Jerome Engineering v Lloyd Morris [2001] Adj.L.R. 11/123

JUDGMENT : **His Honour Judge Cockcroft**: 23rd November 2001. Combined Court Centre Leeds. TCC.

1. On the 9th July this year, in this same case, I was faced with an application for summary Judgment on behalf of the claimants and in the course of the argument which followed it was necessary to deal, in giving judgment at that stage, with many of the factual issues and the legal issues which have been raised once more today. In the circumstances, it should come as no surprise to anyone if I adopt the factual background as I described it in the course of dismissing that application which had lead on to a trial today.

2. In June 1999 the claimants were subcontracted by the defendants to carry out work which consisted of mechanical and electrical installation at three school sites, collectively described as the Wrexharn Schools Project. It is not disputed between the parties that this construction contract incorporated the standard DOM2 Without Design Conditions of Contract and that at Clause 38A in those Standard Conditions was provision for an adjudication procedure.

3. Between September 2000 and February 2001 various disputes arose concerning variations and valuations of the claimants' work., as a result of which, on the parties being unable to resolve those disputes, on the 8th March of this year the claimants served on the defendants a Notice of Intention to Refer to Adjudication. They followed this by a formal referral to the adjudicator, a Mr. Maxwell McCoy, on the 15th March and on the 29th April the adjudicator made his decision, having had the benefit by then of an exchange of written documents, a response to the referral, a reply to the response and so on, to which I may make reference during the course of this judgment The adjudicator concluded that although it was not his responsibility to place a final valuation upon the applicants' work, an interim payment of £70,000 should be made under the contract by the defendants to the claimants and that the defendants should be entirely responsible for the payment of his (the adjudicator's) fees of which £5,000?odd remained outstanding. The final date for payment having expired, the claimants seek by the present proceedings to enforce the adjudicator's interim award. The defendants filed a Part 20 Counter Claim seeking a declaration that the adjudicator's decision is unenforceable being out with his jurisdiction and that pleading has been accepted as the defendants' defence.

4. I understand today that the matter has been referred back for further and final arbitration which clearly will take some time. If Mr McCoy's decision is enforceable, then it is only right and proper that the claimants should have the use of the £70,000 which he ordered by way of an interim payment, pending that final resolution. If, on the other hand, his decision is unenforceable, then the claimants will have to remain out of any of the money which they are owed until a final decision is made.

5. The claimants' case is apparent from various documents and from oral evidence and argument. I have read an affidavit from Mr. Husband. I have seen a skeleton argument and a supplemental skeleton argument from Mr. Holroyd, on the claimants' behalf, & I have also had the benefit of hearing Mr. Smith, the claimants.' managing director, and Mr. Clymer, the quantity surveyor whose documents feature in this trial, and Mr. Holroyd has added to his skeleton argument by further oral submissions. He starts by emphasising that this was not a construction contract governed by the Scheme for Construction Contract Regulations of 1998. Had it been governed by the Scherne, the Notice of Intention to Refer to Adjudication would have been fatally flawed because it did not, in terms, express the relief which was sought. However, that is by way of parenthesis because, as I have already stated, the starting point here to the clairnants' argument is the common ground which is that this is a case which is governed by DOM2 Without Design Conditions, so that Clause 38A is in point and 38A4.1, which is to be found at Page 96 in the trial bundle, provides as follows:

6. *"When, pursuant to Article 3, a party requires a dispute or difference to be referred to adjudication, then that party shall give notice to the other party of his intention to refer the dispute or difference, briefly identified in the Notice to Adjudication. Within 7 days from the date of such Notice or the execution of the JCT Adjudication Agreement by the adjudicator at later, the party giving the Notice of Intention shall refer the dispute or difference to the adjudicator for his decision (the referral) and shall include with that referral particulars of the dispute or difference together with a summary of the contentions on which he relies, a statement of the relief or remedy which is sought and any material he wishes the adjudicator to consider."*

7. It is then necessary to go to the Notice of Intention to Refer in the form of a letter from Mr. Clymer, directed to the defendants and dated the 8th March of this year. It is to be found in the bundle at various places but I have marked and will use Pages 64 and 65 for these purposes. Mr. Clymer wrote to the defendants as follows:

"In connection with the Wrexham Schools Projects. We are appointed by Jerome Engineering Limited in this matter and we write to formally notify you that the following matters will be referred to adjudication in accordance with Section 108.2.A. of the Housing Grants Construction and Regeneration Act 1996:

(1) That you have failed to properly make interim valuation and payment in accordance with Clause 21.1. of the subcontract

(2) That you have failed to properly value variations in accordance with Clauses 16.3 and 16.4 of the subcontract and have failed to include amounts properly valued in interim valuations, as required by Clause 21.4.1 of the subcontract.

(3) That by your dependence upon payment of valuations by a third party and upon the valuations and payment of variations by that same third party, you are in breach of Section 1.1.3.1 of the Housing Grants Construction and Regeneration Act. We refer you to the Preliminaries and General Conditions Document of the main contract documents and specifically Page 9, Item A.20. The main contract is identified as the standard form with Contractors Design 1981 with amendments 1 to 11 and TC 94 WC1. We note that Amendment 12 is not incorporated and therefore these documents having effect as determined by a reference to Clause 5.1 of the subcontract, we rely upon the Housing Grants Construction and Regeneration Act to institute adjudication proceedings. We are proceeding to apply to the Academy of Construction Adjudicators for nomination of an adjudicator."

and so on

8. Within the 7 days provided, there then came a formal referral, in fact it was dated the 12th March 2001, and it begins on the trial bundle at Page 67, running on to 81. There is no doubt at all that that document particularises the relief which is sought by the adjudication, see for example at Page 72 in the bundle, Paragraph 3.3: "The claimant seeks a peremptory decision in respect of any award. 3.4. The amount due is as follows:" and there is then a breakdown as between the various schools with allowance for retention and contra charges against gross figures, yielding a nett underpayment of £122,604. Then, later on in the Referral, Page 80, Paragraph 5, again the matter is spelt out: "The claimant seeks proper valuation of the variations and payment under the subcontract as set out in the documents and the release of retention monies," and the figure of £122,604 is again mentioned, together with interest, just under £130,000, and that was the amount of the award that was then sought.

9. Against that background of documents, Mr. Holroyd's argument is that Clause 38A 4.1 entirely complies with the relevant provisions of Section 108 of that Housing Grants Construction and Regeneration Act and that both the Clause and the Section 108.2 clearly provide for a two stage process of referral, comprising a first stage of giving Notice of Intention to Refer (that is the letter of the 8th March 2001) within which the subject matter is to be briefly set out and within 7 days of that Notice of Intention, the Referral should follow, which is to include (among other things) a statement of the relief or remedy which is sought, and the Referral which followed within the time limit provided did indeed contain a statement of the relief or remedy which is sought. Mr. Holroyd submits and he is entitled to emphasise it that Clause 38.A makes no provision for any statement of relief within the letter comprising Notice of Intention to Refer. If it had been intended that the Notice of Intention to Refer within that Notice relief had to be spelt out, it would have been an easy matter for Clause 38A to say so. It does not, and the point is all the more sharply thrown into relief by the requirement that such a statement is to be included within the Referral Document. So, each of the above documents was fully compliant says Mr Holroyd, with the Clause and with the Act.

10. The main purpose of the adjudication, perfectly well known to the defendants, was to obtain an interim payment and that this was, if not in express terms, then by irresistible inference apparent from the letter giving Notice of Intention to Refer and that in any event the Referral, which I emphasise

again is the only document in which Clause 38 A.4.1 stipulates that relief shall be specifically requested, made it abundantly obvious that the claimants sought an interim award. Therefore, goes the argument, in making such an award, Mr. McCoy the adjudicator was acting within his jurisdiction so that his decision, whether right or wrong, is binding upon the defendants.

11. Against. that, let me summarise the argument which has been put on behalf of the defendants. First of all, as Mr. Singer points out, it is fully pleaded in the Part 20 Counter Claim or Defence. I have read also an affidavit from Mr. Morris and I have the benefit of Mr. Singer's skeleton arguments and his oral submissions. He argues that the crucial. document determining the adjudicator's adjudication is the Notice or Intention to Refer (the letter, in other words) of the 8" March this year, which in three paragraphs sets out the terms of reference, without any request for an interim payment or award and that insofar as the letter is thereby defective, such defect cannot be cured by the formal referral, nor can the dispute for the adjudicator's resolution be enlarged or cut down by any document which follows the Notice of Intention to refer.

12. In support of these propositions, reliance is placed upon the judgment of his Honour Judge Humphrey Lloyd, QC in **KNS Industrial Services (Birmingham) Limited v. Sindall Limited** which is dated the 17th July of this year, of which I have a transcript. On the facts, that case appears to be substantially different, although it is right to say that it addresses the extent of the adjudicator's jurisdiction in a 38A case. There the Notice of Intention to Refer was a very full document, carefully drafted by solicitors, specifically requesting the adjudicator to make certain awards and the main issue was whether or not the adjudicator had jurisdiction to reduce an award that he had initially decided was due to an unpaid or underpaid subcontractor. However, in the course of determining those issues, which do not arise in the present case, the learned judge made observations which are of general application.

13. First of all, before making any ruling of his own, he drew attention in his judgment to the case of **Fastrack Contractors Limited v. Morrison Construction Limited**, which is to be found now reported in 2000 Building Law Report at Page 168, and at Page 176, in his Judgment, his Honour Judge Thornton said as follows:

14. *"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, 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."*

15. His Honour Judge Humphrey Lloyd went on to deal with the matters before him and the relevant passage is in Paragraph 21 of his Judgment it is Page 11 of the 14 page transcript and it is about 5 lines down from the bottom of the page, within Paragraph 21, the learned judge said this:
"A party to a dispute who identifies the dispute in simple or general terms has to accept that any ground that exists which might justify the action complained of, is comprehended within the dispute for which adjudication is sought. It takes the risk that its bluff may be called in an unexpected manner. The further documents which come into existence following the Notice of Adjudication, such as the Referral, which is defined in Clause 38A, do not cut down or indeed enlarge the dispute unless they contain an agreement so to do. The adjudicator is appointed to decide the dispute which is the subject of the Notice and that Notice determines his jurisdiction. The adjudicator's jurisdiction does not therefore derive from the further documents."

16. Again, my attention was drawn to the dicta from the same learned judge in the case of **F W. Cook Limited v. Schimizu UK Limited**, of which I also have a transcript, dated 4th February of last year. In that case the learned judge determined a similar issue whether an adjudicator had exceeded his

jurisdiction upon interpretation of the Notice of Intention to Refer under the TECSA Rules. As to interpretation of the relevant documents, at Paragraph 3, Page 206, he said this (I am citing simply the last few lines of the first paragraph under Paragraph 3):

"It is not right to read letters of this kind minutely, to pore over individual words, to milk a particular noun or verb and to try and give it a legalistic effect One must put one self in the position of the parties at the time and adopt so far as one can, a common sense approach."

17. Against that background, Mr. Singer submits as follows: first of all, that the Notice of Intention to Refer does not specify the relief which is expressly sought. This of course will be an issue of interpretation. Secondly, he submits that if he is right on one, then no further document can make good that shortcoming and he prays in aid the authority which, whilst not binding is obviously persuasive, of **KNS** (if I can so refer to it hereafter.) He has a third line of argument is if he is wrong on one and two and the arbitrator was properly seized of jurisdiction to make an interim award, then, says Mr. Singer, he did not exercise that jurisdiction in accordance with Clause 21.3.1 of the DOM 2 Conditions and, since compliance with those provisions is a term of a contract between these parties, then breach of it renders the award unenforceable. He submits that, unlike the Court, Mr. McCoy as adjudicator did not have a wider discretion governed only by Civil Procedure Rules, his authority was constrained by the terms of the contract.

18. Dealing with those arguments one by one, Mr Holroyd submits as follows: first of all, the Letter of Intent, properly interpreted, does specify the relief which is sought and he avails himself of the passages from which I have already referred in **Fastrack** from his Honour Judge Thornton and from **Schimizu** from his Honour Judge Humphrey Lloyd. This is, as I have indicated, a question of construction and he submits that giving the Letter of Intent its ordinary and natural meaning in the context in which it was sent, namely by reference to the background from which it sprung, well known to both parties, I should conclude that the Letter of Intent specifies the nature of the relief which is sought. Alternatively, Mr, Holroyd argues, if that letter does not itself spell out the relief which is sought, then I am entitled to have resort to the referral document. He does not submit, nor does he need to, that His Honour Judge Humphrey Lloyd was wrong in KNS, he submits that a distinction is to be drawn between the words 'dispute' and 'relief, so that the referral document in no way enlarges or cuts down or changes the dispute, nor could it conceivably do so, in spelling out the relief which is sought, and so he distinguishes KNS on that basis.

19. As for the third of Mr Singer's submissions, Mr. Holroyd concedes that, no doubt with the very best of intentions, Mr McCoy did not, in terms, follow the exercise for the evaluation of an interim award in accordance with Clause 21. But, he says, the adjudicator asked himself the right question, in other words, "Are the claimants entitled to an interim payment and, if so, how much should it be?" So that if he addressed the right answer and he was properly seized of jurisdiction, it is immaterial that lie gave the wrong answer or, by implication, adopted the incorrect route to reach such an answer and here Mr. Holroyd prays in aid the authorities of **Bouyges (UK) Limiled v. Dahl Jensen (UK) Limited** to be found in The Times for the 17th August of last year and **Macob Civil Engineering Limited v. Morrison Construction Limited** to be found in 1999 Building Law Reports at Page 93. It without referring further to those cases, common ground that if the adjudicator, properly seized of the matter, addressed the correct questions, then the defendants cannot prevent his award being enforced by protesting that he reached the wrong answer.

20. Against that background, what are my own findings and conclusions? The Notice of Intention to Refer does not expressly specify the relief which is sought but it is appropriate, in my judgment, given the wording of that letter, to have regard to the background from which the letter springs and which was known to both parties at the material time. I have referred to it in brief outline form already, the dispute arose I think at first in September of the year 2000 and ever since then, to an extent which yet has to be definitively resolved, the defendants have kept the claimants out of money which is due and owing to them and when they were faced with interim claims they did not issue any notices withholding payment and so it automatically follows that when this letter was sent and received both

parties perfectly well knew that the claimants were owed a sum of money which had not been paid but which had been withheld.

21. As if to spell it out further, Paragraph 1 in the Letter of Intent particularises
"That you have failed to properly make interim valuation and payment in accordance with Clause 21.1 of the subcontract."

22. Neither the defendants nor any officious bystander if it is appropriate to introduce that test and it may not be, but I make reference to it neither the defendants nor any such third person could conceivably have come to any other conclusion than that the claimants were referring to adjudication because they wanted payment of that which, at least on an interim basis, was due to them. And so I interpret the Notice of Intention to Refer accordingly, in other words, I find with Mr. Holroyd on his first. submission that for the purposes of the contract the letter giving Notice of Intention to Refer, whilst not expressly setting out the relief sought, must be interpreted as being a Notice of Intention to Refer to adjudication for the purposes of recovering money, an interim award.

23. But it does not stop there because, even if I were wrong about that, I would find for Mr. Holroyd on his second submission. If there was no attempt to specify relief expressly or by implication in the Notice in other words, if I am wrong on the conclusions I have already reached but the relief was fully spelt out in the Referral, then both the Notice of Intent and the Referral were in full compliance with Clause 38.A of DOM 2 and the Referral does not constitute an attempt to cut down or enlarge or alter in any way at all the adjudicator's terms of reference as to the dispute. The distinction which Mr. Holroyd draws between 'dispute' and 'relief is not, in my judgment, a specious one but goes to the very heart of this case. Given that that is my conclusion, it is unnecessary to consider **KNS** further, although in dealing with the application for summary judgment I did make some remarks about **KNS** to the effect that I did find it difficult to understand why, in a situation where claimants have fully complied with the standard clause which undoubtedly applies here, namely Clause 38.A in the Letter of Intent and in the Referral, how could it be and why should it be that the claimants were precluded from making any reference to the only document which Clause 38A provides should contain a statement of the relief or remedy which is sought? I think. the answer is to be found in that crucial distinction between 'dispute' and 'relief.

24. But, of course, Mr Holroyd is not yet out of the wood because there remains Mr. Singer's third submission. Clause 21, to be found at Page 106 and 107 in the trial bundle, does indeed set out at 21.3 on Page 106, an exercise which the adjudicator is required to follow in evaluating an interim award and it is common ground that he did not follow it on this occasion. His adjudication is to be found towards the beginning not follow it on this occasion. His adjudication is to be found towards the beginning of the bundle, it begins at Page 7 and goes on to Page 12.

25. In that decision the adjudicator Mr. McCoy correctly acknowledges that he is in no position to make a final award and was not invited to do so. He said, at sub paragraph 4 of his decision, Page 11:
"It is not my responsibility to value the applicant's work, the exact valuation of the works is not within the remit of this adjudication"

26. The exact final valuation of the works, by that I take it he meant.
"It is a matter between the respective parties to value and agree the application for payments by responsible professionals, if considered necessary. Pending full, final and proper valuation of the works by any of the instruments remaining available to the parties,"

he said,
"I find that an interim payment of £70,000 should be made under the contract by the respondent to the applicant until such time as final valuation is agreed. I do not find that interest should be added to this figure, such interest will become payable upon the final resolution."

27. And, as to costs, l found that the respondents should be responsible for his fees in their entirety.

28. Does the fact that he failed to follow the exercise set out in Clause 21, render his interim award unenforceable? In my judgment, it does not. We are driven back to the case[s] of **Bouygues (UK) Limited** *[sic v. Dahl Jensen and]* **Macob** ***[sic Civil Engineering Limited v. Morrison Construction***

Limited] (to which I have already made reference) and the starting point must be whether or not, in doing what he did, Mr. Holroyd addressed the right question and I believe Mr. Holroyd is right to say that he did. The question was, should the claimants be entitled to an interim award and, if so, what is the quantum of that award? Clause 21 provided a me by which he was to arrive at the assessment of any interim award and in not following Clause 1, it see to me that the only correct interpretation is that he followed the wrong procedure, whether the answer was wrong, but he addressed the right question and, in those circumstances, the defendants are not entitled to prevent his award from, being enforced. On any view, what he was manifestly endeavouring to do was to arrive at a figure which would be just and would safely cover the barest minimum figure that is due to the claimants from the defendants and to identify that as a figure which, in justice, should be paid out to the claimants so that they have the advantage of that money, pending final resolution, I believe that he entitled to adopt that approach albeit that he did not correctly comply with Clause 21 in the Standard Terms. He should have applied Clause 21 but, in doing so, he was not addressing the wrong question. I am therefore satisfied that the interim award is enforceable and there wil1 be judgment. for the claimants accordingly. As I have already remarked, an arbitration leading to a final award is now, as I understand it about to commence. It will do so with the defendant having paid the claimant £70,000 plus the adjudicator's costs which, since the defendants have kept the claimants out of a significantly larger sum of money since September 2000, is happily consistent with the overriding objective. The arbitrator specifically did not award an interest.

MR. HOLROYD: *My Lord, he did not. The question is, clearly if the award had been honoured in the first place when it was made in April 2001, the claimant would have been in that money then. The question is, should he therefore have interest up until today or should it be dealt with within the contract itself, because it could clearly be mopped up in the contract? If the award today was for £70,000 bare, then the fact that it was paid late could be adjusted within the final contract sum. I cannot argue that is other than the adjudicator proposed should be the way forward. However, the adjudicator cannot have contemplated that it would be in November 2001 before the money was paid. So it would be my submission that certainly since the 29th April, when the award was made, to today there should be interest on that £70,000 and of course that could be taken into account in the final arbitration. The claimant has been kept out of that money, on your own judgment, since this decision was made.*

JUDGE COCKROFT: *Yes. Mr. Singer?*

MR. SINGER: *Well, there are two points: first of all, the adjudicator, whose judgment you have upheld, expressly did not order interest for a very good reason. Awarding interest now is only going to complicate matters in the arbitration.*

JUDGE COCKROFT: *I think it might, I am not going to go down that road. There is no question of the claimants ultimately being worse off, but I think the calculation is better left until the final award is known.*

MR. SINGER: *So the judgment would be for the £75,000 claim.*

JUDGE COCKROFT: *Yes.*

MR. SINGER: *My Lord, there are two other matters that arise: the first is obviously I should seek permission to appeal. In my respectful submission, this is an eminently arguable case for the Court of Appeal. It is an important case, as you said yourself, it has been argued fully before you. You have come to a view as to the construction of a document which is, with respect, eminently arguable and you have come to a view in respect of what the adjudicator actually did which obviously your Lordship has just given the judgment and I am most grateful for it, but I must respectfully submit that your judgment on Part 3 is wrong because the question that the adjudicator should have asked himself was not what your Lordship said, the question was, "Should the claimant be entitled to an interim valuation under Clause 21 and, if so, in what amount?" And the adjudicator simply said, "I am going to make an assessment of an interim*

payment a la CPR. So I must respectfully submit to your Lordship, for the purposes of requesting permission to appeal, that the second part of your judgment is wrong and…..

JUDGE COCKROFT: *Well, you cannot persuade me of that now, Mr. Singer.*

MR. SINGER: *No, of course not, no, my Lord, but, for the purposes of appeal, I would simply wish to persuade you that it is reasonably arguable that you went wrong and I would seek permission to appeal and I would, in any event, seek an extension of the time for putting in a notice of appeal to 28 days, so that I can take full instructions from my client.*

JUDGE COCKROFT: *If the Court of Appeal think otherwise, they will give you leave, but I am not going to give you leave. I believe that this is simply to further the delaying tactics of which the claimants have already been victim. There is to be a full and final award by the arbitrator, assuming his terms of reference are adequate and, pending that full and final award, it is my intention that the claimant should have the barest minimum of monies which they have been kept out of since September 2000 and I am not prepared, myself, to give you any leeway which can cause any further delay in the payment of this money.*

MR. SINGER: *Could I have 28 days to put in a Notice of Appeal?*

JUDGE COCKROFT: *Yes.*

MR. SINGER: *Thank you. My Lord, there is another issue which directly impacts on what you have just been saying because although it appears, it does not appear it is a fact, that unfortunately this document has not reached my learned friend or his instructing solicitors, my instructing solicitor did seek to notify the claimant that they would be arguing for a stay of execution of any judgment, pending the determination of the arbitration, because we do not believe that when the arbitration is determined that Jerome Engineering will be in any position to pay the money back. Now I cannot deal with that today, first of all because it is Part 3 and there is some law in it and, second of all because my learned friend has not seen the document. I have got a statement from a chartered accountant with some financial background and there are also some authorities which are actually, although your Lordship probably has not seen them, they are at the back of my bundle, but of course you will not have seen them because I have not referred you to them. The leading case is called* ***Cadogan*** *and it is a decision of Judge Seymour.*

JUDGE COCKROFT: *Well, if we cannot deal with it today, there is no point in embarking upon it. But I am wondering whether mid-way solution is not to have that money paid into court as a condition of any appeal.*

MR. SINGER: *Well, my Lord, we did in fact make an open offer to pay the money into court, pending the arbitration proceedings being dealt with. Certainly if your Lordship has got into mind the payment into court of the £75,000 plus VAT, pending the outcome of the arbitration, I would not seek to-----*

JUDGE COCKROFT: *But I imagine Mr. Holroyd would.*

MR HOLROYD: *My Lord, I would. There are a number of issues raised there: firstly, there is no evidence before your Lordship today that the claimant could not pay back the money that you have authorised should be paid today. The defendant knew this case was proceeding today and must have been aware that one of the outcomes was your Lordship's judgment, and if it wished to make that application it should have had the documents and the evidence and the case law, not only before your Lordship but before those who instruct me, in proper time that the matters could be properly dealt with today. There is just no evidence before your Lordship for saying that there should be a stay in this case because Jerome may not be able to pay back the money. It that had been a serious contention, in my submission, that evidence would have been before the Court and it could have been argued today.*

JUDGE COCKROFT: *It is certainly inconvenient for all matters not to be resolved today, apart from the fact that further costs and delay are likely to be incurred, I cannot identify a date within the next month when I could hear you.*

MR. HOLROYD: *My Lord, the other point is this, that if money is paid into court, pending arbitration, then that again is effectively staying the adjudication, pending arbitration, which the 1996 Act is against, it says that the adjudication decision should stand, pending final resolution in arbitration. If it were possible for a party to come along and simply say, "Well, we are arbitrating on this matter, therefore let's have a stay," it would defeat the whole object of adjudication and, in my submission, the claimant has been kept out of his money as it is since September 2000 and any attempt today, without evidence and without anything that has been put to those who instruct me, to keep the claimant further out of his money, in my submission, should be resisted. The order should be today, in my submission, your Lordship, that the £70,000 is paid forthwith or within 14 days and the same with the adjudicator's fees. The defendant, in my submission, should have been prepared if he wanted to come along and made these submissions. There if one further point, my Lord, although I accept what your Lordship says about interest, the late payment of the £70,000, the adjudicator's fees in the sum of £5,150 should be the responsibility of the respondent.*

I understand the claimant paid those and, in my submission, he should have interest on the adjudicator's fees. Those fees were some £5,150, it is 6 months since the decision was made, in my submission, a simple calculation would be 4% interest over those 6 months, that is another £206 in interest simply on the adjudicator's fees. It is my submission that there should be no stay of payment of these matters, pending arbitration or an application for appeal, because that would simply frustrate the provisions of the Act still further.

JUDGE COCKROFT: *On the point of interest, Mr. Singer, what do you say?*

MR SINGER: My *Lord; there is no evidence before us of when that £5,000 was paid by the claimant.*

JUDGE COCKROFT: *That can easily be established.*

MR. SINGER: *I am sure it can be, I do not want to make a big issue about £206 in the context of the dispute, I am not going to make too much of a fuss about it if that is the position, the real interest is going to fall on the £70,000 and you have already made a decision on that with which of course we agree. So my position is that it is a matter for your Lordship. You might think it is easier just to leave all questions of interest to the end and this is a discreet matter that can be dealt with discreetly.*

JUDGE COCKROFT: *Yes, I think it can properly be dealt with discreetly from the interim award and all that is necessary is a simple calculation from the date.*

MR. HOLROYD: *It can. I can also say Mr. Smith is here, he could give evidence on this, if necessary. He paid the adjudicator's fees before the award was set, so the fees have been paid, they were paid prior to the April 29th 2001 and, in my submission, interest over a 6-month period from then will take us to the end of October, I am being somewhat generous towards the defendant, and my calculation is £206 at 8% per annum over a 6-month period.*

JUDGE COCKROFT: *Very well. My judgment will carry interest in the amount of £206 on the adjudicator's fee, with interest on the interim award to await the final arbitration. As to stay of execution?*

MR. SINGER: *Well, my Lord, I am ready to deal with the stay of execution today because I have got my evidence and I have got my authorities. The reason we are not doing it is because, unfortunately, the post between Chester and Bradford does not seem to be terribly reliable or the DX, to be more accurate, because although the statement was put in the DX on Monday afternoon by my solicitors, it has not arrived at my learned friend's Instructing solicitors. So I do not want it to be thought that I am not ready to deal with-an application for stay of execution. I was merely recognising the pragmatic reality and the practical reality that my learned friend is not going to be able to deal with it today because he has got no opportunity to put in evidence to the contrary of mine.*

JUDGE COCKROFT: *Well, there is nothing in your skeleton argument which led me to suppose I was going to be dealing with it today.*

MR SINGER: *My Lord, that was deliberate because we did not think it was appropriate to address that issue independent of the trial because it was not necessary.*

JUDGE COCKROFT: *At any rate, you do not have any evidence here, do you?*

MR. SINGER: Well, *I do, yes, I have evidence, I have a witness statement.*

JUDGE COCKROFT: *Have you seen it, Mr. Holroyd?*

MR. HOLROYD: *My Lord, I have not and my point is this, that there was no reason at all why that should not have been delivered a fortnight/three weeks ago. The defendant knew the situation he was going to be in if he lost this case. He could have done this in ample time for both myself and your Lordship to be appraised of this issue and indeed to respond to them.*

MR. SINGER: *My Lord, the position is this, in my respectful submission, I have 28 days to put in a Notice of Appeal and I am grateful for that, I would simply say this, if your Lordship orders payment within those 28 days but gives me permission to lodge an application for a stay of execution within those 28 days, to be heard, hopefully, by your Lordship, but if not by one of your Lordship's colleagues in the Technology and Construction Court, then that is the position. And, if I do not get a stay of execution or a stay pending the hearing of that application, well, then my learned friend can take execution steps. A normal award would not be enforceable until 14 days after normal judgment, so I cannot be barred from making an application for a stay of execution following your Lordship's findings, I do not seek to make it this minute for the reasons I have identified and I do apologise to my learned friend because he did not receive it and of course to your Lordship for any inconvenience, it was not intended. But, my Lord, there will be an application for a stay.*

JUDGE COCKROFT: *Well, you can make that application when you appeal for leave. I am going to refuse you your stay of execution. There will be payment of the judgment sum within 14 days.*

MR. SINGER: *Has your Lordship formally dismissed my application for a stay of execution?*

JUDGE COCKROFT: *I can barely hear you, Mr. Singer, do speak up, please.*

MR. SINGER: *I had not formally put an application for a stay before your Lordship, so your Lordship is not formally dismissing any application, it not having been made. Is your Lordship saying that at this stage you are not prepared to grant any stay and if I have an application I must make it to your Lordship, or is your Lordship actually dismissing an application for stay and saying that I must make that to the Court of Appeal?*

JUDGE COCKROFT: *I am not criticising you personally, Mr. Singer, but news of any such application takes me completely by surprise, as it does Mr. Holroyd. I do not believe there is any reason for either of us being ambushed in this way and I note your application for a stay and I am not going to allow it, so you are off to London.*

MR. SINGER: *Yes, my Lord.*

MR. HOLROYD: *My Lord, there is the question of costs in this case. I do believe a schedule has been placed before the Court. I hope your Lordship has had the opportunity to see it but, if not, my Lord, I can in another copy of it.*

JUDGE COCKROFT: *I have not looked at it yet, but I do have the document.*

MR. HOLROYD: *My Lord, this Schedule of Costs is the whole costs of this claim with the exception of your Lordship's order on the summary judgment application which was that the claimant, having lost the summary judgment application itself, should bear the defendant's cost of that day.*

JUDGE COCKROFT: *In any event.*

MR. HOLROYD: *In any event.*

JUDGE COCKROFT: *Yes.*

MR. HOLROYD: *So the Schedule of Costs here does not include that, the instructions from my instructing solicitor, and I seek the costs in the Schedule.*

JUDGE COCKROFT: *You are requiring me to make a summary assessment of them.*

MR. HOLROYD: *I suspect that is a matter for your Lordship as to whether a Technology and Construction Court does make summary assessment of costs.*

JUDGE COCKROFT: *I have never made one before after a full trial.*

MR. HOLROYD: *I have to say, my Lord, that this, although it has been one day, is not a Fast Track case, it is in the High Court.*

MR HOLROYD: *It is a matter for your Lordship as to, whether these costs should be summarily assessed today or whether the matter should be adjourned for what used to be described as taxation purposes.*

JUDGE COCKROFT: Yes, detailed assessment now. What do you say, Mr. Singer?

MR. SINGER: *My Lord; it is not an interlocutory hearing where you would assess costs, it is a trial, I mean it is not normal to assess costs summarily. I would also wish to point out that the amount of the costs is enormous, £24,000 and included within it, it is said that Mr. Husband has spent 69.1 hours looking at documents in this case. My Lord, it is to be contrasted with my Statement of Costs, which I hope you have got.*

JUDGE COCKROFT: *Yes, but if you are not careful Mr Singer, you will draw me into making a summary assessment.*

MR. SINGER: *My Lord, I simply: want to point out that my costs are £7,619 and what I am trying to point out is it is going to be extremely hard for you to make a summary assessment, not least because the claimant's are, for some unknown reason to us, three-and-a-half times bigger than ours. So I would say that you should simply make the usual order which is that the costs of the claim and counter claim will be assessed in default of agreement.*

JUDGE COCKROFT: *I think that is right. There are obviously questions to be asked which could not be easily answered, I think, today. It would usually be the subject of a detailed assessment. It is a very substantial claim, it may be fully justifiable, but the sort of broad brush approach that may be appropriate on an interlocutory matter cannot, I think, be applied to this. And so I am going to make an order that the claimants' have their costs, the defendants pay the claimant's costs, to be the subject of detailed assessment if not agreed, those costs to exclude, as the Schedule already has done, the costs which I have already ordered the claimants pay the defendants in any event in connection with the application for summary judgment.*

MR. SINGER: *I am very grateful and can I apologise again to your Lordship for any discourtesy that was taken by the way in which the application for a stay was put before your Lordship, it was most certainly not my intention to do that and I also apologise to my learned friend for him not receiving the evidence in time.*

JUDGE COCKROFT: *Well, the word 'ambush' that I used may have been unduly strong, but it is clear we are not in a position to deal with it and I think we should have been put in that position, today is the day for dealing with such matters. So if this needs to be further delayed, then you will have to take it to London.*

For the Claimant: MR HOLROYD
For the Defendant: MR. SINGER