

JUDGMENT : HIS HONOUR JUDGE WILCOX: TCC. 23rd January 2004.

1. This is an application for Summary Judgment under Part 24 of the Civil Procedure Rules to enforce the award of an Adjudicator, Mr Neil Burton. The project on which the parties were engaged comprised remedial works to Nationwide Anglia Property Services Limited, Corporate Headquarters at Swindon. Taylor Woodrow Limited was the main contractor and Defendant in these proceedings; BAL (1996) Limited, trading as BACO Contracts, was the sub-contractor and the referring party.
2. BACO'S tender price for the sub-contract element of the remedial works was £3,467,545 for four phases of the works relating to glazing and allied activities.
3. Nationwide were concerned at the level of costs, they were cautious and proceeded with the phased work piece-meal and incrementally. They issued a letter of intent to Taylor Woodrow who in turn issued a letter of intent to BACO on the 6th December 1999. The relevant parts of that letter include these passages:
 - "2. *It is our intention to engage you to carry out the new works subject to the completion and execution of a formal sub-contract agreement to the contract and satisfactory completion of a Performance Bond.*"
 - "3.1: *Please accept this letter as our instructions to commence the new works as from the 6th December 1999 pending agreement and execution of the contract and Bond. Your work done under this instruction shall be governed by the terms and conditions of the TWC sub-contract agreement, the sub-conditions applicable to all sub-contractors and the schedule of information attached. In the case of conflict between the contract and this letter, then the contract shall prevail.*"
 - "3.2. *On the above basis you are authorised to commence with the construction of the new works to Phase 2, Block C, in accordance with the attached schedule and information.*"
 - "3.3. *The contract value for this phase of the works will be £1,332,625.20 plus VAT, as the revised Bill of Quantities detailed under cover of our facsimile dated 3rd December 1999 and included in the schedule of information attached.*"
 - "3.4. *Notwithstanding that the contract has not been executed the contract programme will commence on the 10th January 2000, and the date for completion should be 1st October 2000.*"
 - "3.5. *All works carried out under this letter shall be carried out in a good and workman like manner with any materials selected being of a satisfactory quantity required.*"
4. I then go to Paragraph 4.0:

"We shall pay you for any work done under this instruction in accordance with the payment provision to the contract up to a maximum £750,000 plus VAT or such higher sum as we may later authorise in writing, subject however to this sum being reduced by the amount of any claim or set-off arising from a breach to the terms of the contract."
5. In due course the limit under Paragraph 4 of the letter of intent was increased to £2,250,000 plus VAT. It is common ground that by BACO's actions in commencing work following the receipt of the letter of intent a sub-contract was formed. The terms of the sub-contract are those set out and incorporated by reference in the letter of intent.
6. It is accepted that all work carried out by BACO would be governed by the terms and conditions of the Taylor Woodrow sub-contract agreement and the letter of intent. Liquidated and ascertained damages were applicable at the rate of £14,000 per week.
7. The Taylor Woodrow sub-contract was compliant with the requirements of the Housing Grants Construction and Re-Construction Act 1996 as to the provision of an adjudication procedure. Clause 4.5 of the rules under the contract applying the adjudication procedure so far as relevant provide that:

"Without prejudice to the generality of 4.2 the Adjudicator may:

 - (a) *Limit the length of any written or oral submission;*
 - (b) *Require any employee or agent of either party to give written or oral submissions provided that any written submission shall be copied to the other party, and further provided that no oral submission shall be made before the Adjudicator without an adequate opportunity being given to the other party to attend and also make oral representations;*
 - (c) *Obtain advice from specialists provided that one party requests or consents and agrees to be responsible for the costs and expenses so incurred."*
8. Phase 2 works were to commence on the 10th January 2000 and be completed by 1st October 2003. In due course BACO carried out Phase 3 works under the letter of intent and the Court is not concerned with those. Disputes arose between the parties as to what sums were due to BACO in respect to the works they had carried out and what was the proper valuation of those works. BACO commenced the

adjudication on the 27th June 2003 and served a Statement of Claim on the same day. In the introductory section of the reference it is provided that:

"The matter that had been referred to adjudication is the proper valuation of the subcontract works completed by BAL (1996) Trading as BACO Contacts hereinafter referred to as BACO, pursuant to a sub-contract entered into with Taylor Woodrow Construction Limited for the rectification, alteration and adaptations to the existing Nationwide House Building in Swindon, Wiltshire. This referral to adjudication relates to the proper valuation of the sub-contract works relating to the measurement of provisional quantities, variations and additional works and the additional scaffolding and extra hire of scaffolding."

9. And then the following passage appears, to which I give emphasis:

"This referral to adjudication excludes any loss and/or expense and/or damages which may be the subject of a separate referral."

That passage and a further passage give rise to a later submission by the Defendants.

10. Taylor Woodrow in its response document included the following submission:

"In due course the limit under Paragraph 4 of the letter of intent was increased to £2,250,000 plus VAT. BACO have not explained how it is that they are entitled to be paid more than that sum under the sub-contract. It is submitted that they need to do so in order to establish any further entitlement."

11. The claim referred to the Adjudicator, Mr Burton, appointed by CEDR by BACO under the provision of the sub-contract was that it was entitled to a Declaration that the proper valuation of the matters referred was £2,882,274.45, or such sum as the Adjudicator shall decide, and to a Declaration of Entitlement to the payment of £698,508, being the difference between that already paid on account, namely, £2,183,765, together with accrued interest of £198,600.

12. A matter the Adjudicator had to consider was whether the cap referred to in Clause 4 of the letter of intent affected the claim. The Adjudicator in due course ordered a timetable for the Defendant's responses and the Claimant's final comments, and a meeting on the 24th July was fixed. The faxed letter provided amongst other things, and I quote:

"I should like to meet with representatives from the parties, particularly surveyors, as I wish to run through the documentation with them and raise any queries I may have. Attendees will be limited to three per party unless I agree otherwise. It is not necessary for solicitors to be present unless the parties particularly wish them to be present at the start. In any event to avoid unnecessary costs I would not see that it is necessary for solicitors to remain throughout. Please will you advise no later than 11 a.m. Tuesday, 22nd July, who should attend."

13. On the 22nd July the Claimants indicated that they wanted Mr Simon Hughes of Counsel present. The Defendants therefore asked if their Counsel should attend. The Adjudicator replied on the 24th in these terms:

"I cannot see that there are sufficient legal issues for me to consider that need Counsel to be involved. I also think it is unlikely that Counsel will be able to assist me with understanding the measured account. As previously advised, I envisage that the meeting will be at the surveyor level dealing with the account issues. I intend that to be the case and will not allow the meeting to be side-tracked."

14. The Adjudicator then noted that he would nevertheless hear representations at the meeting as to the need for the attendance of Counsel and indicated a timetable providing for this.

15. At the meeting the Adjudicator raised the issue as to whether the cap of £2,250,000 applied to Taylor Woodrow's liability under the contract. There is evidence from Mr Foster before me that the Adjudicator told BACO representatives that **in relation to the cap** argument, they, "Have a problem". At the meeting there was discussion as to the validity of the cap and whether it applied only to Phase 2 works and not to Phase 3 works introduced as a variation.

16. On the 27th July 2003 the Adjudicator sent two faxed letters to the parties, one arranging a further meeting with quantity surveyors on the 30th July, the second provided that the parties would be at liberty to provide short written representations on the issue of the cap by 12.30 on the 31st July of 2003. He said:

"I may require assistance from my own source, solicitor or Counsel, if representations are made. I should like your consent to obtain this assistance as provided by Clause 4.5 of the Rules. However, please be advised that if this consent is not given formally and representations are made, it shall be within my discretion in setting the procedure under Clause 4.2 that reasonable costs incurred by me should be part of my expenses."

17. The Claimants made written submissions on the 31st July 2003 and indicated their consent to the Adjudicator's recourse to legal advice. The Defendants did not object, observing that in the light of the submissions they hoped it would not be necessary since the matter in their view was clear.
18. On the 5th August 2003, the Adjudicator informed the parties:
"I have received submissions on the £2,250,000 limit from both parties as directed. The Counsel for each of the parties has settled these submissions. As this is an important matter in the adjudication I therefore wish to consider them with my own Counsel. I have therefore engaged Counsel via solicitors and will be meeting with Counsel and solicitors later this week at the earliest convenient date."
19. The parties were not told precisely when the meetings were to take place or what material the Adjudicator intended to provide the lawyers with, or whether the advice would be in writing or reduced to writing at some later stage.
20. He next communicated with the parties on the 17th August 2003 indicating that he had reached his decision. He informed the parties that he had had a four hour meeting with solicitors on the 4th August and a meeting with Counsel on the 6th August which lasted four hours. BACO paid his fees and expenses and the award was communicated to the parties on the 19th August. He made a declaration that the proper valuation of the measured works was £2,520,545, and that no retention or deduction of damages was warranted. A contrary charge by Taylor Woodrow in the sum of £10,336.61 was allowed. He gave a credit for a discount in the sum of £62,754, and provided payments altogether of £2,183,765. He ordered payment by Taylor Woodrow of the balance, £2,636,058.14. There were fees of £8,264, and the total was £2,719,022.21. There are two matters in his reasons that I must deal with before I go onto the main substance of this application and the parties' arguments. He said:
"From the evidence I have seen and heard I am of the view that Taylor Woodrow tried to place greater obligations on BAL than exist under the contract. I am satisfied that BAL were prevented from completing their works by Taylor Woodrow and others under Taylor Woodrow's control. Furthermore, they undertook significant additional Phase 3 and varied work and they are entitled to a reasonable time to complete these. I find that BAL completed their works in a reasonable way given the constraints they were placed under and that they are entitled to appropriate extensions of time."
21. The Defendant upon these passages and the passages that I earlier referred to, argued that the Adjudicator had considered matters that were not part of the referred dispute at the time of the reference and thus he had no jurisdiction in relation to those matters. These arose out of matters properly in evidence before the Adjudicator by reason of the arguments presented by the Defendants and based upon matters initiated by them. It is evident from their written submissions clearly the Adjudicator not only had the jurisdiction to consider these matters, he had a duty to the Defendants to consider them.
22. I turn now to the so called 'cap argument'. The Adjudicator in his award found in his reasoned award that:
*"Firstly, Taylor Woodrow's points are not attractive on their merits. Taylor Woodrow took no steps to prevent BAL proceeding beyond any limitation date or cap figure. BAL was, and remained, obliged to proceed with the works. Any work undertaken whose value exceeded the cap was in my view either work authorised or was work where the operation of the cap was waived.
Work was instructed without agreed prices to calculate the cost from as compared with any limit set.
The contract sum was significantly exceeded in any event.
The standard conditions take precedence over the contract.
If any sum greater than the cap becomes due then there is a conflict and the standard conditions apply."*

23. I have therefore formed the view that there is no cap on BAL's entitlement to be paid by Taylor Woodrow for the works, and I conclude that Taylor Woodrow is obliged to pay BAL for the full value of the works.
24. It is no part of the role of this Court, considering a Part 24 claim, to enforce an Adjudicator's decision, to review the merits of his award and enquire into his findings of law or fact. There are strong public policy reasons which militate against such an approach and Parliament has provided a robust and pragmatic dispute resolution system giving provisional finality to the Adjudicator's award pending ultimate resolution of the disputes referred by arbitration, litigation or agreement.
25. Mr Henderson submits that Summary Judgment under Part 24 here should not be granted because it is arguable that the Adjudicator did not have jurisdiction because he was in breach of the principles of natural justice and that he came to a conclusion on a material question of law, receiving advice from third party solicitors and Counsel without disclosing the advice that he had received and the facts and matters comprising his instructions. He submits that had there been any wrong advice given or any mis-apprehension or misunderstanding disclosed or error of matters comprising the instructions, disclosure openly and fairly made by the Adjudicator before the award would have enabled the parties to deal with the matters disclosed and serve to assure the parties as to the fairness of the proceedings.
26. Mr Acton Davis accepts that the Adjudicator, originally untroubled by the cap issue, became exercised by it to the degree that he sought advice from solicitors and Counsel. He submits that the Adjudicator's procedure was transparent and fair because he received submissions from both parties and told them that he was seeking advice about the cap argument and submissions. Neither party, he contends, asked the Adjudicator to disclose his instructions or the advice given to him. It cannot now be contended, he submits, that the procedure was unfair or that there was any breach of the rules of natural justice, albeit that the advice concerned material matters and not peripheral matters.
27. Mr Henderson relies upon the Judgment of His Honour Judge Seymour QC in **RSL Southwest Limited v Stansell** [2003] EWHC 1930 in the Technology and Construction Court of the Queen's Bench. In that case the Adjudicator had indicated to the parties' representatives that he wanted to obtain assistance on programming issues from a specialist in that area.
28. The Plaintiff's representatives agreed without qualification, but the Defendant's representative agreed subject to a request that he be allowed to see any report prepared by the specialist, and that he be given reasonable time to comment upon any such report. The specialist's preliminary report was offered to the parties for comment. The Plaintiff's representative provided comments. The Defendant's representative did not because the conclusion in the preliminary report was; that the Plaintiff had failed to prove its case. The Adjudicator's decision was based upon the specialist's final report which differed in certain material respects from his preliminary report. The parties' representatives were not given an opportunity to comment on that final report. Judge Seymour held that the Adjudicator should not have any regard to the specialist's final report without giving both parties an opportunity to consider the contents of that report and to comment upon it. If necessary he should have obtained an extension of time to allow that to happen. In the circumstances the Plaintiff's application for Summary Judgment was refused.
29. At Paragraph 32 of his Judgment he said:
"It is elementary that the rules of natural justice require that the party to dispute resolution procedure should know what is the case against him and should have the opportunity to meet it."
He goes on:
"It is essential, in my judgment, for an Adjudicator, if he is to observe the rules of natural justice, to give the parties to the adjudication the chance to comment upon any material from whatever source, including the knowledge or experience of the Adjudicator himself to which the Adjudicator is minded to attribute significance in reaching his decision."
30. In my judgment it is significant that the principal ground of that decision was not dependent upon the request made by the Defendant's representative to comment on any report from the specialist. It is

based on the general principles of natural justice and the obligation of the Adjudicator to give the parties an opportunity to comment upon any new material.

31. Section 108 of the 1966 Act provides:

"A party to a construction contract has the right to refer a dispute under the contract for adjudication under a procedure complying with the scheme. For this purpose 'dispute' includes any difference."

It goes on:

"The contract shall impose a duty upon the Adjudicator to act impartially. He has no jurisdiction if he acts otherwise in accordance with the principles of natural justice."

32. Mr Acton Davis submitted that the failure of the Defendant to ask the Adjudicator to disclose his instructions and advice was a matter to be given significance when procedural fairness was considered. He was not prepared in argument to characterise such a failure as a waiver; properly so, in my judgment, because the duty to disclose is that of the Adjudicator.

33. He relied upon the acquiescence of the parties to the Adjudicator's proposed procedures. In a Scottish case cited before me **Costain Limited v Strathclyde Builders Limited** [2003] Scotts CS 316, Lord Drummond Young considered acquiescence. In that case the Adjudicator was required by the timetable in the adjudication to reach his decision by 13th June 2003. By 10th June he had received all of the submissions and evidence adduced by the parties in support of their respective cases in the adjudication. on that date the Adjudicator wrote to the Agents for the parties and asked the pursuer to grant an extension of four days time within which he was required to reach his decision. That request was addressed to the pursuer's agents because under the terms of the parties' contract it was the referring party that was entitled to grant such an extension. In the letters to the agents the Adjudicator explained that he sought the extension because he wished; "to discuss one point in particular with his appointed legal advisor". The pursuer granted such an extension and the Adjudicator advised the parties of his decision on the 17th June 2003. The result of the Adjudicator's discussions with his legal **advisor was not** made known to the defender or indeed to the pursuer, nor was either party told of the terms of the discussions that had taken place.

34. The question of acquiescence was considered by the Judge at Paragraph 31 of his opinion in these terms:

"The defender's submission on this matter related to acquiescence in the proper sense of the word as a form of personal bar. My understanding of the pursuer's argument, however, was the concept of acquiescence was not used in that way. The argument is rather directed towards a concept of unfairness which obviously lies at the heart of natural justice. The submission was that when a Court considers the general question of fairness of the procedure adopted by the Adjudicator he should have regard as to whether the party alleging unfairness or its representative has acted in the manner calculated to suggest that the procedure followed by the Adjudicator was accepted as fair. In the present case therefore the Court should have regard to the failure of the defender's legal representative to object at once to the procedure taken by the Adjudicator when it was intimated to the parties.

In some cases there might be considerable force in such an argument. When parties or their representatives lead an Adjudicator to believe that the procedure that he intends to follow is fair the appropriate conclusion may be that the procedure was indeed fair because there was an opportunity to object to it which was not taken.

*Nevertheless, two further considerations are in my opinion relevant. In the first place for reasons already discussed I consider the role of natural justice to be of the greatest importance. Consequently I would be reluctant to derogate from the (*inaudible*) rule except in a case where the procedure proposed by the Adjudicator was clearly accepted as fair, whether expressly or by implication.*

In the second place, if too much importance is attached to a failure to object to a proposed procedure that may place an undue burden upon the parties' advisors. In particular the significance of a proposed procedure may not be immediately apparent. Moreover the rapid time limits that apply in an adjudication affect the parties and their advisors as well as the Adjudicator and there may not be a great deal of time to consider the full implications of the procedure that has been proposed.

For these reasons I am of the opinion that it is only in a clear case that acquiescence in the sense in which that concept is used by the pursuer would be relevant to the issue of whether there has been a breach of the principles of natural justice."

35. I respectfully agree with that statement of principle and the significance to be attached to acquiescence. In this connection see **Try Construction Limited v Eaton Town House Group** [2003] BLR, 286 where a similar approach was followed in the English jurisdiction, the parties there had agreed with the adjudication beforehand upon the procedure to be followed.
36. In my judgment there was no relevant acquiescence in this case by omission or conduct which would lead me to conclude that the procedure followed was fair and that there was not a breach of the principles of the rules of natural justice. Acquiescence as to an Adjudicator's procedure, on the face of it in breach of the principles of natural justice, would have to be clear, informed and unambiguous.
37. In this case the challenge to the breach of the principles of natural justice cannot be described as hopeless as it was in **Macob v Morrison** [1999] Building Law Reports, 93. In my judgment a fair minded and informed observer would conclude that in this case there was a real possibility of unfairness. It is important that confidence in the adjudication system should be maintained both in general and in relation to the decision in individual cases. For such confidence to be maintained it is important that adjudicators should be clearly seen to give parties a fair opportunity to present their arguments and deal with the material matters upon which an adjudicator may be basing his decision.
38. For the purposes of this Part 24 application the Defendant has persuaded me that there is a strong arguable case that there has been a breach of the principles of natural justice.
39. Mr Acton Davis contends that should I come to such a finding that is not an end of the matter because he submits the Court has jurisdiction to sever the award, namely, identifying that part which was within the cap and that which was over the cap. He contends that the Court has jurisdiction to award an interim payment reflecting that part of the award which falls within the cap. To do so would involve a close examination of the Adjudicator's award and his reasons; in short, to review it as to the law and factual basis of the award. It is an exercise the Court is not entitled to follow. The whole of the award is arguably in this case without his jurisdiction, not merely part. Like the curate's egg, the whole must be rejected, subject of course to the Court's powers under Part 25 of the Civil Procedure
40. Rules. 25.7(1) provides; *"The Court may make an Order for an interim payment only if:*
(a) *the defendant against whom the Order is sought has admitted liability to pay damages or some other money to the claimant."*
41. I pause there; this is not the case here. It was the case, however, in **Glencot Developments v Benn Barratt** [2001] Building Law Reports BLR. 207, where a free-standing admission of monies due in any event was made the subject of an interim payment by His Honour Judge Humphrey-Lloyd QC.
25.7(b) provides that the Court can Make an interim payment: *"Where the claimant has obtained Judgment against the defendant for damages to be assessed or for a sum of money other than costs to be assessed."*
42. That clearly is not the position here. And then (c): *"Except where Paragraph 3 applies..."*
43. I interpolate that relates to personal injuries and is not relevant:
"...the court is satisfied that if the claim went to trial the claimant would obtain Judgment for a substantial sum of money other than costs against the defendant from whom he is seeking an Order for interim payment."
44. The claim here relates solely to an Adjudicator's award, which, for the purposes of Part 24 in its entirety, in my judgment, is tainted by the jurisdiction challenge.
45. There is no basis, in my judgment, upon which I could, even if I felt inclined, make an interim payment. The application for Summary Judgment, therefore, for the reasons I have given stands refused.

Mr Hurworth appeared on behalf of the Claimants

Mr Henderson appeared on behalf of the Defendants

- HHJ WILCOX: *Now I indicated that I would give an extemporary Judgment. I direct that it shall be transcribed and that copies should be provided to the parties. There may be applications that flow from that.*
Mr Henderson, are there any observations you would like to make at this stage?
- MR HENDERSON: *My Lord, I am extremely grateful for the direction that it be transcribed. I am very happy with the result but it seems to me that the decision is an important one. I did notice one or two very small what will be typographical points, in particular that is BAL (1996) not '66.*
- HHJ WILCOX: *'66, you are quite right.*
- MR HENDERSON: *96; and I think on some of the...*
- HHJ WILCOX: *Arithmetic.*
- MR HENDERSON: *...when your Lordship was going through the amounts that the Adjudicator had awarded a decimal point had moved, but all of those matters are much easier dealt. with on a transcribed version...*
- HHJ WILCOX: *They are.*
- MR HENDERSON: *...they are simply the ordinary matters to be raised, so I am extremely grateful for that direction, my Lord.*
- HHJ WILCOX: *Now I will adjourn, unless I am otherwise persuaded, any other applications. There will be a costs application, there may be, I do not know...*
- MR HENDERSON: *I wonder if I could ask for my costs to be summarily assessed today. The only other application, I don't know if my learned friend would wish to pursue an application for permission to appeal, and I can see that your Lordship may want to give him an opportunity to consider your Judgment before...*
- HHJ WILCOX: *I think it would be fair for that to be a consideration of the written text.*
- MR HURWORTH: *It is a point that I would like to discuss with Mr Jonathan Acton Davis, I'm afraid, Sir...*
- HHJ WILCOX: *No, no; don't apologise, it is something that I wholly understand. I will direct, as I say, that there shall be a transcript provided to you as soon as possible, and then there will be liberty to apply in relation to appeal should that be appropriate. What do you say about costs at this stage? Is it a matter that you are in a position to deal with?*
- MR HURWORTH: *I am in a position to deal with, my Lord, and I note that Mr Henderson asks that they be assessed summarily.*
- HHJ WILCOX: *Yes.*
- MR HENDERSON: *My Lord, it would be enormously convenient if your Lordship could do that because it may be that when my learned friend discusses it with Mr Acton Davis, it may be that there are no other applications, whereas if we don't deal with costs we will need to come back and sort that matter out.*
- HHJ WILCOX: *Yes; we certainly do not want that to happen.*
- MR HENDERSON: *No. My Lord, first of all on the Order, I think it is simply that the applications for (1) Summary Judgment, and (2) an interim payment, be dismissed.*
- HHJ WILCOX: *I so Order.*
- MR HENDERSON: *Secondly on costs; I ask obviously that the Claimant pay the Defendant's costs of this action in any event. I ask that they be summarily assessed in the amount of the schedule. I hope that has reached your Lordship.*
- HHJ WILCOX: *Yes, I have both schedules.*
- MR HENDERSON: *I am extremely grateful. The total amount is £12,770.*
- HHJ WILCOX: *£12,770.*

MR HENDERSON: *My Lord, I would just make a couple of observations in relation to it. First of all your Lordship will note that there is a reference to the case of **Re: Eastwood** at the bottom there. The reason for that is that my instructing solicitor is employed by Taylor Woodrow and it is the principle set out in that case.*

HHJ WILCOX: *Yes, indeed.*

MR HENDERSON: *And secondly I should draw attention to the fact that of course this summary assessment includes costs thrown away by the adjournment. Your Lordship may recall that this matter was originally listed before Judge Toulman and it was adjourned, so this is...*

HHJ WILCOX: *Yes, I recall that.*

MR HENDERSON: *...all wrapped up in that, and the history of that, my Lord, was that the Judge expressed doubt that it could be dealt with in half a day, and the parties, as it were, took their cue from the Judge's provisional view, although in fact in the end it was dealt with by your Lordship in half a day. But nevertheless I wrap up all of those costs; it was the Claimant's costs estimate in the first place, but I ask in the sum of £12,770, which compares with in excess of £20,000-odd on the Claimant's side.*

HHJ WILCOX: *Well let me hear -- is there any argument as to rates or hours?*

MR HURWORTH: *Yes, my Lord, in both cases. Firstly, I would like to deal with Mr Henderson's fees. I think you made clear at the close of the last hearing that costs, and indeed our attendance here today it seems to me, could be dealt with adequately by solicitors.*

MR HENDERSON: *My Lord, I should have clarified, I am so sorry; this is the assessment that went before your Lordship last Friday.*

HHJ WILCOX: *Yes.*

MR HENDERSON: *I have not put in any additional form for today...*

MR HURWORTH: *I do recognise that.*

MR HENDERSON: *...and the reason for that is that your Lordship may notice that it had been assessed on the basis that it would be a full day and my instructing solicitor would be here for eight hours, and the view we have taken is that by coming along today that is effectively -- in other words, if we had assessed it at lunchtime last week there might have been an over-estimate...*

HHJ WILCOX: *Yes.*

MR HENDERSON: *...but by coming back here today it has covered it essentially.*

HHJ WILCOX: *Yes, I can see; it is incorporated within.*

MR HENDERSON: *Yes. I am not asking for a separate - I am not trying to increase it on the back of the attendance today.*

MR HURWORTH: *I think I recognise that, my Lord, I am simply saying that had this matter been disposed of as far as Counsel was concerned at lunchtime last Friday I would have expected that Counsel's fees of, well, £5,750 might reasonably have been reduced because they were based on the expectation that the matter would last all day.*

HHJ WILCOX: *But I think the difficulty in your argument there lies that that may be the case; firstly one Judge thought it was going to take a whole day. Secondly, Mr Henderson's services had to be engaged for a whole day, and he is not able to use his services for the afternoon gainfully in another matter, is he?*

MR HURWORTH: *I am in your Lordship's hands; it is a point I felt that I had to make.*

HHJ WILCOX: *No, no, you make the point, but the rejoinder I make is that he was 'bought for a day', so to speak, if he doesn't mind me using that expression!*

MR HENDERSON: *I am for hire, my Lord!*

HHJ WILCOX: *And he could not do other things in the afternoon.*

MR HENDERSON: *And the reality, my Lord, in truth is that there wouldn't be a reduction on - that is not the way that these work...*

HHJ WILCOX: *There would not in any event, I know; a fee is a fee.*

MR HENDERSON: *The fee is agreed.*

MR HURWORTH: *Well I'll try it on Mr Acton Davis!*

HHJ WILCOX: *Well that is a matter between you and , Mr Acton Davis; I will not give you any encouragement!*

MR HURWORTH: *Secondly, my Lord, solicitor's costs; there is one particular matter of hours that I would like to focus on and that is the work done on documents, approximately ten-and-a-half hours.*

HHJ WILCOX: *Where do I find that?*

MR HURWORTH: *That is on the second page.*

HHJ WILCOX: *The second page.*

MR HURWORTH: *The second item.*

HHJ WILCOX: *Yes, I see, yes.*

MR HURWORTH: *As I seem to recall Mr Henderson acknowledging at some hearing last Friday, the Defendant's exhibit to the witness statement was substantially the same as the Claimant's. One does rather imagine that a good deal of time has been spent on that exhibit and documents unnecessarily, especially in view of the fact that Mr Foster was the one actually involved in the hearing, and I really do question whether the time of ten-and-a-half hours is at all reasonable.*

HHJ WILCOX: *What have you claimed for work done on documentation?*

MR HURWORTH: *We were of course the Claimants.*