JUDGMENT : HIS HONOUR JUDGE MARSHALL EVANS QC : Liverpool County Court : 29th July 1999

1. In this case of John Cothliff Limited and Allen Build (North West) Limited, the claimant seeks to enforce an order made by Mr. Ronald West appointed as adjudicator pursuant to the provisions of the Housing Grants Construction, and Regeneration Act 1996 in respect of a claim for payment for work done in the building trade.

2. In the contract between the parties to the dispute which went before the adjudicator, there was no express provision for adjudication under the Act. There is an arbitration clause, but no adjudication procedure. Because of the provisions of the 1996 Act, Section 114, Subsection 4: *"In default of contractual provision agreed by the parties, the provisions of the scheme for construction contracts applies, having effect as implied terms of the contract concerned."* That is a bit of a paraphrase of the Act to the circumstances and is not the precise words of the section.

3. It followed that there was an implied term in the contract for reference to adjudication under the scheme. Such a reference was made. The claimants in this application for summary judgment were the claimants under the adjudication. The adjudicator made an award in their favour for approximately £28,500. The claimants had asked for costs.

4. He said, at paragraph eight of his adjudication:
"In their claim the claimants request me to determine the payment of costs of and 4 n the adjudication. Under the Housing Grants Construction and Regeneration Act 1996 I have the power to do this. Whereas in arbitration it is normal for costs to follow the event, in adjudication under the scheme I may make my decision based on the behaviour of the parties in attempting to resolve their differences. I therefore decide as follows..." He dealt with his own fees and costs, and then he effectively awarded the claimants 70 per cent of the costs of the adjudication, postponing assessment.

5. He gave what I consider to be a supplemental decision or part of the original decision which had been adjourned part heard as to the costs, and said at paragraph two: *"Before making the decision to award costs, I carried out considerable research on the subject. As the parties are aware, adjudication under the scheme is new, and as Tills remark,"* that is a reference to the solicitors instructing counsel for the defendant in this particular hearing, *"this adjudication is at the cutting edge."* It is always exciting for a judge to learn he is at the cutting edge.

   "I consulted Cottam's book and read the ***Macob Civil Engineering v Morrison Construction*** *judgment. I also referred to the adjudication schemes. Macob gives little guidance on this aspect but philosophises on the reasons for adjudication. A wide variation exists with respect to costs in various schemes. ICI and CIC are specific in that they do not give the adjudicator any power to award costs, whilst the scheme under the Act remains silent on the matter.*

   "GC/Work/1(1998) in Condition 59 states that the adjudicator has full power to award costs and expenses just like an arbitrator or judge, but that is a reference to a different scheme. I reason that as the scheme under the Act remains silent in comparison with other schemes being specific either way, this leaves the adjudicator the option to award in certain circumstances. If the parties make no mention of costs then the adjudicator cannot himself raise it."

6. I pause to say that I am not so sure about that if he has got jurisdiction to award costs, because, and I was referred to the scheme, one of the things which an adjudicator can do under paragraph 20: *"He make take into account any other matters which the parties to the dispute agree should be within the scope of an adjudication, or which are matters under the contract which he considers are necessarily connected with the dispute."* However, that is what the adjudicator said.

7. This is the situation on which Cotton gives his opinion in his book: *"However, when one or both of the parties request costs, either in the referral notice or in a counterclaim, then the adjudicator has the authority to make an appropriate award. Indeed, I can easily visualise a referral comprising solely of a request for costs."* I personally remark that I do not find it quite as easy to visualise as the learned adjudicator.

   "Messrs. Tills argue that the Government envisage the scheme as being a cheap, easy method of obtaining interim decisions," that is something which everybody is agreed upon, "and quote Macob to support this view. They argue that the awarding of costs is contrary to this philosophy as it encourages a party to spend excessively on promoting their case.

"While I have sympathy with the view that adjudication should be cheap and easy, it should be noted that the Government's own standard contract GC/work/1(1998) encourages the award of costs. The onus of keeping costs down to a sensible limit falls on the adjudicator when he is assessing the costs." He then went on to reduce the claimed costs from about £26,000, which coincidentally was about the value of the claim, to £13,500 or thereabouts, and awarded the appropriate sum calculated as 70 per cent of the figure he assessed.

8. I pause to comment that in saying that it was for the adjudicator to keep the costs within reason, he was acting wholly in accordance with the spirit of the still relatively new CPR which refer to proportionality and a variety of considerations in Part 1, even though Part 1 is a bit of a wish-list and it is not possible to achieve everything that is stated to be desirable in Part I in practice, in particular to equalise the financial position of the parties when they commence and conduct the litigation.

9. Essentially, what has happened is that the figure he awarded by way of costs was what I regard as part of one decision, albeit broken by an adjournment for the purpose of assessment. In practice the defendants have failed and refused to pay those costs and contest that there is any power to award them lying in the adjudicator. On that basis they say that they have an arguable defence to the claim and there should accordingly not be summary judgment.

10. Of course they have an argument. This is not an easy point. It is a novel point. I am assured by counsel, who have so far as I can see conducted wide ranging investigations into such authority as there is, that there is no authority on the point. Nevertheless, the whole case turns on one point of law and I see absolutely no reason why I should say that there is an arguable point of law and put it off for trial. It is for me to decide the point of law today.

11. There are conflicting policy reasons for and against the award of costs. They are mentioned in the book "***Adjudication in the Construction Industry***" by Kate Gordon. A passage to which I have been referred headed "***Power to Award Costs***" at page 71, under paragraph 5.9.3: "In the absence of power conferred either by contract or by statute, the adjudicator has no jurisdiction to order one party to pay the costs expended by another in the adjudication proceedings. Power to award costs is conferred upon courts and arbitrators expressly by statute."

12. Then there is a footnote which refers to Section 51 of the Supreme Court Act 1981 and Section 61 of the Arbitration Act 1996: "There is no statute which confers such power upon adjudicators. If the parties wish the adjudicator to have power to award costs, they must confer such power upon him. Conferring the power to make a costs order may deter frivolous applications for adjudication. Not conferring the power to make a costs order may encourage late payment for which there may be little effective sanction. The parties must decide the provision as regards costs best likely to promote their commercial interests."

13. I will say two things at the outset. Firstly, if the parties expressly agree that the scheme should apply, it would certainly be desirable that they consider whether in the circumstances which obtain in relation to the contract there shall or shall not be power in the adjudicator to award costs. As they have power expressly to agree to the scheme, it seems to me at least arguable that they have power to agree that there should be no order as to costs even if in the general rule the adjudicator has power to award costs under the implications of the scheme in the contract under Section 114 of the 1996 Act, or by any other term to be implied in the contract.

14. Secondly, it would have been extremely helpful and avoided this hearing if in the statutory scheme, or indeed in the Act, it had been expressly stated one way or the other that there was power to award costs, or some limit on costs, or at any rate some provision as to costs. I have been referred to a consultation paper, which in my experience is something which is issued, responses are obtained, and then ignored. At page 28 under paragraph B25 the issue to resolve is stated: "Should the adjudicator have any power with regard to parties' costs?" The proposal is that the adjudicator has no such powers. Unless otherwise agreed between the parties, their costs shall lie where they fall.

15. If the proposal in the consultation paper had been intended to be adopted, it seems to me it should have been incorporated in the scheme or the statute. It was not, but that is a negative fact which I do not think takes it any further.

16. There are arguments, it has to be said, for and against having awards of costs in any sort of adversarial proceedings. In the ordinary way in all arbitration and legal proceedings in courts, costs, subject to a very wide discretion, which has been greatly and specifically increased under the CPR, follow the event. That is not true in my recollection in the industrial tribunal, or in many other statutory tribunals, save for a power to award costs in the event of one party having behaved in a way which the tribunal finds to be unreasonable, presumably of a Wednesbury type category.

17. Similarly, in some proceedings in court there are fixed limits as to costs recoverable in certain circumstances. There is a proportionality element to be considered where costs are disputed under the CPR. There used to be in arbitration proceedings in the County Court, which were commonly called Small Claims, limitation to fixed costs plus certain recognised heads, a certain amount of legal advice, payment to experts, and so on. There is a similar provision, I could not at the moment specify in detail, under what is now the Small Claims Track.

18. Nevertheless, where substantial sums are involved in matters of legal and technical complexity, the general trend of behaviour in the jurisdiction of England and Wales is that costs are within the discretion of the tribunal but principally follow the event subject to reasons for variation of that general principle.

19. The arguments on both sides in this case have been presented to me in very clear form, both in skeleton arguments supported by authorities and by both counsel, whom I compliment on the clarity of their arguments if not wholly on their succinctness because they have rather exceeded their time estimate in the course of the hearing. If people wish to see them ventilated in full, they can be found in the transcript of the entire hearing and in the skeletons.

20. Essentially, the claimant says that under **Macob** this is a decision; the scheme is a straightforward scheme. I should give it a purposive interpretation. To avoid challenge to decisions of adjudicators in the courts, it should simply be enforced subject to the overriding review provisions which in this case, as there is an arbitration clause, will take place in an arbitration should there be one.

21. In any event, says the claimant, there is power in the adjudicator to award costs. Not so, says the defendant. The adjudicator has no power because that would require a statutory power or a contractual power_ which there certainly is not expressly, and there are countervailing policy reasons why there should be no power to award costs which make that policy equally as valid as the one advanced by Mr. Bawdery, who has argued on behalf of the claimant that plainly there ought to be power to award costs.

22. Public policy has been stated to be an unruly horse, and indeed it is. I am therefore cautious about public policy, apart from saying at the moment that plainly this scheme needs a purposive construction. It is intended to provide a swift and, no doubt it was hoped, cheap - although the facts in this case rather suggest that it is nc'~ as cheap as might have been hoped - means of interim resolution of disputes so that who was to hold the money in the meantime could be determined. But, says the defendant, where there is no power to do what the arbitrator has done, you should not blindly enforce a decision just because it is a decision. It is as null and void, in effect they are saying, as if the adjudicator had never been properly appointed.

23. I do see that there may be and probably will be cases in which there is some fundamental flaw in the process of appointment - and I will go no further than that - as to a decision of the adjudicator which would justify the Court in intervening and saying: *"This is not a decision of an adjudication under the scheme and accordingly it shall not be enforceable."*

24. I am very doubtful whether a point like the one in this case falls within. that area in any event. But, primarily, I decide that the adjudicator has got power to award costs, at least where, as in this case, costs have been expressly sought in the application placed before the adjudicator, and where he has allowed representation, at least on behalf of the defendant by lawyers, and apparently on behalf of the claimant by a firm of dispute pursuing quantity surveyors, whom I am told are the leaders in that specialised field of extracting money from contractors up the line, or it may be denying it to contractors down the line.

25. The scheme is incorporated as applicable by an implied term in the contract by virtue of the section and subsection to which I have already referred (Section 114, Subsection 4 of the 1996 Act). When you look at the scheme, the crucial parts appear to me to be paragraphs 13 and 16. Paragraph 13 says: "The

adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the disputes and shall decide on the procedure," those are the important words, "to be followed in the adjudication.

26. In particular, he may do a great many things, which are set out in (a) to (g), but which represent, in effect, case management in. a variety of forms and, by (h), *"issue other directions relating to the conduct of the adjudication."*

27. Mr. Evans on behalf of the defendant would say that it should be construed - at least he would say if he was still allowed to - eiusdem generis, or he would now have to think of a much more clumsy phrase such as meaning something like the ones before. I think it was intended and plainly intended to be a sweep-up clause to give the adjudicator general power to control, regulate, and direct all matters relating to the procedure, its implementation, conduct, and the hearing and so on, and that it is wide enough to give the adjudicator a discretion as to whether it is appropriate in the circumstances of the particular case to make an award of costs, and of course to adjust such award both by assessment of the proper level of the total costs and by proportioning the amount payable by steps, which in the other order the adjudicator in this case in fact took, add, entirely consistently with the approach adopted in the CPR which must represent the latest word in national policy in respect of the correct approach to the costs of adversarial procedures, even though of course they do not actually apply to adjudication.

28. Furthermore, if there were any doubt about that general power that I have derived from 13(h) by paragraph 16.1_:
"Subject to any agreement between the parties to the contrary and to the terms of paragraph (2) below, any party to the dispute may be assisted by or represented by such advisors or representatives whether legally qualified or, not as he considers appropriate."
"(2) Where the adjudicator is considering oral evidence or representations, a party to the dispute may not be represented by more than one person unless the adjudicator gives directions to the contrary."

It is those last words, again, which indicate to me that the intention is to give the adjudicator a very wide control indeed of the procedures to be adopted in a hearing, or the procedure because it may not involve a hearing, of the adjudication, and all matters ancillary thereto.

29. Furthermore, the adjudicator having reached that decision, in my opinion, and on my ruling as to the law correctly, plainly it is to be enforced. But I also, even if I had doubt about it, think there is great force in Mr. Bawdery's submission that following Macob the adjudicator has made a decision. It is not clear or plain in any sense that it is void, ultra vires, null or anything else.

30. I take the view that despite Mr. Evans' submission that the costs would never have been open to reconsideration, it must follow that as the whole of the substance of the dispute and the liability for payment is to be capable of and plainly intended to be capable of reopening with full review and final decision by arbitration or court procedures, the costs are similarly "up for grabs" in the ultimate resolution of the overall position between the parties.

31. I cannot believe that in seeking to achieve a just overall resolution of the financial implications of construction work, the final arbitrator or judge would be unable to adjust, disallow, revoke, whatever the word may be, the costs allowed on an interim adjudication which was eventually disapproved or revised, or whatever word is appropriate.

32. In saying that, I am not relying on the concession which has been made by Mr. Bawdery in this case, although it has been made and will have been noted by the defendant that whether or not that view is correct - and, of course, I think it is because it is the view I have just expressed and if I did not think it was correct I would not have expressed it - the claimant in this case will not object to the final arbitrator having the power to revise, review, annul, or whatever, the costs award which is sought in these proceedings.

33. Furthermore, bearing in mind that this was plainly a substantial construction contract - it was not putting in a window in place of one that was rotten, but part of a major construction project from the size of the sums involved in what was but a part of the work - I would myself incline to the view that it would be appropriate to imply a term. that the adjudicator should have power to award costs, if an adjudication under the scheme took place, to give what in reality is business efficacy to the contract under the doctrine

famously expressed in the case of **The Moorcock**, or as a necessary incident of a contract of this nature, including such a clause for adjudication, in accordance with the principles for implying terms in contracts enunciated in the House of Lords, I have to say at my own personal instigation through my leader Gerald Godfrey Q.C. in the case of **Irwin v Liverpool City Council**, [which is the one case in which I personally had any opportunity to argue substantive law before their Lordships' House as opposed to the Appeals Committee, having been led on the other occasions when I was privileged to visit that august establishment. My own contribution and that of my opponent was confined to arguing about a defective lavatory and the appropriate level of nominal. damages which, bearing in mind that the House of Lords disagreed with the learned County Court judge on a very minor matter, they reduced from £10 to £5 to the detriment of my clients.]

34. Summary judgment for the claimant with costs assessment.

JUDGE M.EVANS: *Are the figures agreed or disputed? Schedules exchanged?*

MR. BAWDERY: *I think schedules have been exchanged. I have a copy for the Court if it is not agreed.*

MR. EVANS: *My Lord, I have a copy.*

JUDGE M.EVANS: *It must be the claimant's costs.*

MR. EVANS: *My Lord, that is right. I have a copy of the claimant's schedule. I am not suggesting my schedule should become relevant.*

JUDGE M.EVANS: *It may be relevant, because if it is of a similar level it makes it somewhat difficult for you to dispute it strenuously.*

MR. EVANS: *My Lord, I do not dispute it strenuously. I would say two things about it. Has your Lordship been provided with a copy of it?*

JUDGE M.EVANS: *Not as yet.*

MR. EVANS: *(Handed) I hope it can be dealt with very shortly.*

JUDGE M.EVANS: *It will be dealt with very shortly.*

MR. EVANS: *There are two points. Does your Lordship see the item just under halfway down the page which says: "Attending client, preparation and drafting claim"? It appears this is a schedule for all of the costs of the action today.*

JUDGE M.EVANS: *They have not claimed enough actually, because if it is a senior solicitor more than four PQE, the rate is higher in Liverpool at the moment, but that is the rate they have chosen to claim, so you are not going to dispute that.*

MR. EVANS: *My Lord, I am not going to the rate. What I say is that this is a schedule for the costs of the action, although it is not appropriate to summarily assess them--*

JUDGE M.EVANS: *Yes, it is.*

MR. EVANS: *Costs of the action?*

JUDGE M.EVANS: *Yes.*

MR. EVANS: *Very well, my Lord.*

JUDGE M.EVANS: *It disposes of the whole action.*

MR. EVANS: *It has. But my understanding of the summary assessment procedure was the summary assessment of the application.*

JUDGE M.EVANS: *Not where you can dispose of the whole action, then it would be a fast-track case if it had been allocated. Has it been allocated?*

MR. EVANS: *I am not aware.*

JUDGE M.EVANS: *It has probably not because it has been put in for summary judgment and it is in the C and T Court. Maybe you have avoided an £80 liability for an allocation fee.*

MR. EVANS: *My Lord, if it is the whole action they. the only point I make is the question of VAT. I am instructed that the claimant is VAT--*

JUDGE M.EVANS: *If the claimant can recover VAT, it should be net of VAT. Is the claimant VAT registered?*

MR. BAWDERY: *My instructions are that we abandon VAT. It should be net of VAT. If one takes VAT away from the figure, the total for the action is £3,203.67.*

JUDGE M.EVANS: *Any objection?*

MR. EVANS: *My Lord, if that is for the action, no objection.*

JUDGE M.EVANS: *The costs assessed at £3,203.67 payable within 1.4 days. Mr. Evans, you would like me to give leave to appeal, whether or not you are going to take advantage of it.*

MR. EVANS: *I would like leave to appeal.*

JUDGE M.EVANS: *Leave to appeal to the Court of Appeal. You will be given the form. If the clerk would kindly complete the formal parts including my name. Nature of hearing: summary judgment. Date: 29th July. Attach copy of order. Result: judgment for claimant. Defendant's application for leave to appeal allowed. Important novel point of recoverability of costs under statutory adjudication scheme under HGCRA. That I think adequately covers the description.*

MR. BAWDERY: *More than adequately, with respect:.*

JUDGE M.EVANS: *Plus the question of enforcement of adjudicator's decision if without power. You say that even if he did not have power--*

MR. BAWDERY: *You are quite right, my Lord. I am grateful, yes.*

JUDGE M.EVANS: *Thank you both very much.*

MR. BAWDERY: *Can I just raise one point for clarification? in terms of the judgment, would it be judgment for the sum claimed with interest to be assessed if not agreed?*

JUDGE M.EVANS: *Yes.*

MR. BAWDEPY: *I am grateful.*

JUDGE M.EVANS: *Sum claimed with interest to be assessed if not agreed. Thank you very much.*

MR. BAWDERY: *Both counsel are very grateful for the time you have devoted to this, and we apologise if we have caused any inconvenience.*

MR. EVANS: *My Lord, I echo that.*

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NOTE: If it be the intention that this judgment be reported I suggest that the anecdotal passage I have placed in square brackets be omitted - but I have no great objection to its inclusion.