mr. MORT: Quite so, my Lord.

JUDGE LLOYD: As already satisfied by the defendant having, let us say, deducted the amount from the sum due pursuant to adjudicator's decision and/or certificate 20; how about that, or does that not find favour?

Mr. MORT: Once your Lordship comes to that conclusion I am not sure your Lordship can avoid dismissing the proceedings.

JUDGE LLOYD: Well, naturally. But step by step; is that all right, the form of words?

Mr. MORT: Yes, my Lord.

JUDGE LLOYD: Right. I think all I am going to do is to say claim and counterclaim stayed, and that is it? Right?

Mr. MORT: Yes.

JUDGE LLOYD: Because they are all practical terms, and I will now deal with the costs of the action, because it is not the purpose of dealing with the costs of the application, we will deal with the action.

Mr. MORT: Yes, my Lord.

JUDGE LLOYD: Will we not?

Mr. MORT: I would ask you to do so, certainly.

JUDGE LLOYD: So first of all I must deal with the application to set aside the judgment. Did I deal with that last time?

Mr. MORT: You reserved the issue of costs.

JUDGE LLOYD: Right, so I had better deal with that now, because that is something quite independent of the cost of the action.

Mr. MORT: Yes.

JUDGE LLOYD: Costs of application to set aside default judgment to be defendant's in any event. That is right -- no, claimant's.

Mr. MORT: Defendant's, my Lord.

JUDGE LLOYD: Defendant's, that is right. Now, are they to be assessed and, if so, can I do so?

Mr. HARDING: My Lord, we did prepare a costs schedule. What I have now got though is a communicative costs schedule, and I am not sure that I -- we did file a costs schedule.

JUDGE LLOYD: Yes, I am sure you did. I was only asking do I first assess them, and if the answer is "Yes" then we dig out the costs schedule, and if the answer is "No" then I breathe a sigh of relief and we do not assess them.

Mr. MORT: My Lord, we would be content, subject to -- perhaps before coming on to assessment issues, your Lordship could decide the other costs issues, and then we can decide what would be the most convenient way to proceed.

JUDGE LLOYD: Certainly, right. So, fundamentally, I think one would probably be thinking in terms of the claimant to pay the defendant's costs of the action and applications - all other applications.

Mr. MORT: Yes, my Lord. Can I also add to that application that my solicitors, and we cannot immediately find the correspondence -- the proceedings arose initially at a time when the defendants still owed the claimants some money quite apart from liquidated damages. It happened that the balance was paid either the day before or the same day the proceedings were issued, where the claimant did have notice that a further payment ----

JUDGE LLOYD: The proceedings actually included that amount, did they?

Mr. MORT: Yes, my Lord.

JUDGE LLOYD: So it may be that the proceedings themselves were justified?

Mr. MORT: Well, the claimant's solicitors ----

JUDGE LLOYD: Yes, I see, £211.

Mr. MORT: Exactly. I think there was some issue about VAT, but the claimant was told that the payment was being made the next day, and proceedings were then issued on the day the payment was made, because of that my solicitors wrote to the claimant saying, "We will pay the issue fee, but let's drop hands now that that approach has been made", and I believe that a subsequent offer was made to drop hands.

JUDGE LLOYD: To drop?

Mr. MORT: To drop hands - that there be no order as to costs and the parties abandon the claim and counterclaim.

JUDGE LLOYD: At that stage?

Mr. MORT: After the proceedings had started, yes, my Lord.

JUDGE LLOYD: But if both parties dropped then that was the end of it?

Mr. MORT: Yes, my Lord.

JUDGE LLOYD: But they did not?

Mr. MORT: The claimant continued with its application.

JUDGE LLOYD: So, subject to this minor adjustment in respect of the issue fee or something like that, you are seeking the costs of the action and all the applications?

Mr. MORT: Yes, my Lord, but I ----

JUDGE LLOYD: I only want to know where you are.

Mr. MORT: But that was the offer that we made, and I would ask that we have all our costs on the basis that the proceedings were issued at a stage when the claimant did actually know that the additional payment was being made.

JUDGE LLOYD: Yes, but subject to argument on adjustment in respect of the issue fee, that is what you are asking?

Mr. MORT: Yes, my Lord.

Mr. HARDING: My Lord, I do not know the facts of what happened around the issue and issue fee, but it is conceded it is a small amount.

JUDGE LLOYD: It is a drop in the ocean.

Mr. HARDING: There is very little, if that, on whether we should be paying their costs ----

JUDGE LLOYD: I think they should be paying the costs. All right. Claimant to pay the defendant's costs of action and/or applications. Right, now that is what you need to know.

Mr. MORT: In those circumstances, my Lord, I propose that all the costs be dealt with together, with detailed assessment if necessary, subject to, I suggest, an interim payment on account of, say, £5,000.

JUDGE LLOYD: Costs subject to detailed assessment, but with an interim payment on account.

Mr. MORT: Yes, my Lord.

JUDGE LLOYD: On?

Mr. HARDING: On the quantum ----

Mr. MORT: £5,000 ----

JUDGE LLOYD: Right.

Mr. HARDING: I would want to observe that we had wanted both these applications to be dealt with together so, in so far as there have been additional costs incurred in having to come back twice, we would say that we should not have to bear them.

JUDGE LLOYD: That would be a matter for the subject of argument on detailed assessment, I think ----

Mr. HARDING: What I would ask is ----

JUDGE LLOYD: ---- if I do that, because all I do is say in principle this is what you are paying, and if the costs were or not reasonably incurred then that is a matter for a costs judge.

Mr. HARDING: What I was asking is for guidance for the costs judge from the judge who has heard the matter, so a note from your Lordship to that effect.

JUDGE LLOYD: So what are you saying should have happened?

Mr. HARDING: That these two hearings that we have had could have been dealt with ----

JUDGE LLOYD: You do recall that I tried to compress it into one last time. It is true that we were not able to succeed. But I started off last time by saying, "Do we really need to come back next time?"

Mr. HARDING: And Mr. Mort said there was further evidence that he wanted to put in, and the parties had not prepared on the basis of dealing with a summary judgment application.

JUDGE LLOYD: Yes, we all settled that, and in the end the further evidence added not a ha'p'orth to it, and all that happened is that effectively we have taken longer than we all thought that it would take, because all the time was taken up with the default judgment. If it had not been for the default judgment we would have finished on the previous afternoon, because I was not going to take any point by the fact that the -- I mean, we would just have got on with it.

Mr. MORT: My Lord, I remind your Lordship that my principal objection was that we had not had an opportunity to put in a reply to the application, and we had not made our own application for summary judgment.

JUDGE LLOYD: I know what your objection was, but I thought myself that this was something we could have knocked off in an afternoon, but things got in the way.

Mr. HARDING: My Lord, had everyone prepared for the applications in one go then, yes ----

JUDGE LLOYD: Yes, I follow. It may be because you were not prepared for it that we were not able to knock it off, but what are you asking me to do?

Mr. HARDING: To note that there should have been one application and not to -- and so that costs were incurred as a result of having to come back a second time, which should be disallowed.

JUDGE LLOYD: I am not certain that the costs of coming back a second time should be disallowed because we would not have finished the first time, on any view -- well, I do not think we would have finished, or only with a fair wind would we have finished. If, for example, we had not had the last hearing would we have dealt with it all today? Suppose we had adjourned the last hearing without doing anything?

Mr. HARDING: As with most things, we dealt with it in the time allotted, if that is the time that you have.

JUDGE LLOYD: Absolutely, and that is why Parkinson's law applied with the prospect of coming back again on the 27th, and we used up the 27th.

Mr. HARDING: And had our suggestion been taken up we would have been lucky to have ----

JUDGE LLOYD: I think I am going to leave this for you to argue out in front of a costs judge, and this decision does not prejudice you making that argument before a costs judge. He will be fresh, and you may get a better deal out of him than you would out of me, because I think you would not be getting a direction of that kind from me.

So what about the £5,000 on account? It does not sound too bad.

Mr. HARDING: It does not sound excessive.

JUDGE LLOYD: It sounds really quite good, considering.

Mr. HARDING: So we will take that.

JUDGE LLOYD: I think so. So costs to be subject to detailed assessment, but claimant to make interim payment of £5,000 to defendant by 4 p.m. on the 10th August. I think it is a Friday - yes, 14 days - I am just going to give you a date rather than 14 days.

Have we got everything done?

Mr. MORT: Yes, my Lord.

Mr. HARDING: That is it. Thank you very much for sitting so late.

JUDGE LLOYD: Thank you very much, and thank you again for your arguments; very interesting. It is the cases where you least expect it that produce the interesting arguments.

Mr. RICHARD HARDING (instructed by Messrs. Hugh James Ford Simey, Cardiff) appeared on behalf of the Claimant.
Mr. JUSTIN MORT (instructed by Messrs. Morgan Cole, Swansea) appeared on behalf of the Defendant.