

JUDGMENT : HIS HONOUR JUDGE HAVERY: TCC : 30th August 2000.

1. I have before me an application under Part 24 of the Civil Procedure Rules for summary judgment to enforce the award of an adjudicator made under the provisions of the Housing Grants Construction and Regeneration Act in the sum of approximately £64,000.
2. The circumstances of the matter are a little unusual in that the proceedings under which this application is made are fully pleaded and the claim, although strictly all that is being claimed is the money awarded by the adjudicator, nevertheless sets out the terms of the contract and facts and matters which are obviously controversial because they have been placed in issue in the defence; and there is also a counterclaim.
3. I have heard most able argument from Mr. Daniel Beard as to why I should not award summary judgment in this case. His first point -- and there are three major points that he makes - is that if summary judgment is given in this case there will be an estoppel in view of the matters pleaded. His submission is that all the matters pleaded will thereupon be decided by a judgment in this case and that therefore it would not be possible for his side to raise those issues or, for that matter, either side to raise them in other proceedings.
4. I have come to the conclusion that that is not correct. I must say that my decision in this matter depends very much on that conclusion.
5. Mr. Beard referred me to a case in the House of **Fords, Arnold v Nat. West. Bank Plc** [1991] 2 A.C. 93 at 105 in which Lord Keith of Kinkel said:
"Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue relevant one of the parties seeks to re-open that issue."
6. He quotes from Lord Justice Diplock in **Thoday v Thoday**, who makes a similar point. He refers to issue estoppel and he says this:
"There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfillment of an identical or an identical condition is a requirement common to two or more different causes of action."
7. It seems to me clear from those passages which have been cited to me that the particular issue has to be a necessary ingredient in the cause of action and has to have been litigated and decided. Whether a necessary ingredient or requirement, that is the position.
8. In this case, it was quite unnecessary for the claimants to plead their claim in the way they have, because the basis of their claim, as set out in the prayer, is simply and solely the fact of the adjudicator's award and if I were to give summary judgment in this matter, which I propose to do, I do not think that that would create any issue estoppel in relation to anything except the fact that the award was made.
9. Mr. Beard's second point is rather different. He says that in this case, unlike many, though I do not suppose unlike all cases that come before adjudicators, in order to recover the money which he may be ordered to pay, he will have to take a different kind of proceedings from those which were before the adjudicator. There will have to be proceedings for restitution, he says, which involves a different procedure and structure. There is a defence of change of position, for example; if the monies have been dissipated, there may be problems over tracing and so on.
10. Mr. Beard contends that that really fails to fulfill what was intended by s.108 of sub-section (3) of the Act, which says: *"The contract shall provide ..."* And, of course, in this case, as I understand it, it is the terms of the scheme, but it matters not. *"-- that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings ..."* And so on.
11. What Mr. Beard says is that this dispute that was before the adjudicator will not be finally determined by legal proceedings: it will be a different dispute. I think that is something which may happen not infrequently. I may say it only applies to part of the defendant's case anyway, because there is also a counterclaim for damages which is sought to be set off in the pleadings and, obviously, that claim could be brought, given my decision on the question of estoppel.

12. I have to say that, although I have not heard full argument on this, I should be surprised if any defence of dissipation of the monies was allowed to prevent recovery of monies which the court held had been wrongly ordered to be paid by an adjudicator, so I think that this is not a good argument. and that effect is given to s.108(3) even though the nature of the further proceedings brought by the defendant in these proceedings would be different in some material respects.
13. Mr. Beard's third point relates to the European Convention on Human Rights, Article 6. He has referred me to a case before the European Court of Human Rights, **Donbowbeher BV v. Netherlands**. He has referred me specifically to paras.32 to 33 of that judgment, and in para.33 it refers to the requirement of equality of arms for the purpose of a fair hearing in the sense of a fair balance between the parties.
"Each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-a-vis his opponent."
14. Mr. Beard says that in this case that was not so: the defendants were labouring under difficulties in the adjudication, partly due to the fact that much of the time of the principal person involved with the defendant was spent in hospital, visiting his dying mother, and also due to the late delivery of documents produced by the other side in the adjudication.
15. On the other hand, the fact is that the procedure in this case had to be completed within 35 days. That may be inherently unfair, no doubt it is, but the adjudicator had to comply with that time limit; I do not believe, in fact, he did quite comply with it, but I doubt if the adjudicator can be criticised for not allowing a further extension in the circumstances, given the strict time constraint.
16. The question is whether the European Convention Human Rights Article 6 applies to proceedings before an adjudicator. In the first place, the proceedings before an adjudicator are not in public, whereas the procedure under Article 6 has to be in public. I can see that problems arise over whether one refers to a decision as a final decision or whether one has to consider whether Article 6 applies to a decision that is not a final decision, but it seems to me that if Article 6 does apply to proceedings before an adjudicator it is manifest that a coach and horses is driven through the whole of the Housing Grants Construction & Regeneration Act. Maybe it is, of course, because the Convention is something which though not at the moment binding by way of statute soon will be and the courts have to take account of it.
17. In my judgment, Article 6 of the European Convention on Human Rights does not apply to an adjudicator's award or to proceedings before an adjudicator and that is because, although they are the decision or determination of a question of civil rights, they are not in any sense a final determination. When I say that, I am not talking about first instance or appeals, but merely that the determination is itself provisional in the sense that the matter can be re-opened.
18. In those circumstances, therefore, I think the fact that the procedure before the adjudicator is very much a rough and ready procedure it cannot of itself be regarded as a reason for not ordering summary judgment. I do not think the special circumstances to which I have referred alter that position.
19. In those circumstances, I feel constrained to give summary judgment under Part 24 because it seems to me that so far as enforcing the award of the adjudicator is concerned there is no possible defence. Accordingly, I give summary judgment for the claimant in the sum of £66,936.34 plus interest running from 11th July.

- JUDGE, HAVERY: *You have also asked me for a declaration in relation to the fees of the adjudicator; is that right?*
- MR. PITTS: *Indeed, sir, a declaration and an indemnity provided that the fees have not yet been paid by the defendant.*
- JUDGE, HAVERY: *I assume you can get a declaration on summary judgment. Is there anything you want to say about that, Mr. Beard?*
- MR. BEARD: *My Lord, yes. I am not entirely clear whether or not you can get a declaration on the basis of the application that has been made in these circumstances, but perhaps if Mr. Pitts has grounds for that being the case ---*
- MR. PITTS: *Our point is quite simply, my Lord. Were we not to get an indemnity in these proceedings, one could imagine the occasion arising when we would be back to court, having had to pay the fees of the adjudicator, for which ---*
- JUDGE HAVERY: *Do you know the amount of his fees? Has he presented his bill?*
- MR. PITTS: *He has indeed, sir. It is in the particulars of claim. £1,380.59.*
- JUDGE HAVERY: *And what was the order he made, that the defendant should pay the whole of that?*
- MR. PITTS: *Indeed, my Lord.*
- JUDGE; HAVERY: *Did he specify a date when that had to be paid, or was it just a peremptory order?*
- MR. PITTS: *The order itself I believe was pre-emptory, yes.*
- JUDGE HAVERY: *Your fear is that you are liable for his fees if he does not get them from the defendants; is that right?*
- MR. PITTS: *Indeed.*
- JUDGE HAVERY: *Is that in dispute, that that might be the case, Mr. Beard?*
- MR. BEARD: *I think in principle it cannot be in dispute that there is that possibility, although my understanding is that the jurisdiction of the adjudicator in relation to the award of costs is nil, unless I am much mistaken.*
- MR. PITTS: *My Lord, it is his fee, not the costs.*
- MR. BEARD: *And fees fall outside the costs for these purposes.*
- MR. PITTS: *Fees fall outside the costs.*
- MR. BEARD: *I think I can make no objection.*
- JUDGE HAVERY: *Are you going to ask for indemnity for that sum?*
- MR. PITTS: *My Lord, yes.*
- JUDGE HAVERY: *What do you want to say about that, Mr. Beard? He wants indemnity.*
- MR. BEARD: *In relation to an indemnity, given the strange situation that is created under the HGCRA, although it seems a very strange solution, I cannot for my part see any other way in which these matters could be dealt with. The other alternative would be straightforward orders. It makes no difference as far as I can see, my Lord.*
- MR. PITTS: *My Lord, the only alternative may be if the defendant were to give an undertaking to pay the adjudicator's fees within, say, seven days.*
- MR. BEARD: *Whether it should be within seven days -- there is no effective difference, save that the payment by the defendant of the adjudicator's fees directly may be considered a more satisfactory resolution than passing through the hands of another party in these circumstances.*
- JUDGE HAVERY: *All that is being asked for is an indemnity, so if it is paid direct to the adjudicator that will be that, will it not?*
- MR. BEARD: *My Lord, yes.*
- JUDGE HAVERY: *So the defendants to indemnify the claimants against any liability on the part of the claimants to pay the adjudicator's fees of £1,380.59. Is the amount of interest agreed? We have got the £66,936.34 plus interest? If not, it ought to be agreed between counsel.*

MR. PITTS: *It can be agreed between counsel, my Lord.*

JUDGE HAVERY: *Very well, to be agreed between counsel. I should perhaps just deal with that other point about stay of execution. I am not at all without sympathy to the defendants on this point in view of the possible financial circumstances of the claimants, though I have not heard Mr. Pitts on that circumstance: I have merely seen some figures in the exhibit. adduced by the defendants. But it does seem to me that, again, I would be running a coach and horses through the Act. This is a cash flow matter. It may be that the impecunious claimants are those most in need of the money. So I do not think I ought to -- and I therefore do not -- order a stay of execution. I say stay of execution refused.*

MR. PITTS: *My Lord, as to time for payment and indeed costs*

JUDGE HAVERY: *You cannot resist an order for costs, Mr. Beard.*

MR. BEARD: *My Lord, no, I cannot resist an order for costs in principle. However, I would ask that this matter be referred for detailed assessment. The costs are very substantial on both sides.*

My Lord, you have indicated that a great part of the claim that has been set out was wholly unnecessary and the work that went into that claim arguably should not be awarded to the claimant in these circumstances. I would submit that this is not a matter that can properly be dealt with today but would have to be referred off for detailed assessment in those circumstances.

MR. PITTS: *My Lord, much has been said about the nature of the pleadings as they were presented to you. In my submission, it would have been wholly sterile to have asked this court to give summary judgment based on an adjudicator's decision without at least some background to the dispute. It was for that reason that the pleadings were set out in the way they were.*

My Lord, it is perfectly within this court's jurisdiction and ability to summarily assess the costs that are put forward. In my submission, they are not excessive and they are very similar between the parties and I would invite you to do that.

JUDGE HAVERY: *These are the costs of the action. we are talking about, are they?*

MR. PITTS: *The costs of today.*

JUDGE HAVERY: *Just the costs of today?*

MR. BEARD: *My Lord, that is part of the issue: it is not entirely clear from the schedule to what extent this is simply costs of today. The costs on either side are over £10,000, apparently.*

JUDGE HAVERY: *It does say "costs for the hearing".*

MR. BEARD: *That is right, but that may be a matter on which the defendant would want. to take points, quite frankly, my Lord. The fact that the costs are similar on both sides is not instructive, I would submit, my Lord, given that the defendant was obviously answering what had been put to it and putting its best case in the circumstances on what are extremely complex issues that have been raised by this matter. But in large part those issues should not have been raised and the costs to which the defendant has been put should not have been incurred by the defendant. In those circumstances it would, in my submission, be wholly inappropriate to deal with this lengthy and detailed and large statement of costs by way of a summary order.*

JUDGE HAVERY: *I cannot for the moment lay my hands on the claimant's statement of costs.*

MR. PITTS: *I have a copy here. (Statement handed) My Lord,*

I have just taken instructions of my instructing solicitor. The costs are for this action only.

JUDGE HAVERY: *Do you mean this application?*

MR. PITTS: *This application. (After a pause): My Lord, from the start of the action.*

JUDGE HAVERY: *Costs of the whole action.*

MR. BEARD: *In those circumstances, my Lord, it seems to me wholly inappropriate that the costs order should be made automatically today by way of summary assessment.*

JUDGE HAVERY: *I think that is probably right. What I say is, summary judgment etc. with costs to be the subject of derailed assessment if not agreed.*

MR. PITTS: *My Lord, if that is the case, may I apply for a payment on account?*

JUDGE HAVERY: *How much are you asking for?*

MR. PITTS: *Half, my Lord.*

JUDGE HAVERY: *What do you say about that, Mr. Beard?*

MR. BEARD: *My Lord, I do not understand that a detailed assessment of costs hearing would take long to come on.*

JUDGE HAVERY: *It might be about six months, might it not? I am not quite sure.*

MR. BEARD: *That was not my understanding, my Lord. In any event, as you have indicated, this may be a matter that can be dealt with by agreement once the parties have had a proper opportunity to consider, now knowing, following your judgment, the sort of costs that they may wish to challenge. In those circumstances, it would be inappropriate, in my submission, for an arbitrary payment on account to be made and these matters will be dealt with, no doubt, relatively rapidly.*

JUDGE HAVERY: *I will make an order for a payment on account of £3,000. I normally would say within 14 days. Do you wish to ask for longer, Mr. Beard, or not?*

MR. BEARD: *May I take instructions briefly, my Lord?*

JUDGE HAVERY: *Yes.*

MR. PITTS: *My Lord, will that be 14 days for the summary judgment payment as well?*

JUDGE HAVERY: *Time has not been sought for that at the moment. It is just the payment on account, which is normally 14 days.*

MR. PITTS: *Indeed, my point being, my Lord, that the claimant has been kept out of his money for some considerable time.*

I would ask for seven days for payment of that amount.

MR. BEARD: *My Lord, I would oppose a seven day payment, but the defendant would not oppose 14 days.*

JUDGE HAVERY: *This is for what, payment on account of costs?*

MR. BEARD: *Yes.*

JUDGE HAVERY: *Mr. Pitts is now asking for payment of £66,000 in seven days, but I would have thought that in that case it is just a case of drawing up the order of the court and then within seven days it is for your side to draw up the order, is it not, Mr. Pitts?*

MR. PITTS: *My Lord, it is open to you to make an order as to time.*

JUDGE HAVERY: *You are asking for time.*

MR. BEARD: *My Lord, £66,000 is a substantial sum of money for my clients and, in those circumstances, it would ask that there was a delay in terms of payment. If half the money could be paid in 14 days alongside the payment for costs on account and then the other half in 28 days.*

JUDGE HAVERY: *Yes, where I have said "stay of execution", I will say save that half the sum exclusive of costs due under this judgment to be paid by -- I think that takes us to the 13th September, does it not? Did you say 14 and 28 days?*

MR. BEARD: *My Lord, yes.*

JUDGE HAVERY: *By 4.00 p.m. on 13th September and the balance by 4.00 p.m. on 27th September.*

MR. BEARD: *My Lord, it is not entirely clear in the circumstances, but I would ask, if it is required, that permission to appeal in relation to this matter is granted. There is a range of highly complex issues that has been raised in these proceedings that is novel, that has not been heard previously by this court. In the circumstances, particularly in relation to the matters on restitution and whether or not there is a final determination and, indeed, on the points you have made about the application of the European Convention on Human*

Rights to interpretation -- those are important matters on which further argument may usefully be made and, in those circumstances, I would ask for permission to appeal.

JUDGE HAVERY: *Is there anything you want to say about that, Mr. Pitts?*

MR. PITTS: *My Lord, certainly my learned friend has raised some innovative and inventive argument. Clearly there will come a time when adjudication decisions will need to be addressed by the Court of Appeal. I suspect that this is not the vehicle for it, but I can have no real objection.*

JUDGE HAVERY: *I think this is a case where a decision of the Court of Appeal will be valuable, so I give permission to appeal on that account.*

MR. BEARD: *My Lord, in relation to that, the defendant has raised a range of issues about the applicability of the adjudicator's decision and in various academic literature there has been a question raised over the way in which, for instance, **Macob, Morrison** and, indeed, some of the other cases in this area have been dealt with. The matters are raised in the defence and were partly touched upon in the skeleton. In relation to an appeal being made, given that no cases have come before the Court of Appeal on the enforceability of adjudicators' decisions by way of summary judgment and the degree to which fair procedure in the way that the adjudicator deals with these matters have not been aired before the Court of Appeal, I would ask for permission to appeal on the gamut of issues. Although they have not been argued today, they are highlighted in the material before you and, given that there is no further authority, it would seem to me to be appropriate.*

JUDGE HAVERY: *There are further issues other than those in your skeleton, are there?*

MR. BEARD: *Other than the issues raised in the defence and in the skeleton, I am not asking for permission to appeal on different matters, but, for instance, I did not argue today about whether or not the general rule that has been accepted by this court that where an adjudicator reaches an unlawful decision or follows unfair procedure that unless there is a breach of natural justice that takes that outside his jurisdiction those matters do not impugn the adjudicator's decision. But there has been comment suggesting that this is in fact not necessarily the right term. It is raised in the pleading and in my skeleton that the adjudicator erred in relation to fact, law and procedure and that that impugned his decision. It was not considered a matter that should be heard today because, my Lord, you would be bound by the decisions of your brothers in these circumstances, but if the matter is going to the Court of Appeal ---*

JUDGE HAVERY: *I think if you are going to the Court of Appeal I must leave it to the Court of Appeal. If any objection is raised to any argument that you put forward, it is then a matter for decision by the Court of Appeal.*

MR. BEARD: *My Lord, thank you.*

MR. PITTS: *My Lord, just to assist my learned friend, there is in fact now Court of Appeal authority, **Weidendow Jensen** went to the Court of Appeal recently.*

JUDGE HAVERY: *That is on jurisdiction, is it not?*

MR. PITTS: *It is on jurisdiction. It was reported in "The Times" on 21st August, I believe. We are waiting for the official transcripts to come.*

MR. BEARD: *I accept that, but ---*

JUDGE HAVERY: *But I do not think that is going to impinge on these particular arguments, is it?*

MR. BEARD: *No, I do not think so. I do not think it re-visits those questions about whether or not the way in which the adjudicator -- it certainly does not impinge upon the issues that have been raised and argued today.*

JUDGE HAVERY: *No.*

MR. BEARD: *And in my understanding of the decision it just focuses upon whether or not if an adjudicator's behaviour or the way in which the reference is made takes it outside the adjudicator's jurisdiction it effectively confirms **Homer v. Kyrex**, the Scottish case, on jurisdiction. I do not think it goes further than that, but this is a somewhat esoteric argument for these purposes.*

JUDGE HAVERY: *Thank you. I direct the claimant's solicitors to draw up the order.*