JUDGMENT : HIS HONOUR JUDGE MACKAY: 29th October 1999.

1. This is an application for summary judgment under Part 24 of the Civil Procedure Rules under the Housing Grants Construction Regeneration Act 1996. I accept, from what has been said to me and by the comments of Dyson J in **Macob v Morrison** [1999] BLR 93, that the Act provides a speedy method of getting money out of recalcitrant contractors on a temporary basis of necessity. Therefore the court's powers with regard to the adjudication of disputes are limited to that extent. But it is also quite clear that one of the issues which is fundamental to the adjudication powers of the adjudicator and the way the courts look at it is the issue of jurisdiction.

2. In this particular case, there was a building contract under a JCT agreement. Disputes arose under that agreement and an adjudicator was nominated. There was going to be an adjudication on various claims and counterclaims with regard to the building contract. In fact, a compromise was reached on 23rd April 1999, which is seen in the extensive bundle of documents in these papers. It was reduced into writing on 24th April 1999, which document is to be found at page 134.

3. There then followed a degree of uncertainty between the parties and an interim certificate was issued. The claimants made certain invoices and the defendants wrote that there was a pre-condition of the compromise: that £5,000 plus VAT was to be withheld, because it was on of the conditions of the compromise that certain works were to be carried out, which works were not carried out and therefore the defendants withheld this money.

4. What were the claimants to do? They could have done a variety of things. They could have sued in law under the compromise, or (and this is what they did do) they in fact decided that the compromise would not really wash, and so they took the matter before the same adjudicator. In their representations in writing to the adjudicator, they set out the terms of the compromise but said effectively that those terms do not apply, and what they were making application was for payment under the original building contract. This was perfectly reasonable for them to do this and it fitted in with the scheme of the 1996 Act. But, of course, the point was that the defendants were alleging that the compromise existed and they never accepted the adjudicator's jurisdiction to hear the matters under dispute. They said (and now say) that the claimants were making what is essentially a false application for relief for which they were never entitled because of the compromise.

5. The matter came before the adjudicator and his adjudication is set out in the bundle of documents. He found that there was in fact a compromise. But (and this is the big but) he also found that the defendants were incorrect in their assertion that they could withhold the £5,000 plus VAT. Therefore he awarded that sum, together with another sum, which meant an award in respect of the contract sum and the costs of £11,398.93. The claimants went on their way rejoicing, and in due course issued these proceedings for summary relief and summary judgment of their claim.

6. I have been referred to the case of **Macob{?) v Civil Engineering**. It is pointed out that the claim in respect of jurisdiction in the adjudicator is very important. That case is also accompanied in the small bundle of authorities which have been submitted before with the case of **The Project Consultancy Group v The Trustees of the Grey Trust**, which is a judgment, HT/94/29, provided by the Court Service. It indicates that again the Jurisdiction of the adjudicator is an important and relevant matter. In that particular case, the adjudicator's award was not the subject of a valid application for summary judgment because the point taken by the defendants was he did not have jurisdiction because of the date upon which the contract, which was the subject--matter of the claim before him, was made.

7. In essence, therefore, what is put before me is this. The claimants say that their application before the adjudicator was impeccable. It was not on the compromise, which was not a building contract and therefore was not caught by the provisions of the 1996 Act, but was under the JCT contract, which was a building contract. The defendants argued in writing before the adjudicator that there was a compromise. The claimants say that that was a perfectly proper thing for the defendants to do, and they won. Therefore, having won, the adjudicator was faced with the position that he must look at the compromise agreement to see if it had been carried out. Lo and behold, the adjudicator found that it had not been carried out because the defendants had failed to pay all the sums due under the compromise agreement. Therefore the claimants say what more can the adjudicator do? He has a

perfectly proper application. He makes a perfectly proper decision. He goes on to examine the ramifications of that decision and to allocate the losses where they rightfully are.

8. In the question of the costs, the claimants say these costs were perfectly reasonable. Even if they are wrong, they cannot be attacked because this was a perfectly proper adjudication and the way to attack them is to bring your own claim in the courts and argue the toss about that, because we are dealing here with interim relief, with the immediate payment of sums of money under an adjudicator's adjudication.

9. What the defendant say is, "Yes, we won, didn't we? We won in front of the adjudicator and the adjudicator held, quite rightly, that there was a compromise." If that had been the entire adjudication, no doubt the defendants would not have objected to that because they effectively would have won. What they say is to go on and examine the terms of the compromise and to see whether or not the defendants are caught by some act which is contrary to that compromise is an adjudication by the adjudicator which goes outside the terms of the 1996 Act. Therefore the adjudicator should not have awarded any sum and should not have awarded any costs. What they say is, the claim is made. All I have to do is to apply the provisions of Part 24 and I have to decide whether or not the defendants have a reasonable prospect of succeeding in defending the claim. The defendants go on to say that not only should I declare that they have reasonable prospects, I should decide the case today.

10. I find that the application before the adjudicator was properly made, in the sense it was a coherent application that was capable of finding the adjudicator with jurisdiction. But once the adjudicator had referred to the question of the compromise and once he found that the compromise was in existence, there is plainly what used to be called a triable issue and what is now called a reasonable prospect of success for the defendants in arguing that the adjudicator was wrong to make the decision that he did, that he did not have any jurisdiction to make the decision that he did and therefore what I referred to rather clumsily as the parasitic orders of the adjudicator were inappropriate and wrong in all the circumstances.

11. Therefore I find that the Part 24 application fails. I am not prepared, however, to make any declarations as to the eventual resolution of this case.

MR JESS: *I am obliged, your Honour. I apply for costs to be summarily assessed.*

JUDGE MACKAY: *Application for summary judgment dismissed. Costs must follow the event.*

MR JESS: *In my submission, they must on this.*

JUDGE MACKAY: *What are they? Do you want me to summarily assess them?*

MR JESS: *We exchanged sheets yesterday. The costs, if they have not been referred to you already* -----

JUDGE MACKAY: *I did see something somewhere but I cannot remember where it was now. I spent the time buttoning all these things together.*

MR JESS: *Yes, of course, no criticism. There should be one there dated yesterday from Halliwell Landau. I can hand one up if your Honour has not got it.*

JUDGE MACKAY. *Could you hand it up and I will see if I have got it once I have seen it. (Handed to learned judge) I do not think I have seen that actually. It comes to <u>that</u>, yes.*

MR JESS: *£2,567.28*

JUDGE MACKAY: *Any points to make on that?*

MR GRANTHAM: *Your Honour, briefly. First of all, as the defendants have made clear throughout, these points which I am now making are not new points in relation to a summary judgment application. These points have been rehearsed before the adjudicator, they have been rehearsed in the statutory demand proceedings and are now rehearsed again. Given that, your Honour, the attendances on the client of one and a half hours are excessive, the attendances on the claimant of 40 minutes also appear fairly high. The attendance on the court of 30 minutes, I simply do not know what that is for. The attendances on others is wholly unparticularised* ----

JUDGE MACKAY: *Attendance on court, is that today or another day?*

MR GRANTHAM: *Another day, 30 minutes.*

JUDGE MACKAY: *We can ask for particulars of that, can we not? The person we ask is Mr Jess. Which court are we talking about? You were not here when I gave the young lady from Allsops her magic wand to take these proceedings and get summary judgment applications before the court.*

MR JESS: *No. I do not actually know what that 30 minute attendance on court is. I cannot assist with that £55, the third item.*

JUDGE MACKAY: *That is tough then, yes. The others?*

MR GRANTHAM: *Moving down, attendance on others, we simply do not know what that is.*

JUDGE MACKAY: *Who were the others?*

MR JESS: *I think that must be a reference to Attendance on counsel, no, that is on the following page, I do not know the answer to that one.*

JUDGE MACKAY: *It is a bit dodgy that, is it not?*

MR GRANTHAM: *It is a bit.*

JUDGE MACKAY: *It should be made clear.*

MR GRANTHAM: *Moving on, attendance on documents, three hours, is wholly excessive, particularly bearing in mind the bundle bears a remarkable similarity to a previous bundle used in previous proceedings, particularly the statutory demand proceedings.*

Attendances on counsel, giving instructions and conference of three hours and ten minutes, again I reiterate the point. These are not new points, it does seem excessive, three hours and ten minutes.

JUDGE M CKAY: *Okay.*

MR GRANTHAM: *My learned friend will be relieved to hear I do not challenge the brief fee.*

JUDGE MACKAY: *I did not think you would.*

MR GRANTHAM: *Bearing in mind ----------*

MR JESS: *It is the same as yours!*

MR GRANTHAM: *Precisely. I do say the say the settling or a Witness statement, £400, and advice does seem excessive in addition to the conference.*

JUDGE MACKAY: *The trouble with this summary assessment is that it can get rather catty, can it not?*

MR GRANTHAM: *I am being deliberately very careful about my learned friend's position, so I do not intend to be catty in that respect. But using counsel to settle a witness statement and advice of £400 and also to have a conference of £348.33, the combination of the two, in the light of the fact this is only a summary judgment application, in the light that no defence has been filed - in fact they have not even filed an acknowledgment of service - and in the light of the fact the proceedings were not commenced until 8th October and not served until 13th October, it is excessive on any view.*

JUDGE MACKAY: *I had an instance the last day I was sitting where I was asked to determine the question of costs on a schedule. I cut the costs down but left counsel's fee, which was large but it was not oppressive. It was only £500, but it was a claim. Then I was asked to indicate whether or not counsel's fee had been cut down, because the Bar Council are anxious to find out when those cases are so they can press for payment in the appropriate sum. So I said, "No, I do not think I will cut it down." He was acting for two parties and therefore I would not. Up pops defence counsel, "**That is completely unheard of in the rules. It says definitely that merely because counsel acts for more than one party does not imply that he gets any more money.**"*

MR GRANTHAM: *The answer to that is that it is always a matter for the judge's discretion.*

JUDGE MACKAY: *That is what I told him, but I said next time I would cut it down.*

MR GRANTHAM: *There are no rules in relation to that.*

JUDGE MACKAY: *It goes to show -.hat we are entering a new age. Anyway, those are your submissions?*

MR GRANTHAM: *Your Honour, I have not quite finished yet. I do not know what the application fee is because I do not know what application has been issued by the defendants.*

MR JESS: *I do not think we have got an application.*

MR GRANTHAM: *It is remarkable when there is an application fee, is it not? The fax and photocopies are estimated at £300. It seems a little bit generous, to put it mildly.*

JUDGE MACKAY: *Yes.*

Mr GRANTHAM: *There are not many trees left in Brazil, appreciate, but I am sure they have not all been cut down for this case. As to VAT, I do not know if the defendants are VAT registered or not.*

JUDGE MACKAY: *The defendants, Cross, Cross and AB Air Conditioning.*

MR GRANTHAM: *I suspect that they are.*

JUDGE MACKAY: *I would think they probably are but we do not know.*

MR JESS: *My solicitor having put the sum in, I can only assume that they must be.*

JUDGE MACKAY: *Any adjudication I make will be on the basis that the defendants must satisfy the claimants that they are VAT registered.*

MR JESS: *Certainly. Can I answer some of the points of criticism?*

JUDGE MACKAY: *Yes.*

MR JESS: *The first, the attendance on defendant, was criticised. We are claiming exactly the same time, I think, as -- one hour and 30 minutes is what is claimed for by the defendants as against 2.2 hours. There is nothing really in it, in my submission.*

JUDGE MACKAY: *I am not bothered about that.*

MR JESS: *Attendance on documents was criticised at three and a half hours. My learned friend's costs show three hours, so again there is nothing really in that. In terms of counsel's fee in relation to the witness statement and advice, I notice that the sums claimed for attendance on a conference, presumably with counsel, and fee for settling the witness statement by counsel would have amounted to £350, as against the £400 claimed by the defendants, so again there is really nothing in that. The sums claimed by both sides were almost identical, within £70 of each other.*

JUDGE MACKAY: *I would expect that.*

MR GRANTHAM: *Your Honour, that is not quite correct in relation to counsel. The total is £700 plus for counsel.*

JUDGE MACKAY: *Yes, there is £400 and then -----*

MR JESS: *The brief fee of £500.*

MR GRANTHAM: *The attendance of £148. Your Honour, I have made my point, I do not intend to elaborate again.*

JUDGE MACKAY: *Yes. I assess costs in the lower figure. I have not taken all the points that are advanced by the claimants but I have taken some of them. It seems to me that justice will be done if I order, including VAT, a sum of £2,000.*

I also order that, before payment is made, the defendants must show that the defendants are registered for VAT, so it is a proper amount. If they do that then there is no problem. If they do not do that then an appropriate adjustment will have to be made or the matter can be raised again.

MR GRANTHAM: *Your Honour, I am instructed to ask for permission to appeal.*

JUDGE MACKAY: *Having regard to all the circumstances of the case and having regard to the previous helpful decisions of Dyson J, I do not consider that this is a case that need be granted permission to appeal.*

There follows the questions of directions.

MR GRANTHAM: *Your Honour is not allowed to give directions having dismissed the Part 24 application. Certainly that was the case, I do not 'know if it is still the case on a CPR.*

MR. JESS: *I think on a CPR you do indeed have powers at any time to take control.*

JUDGE MACKAY: *I am sure I can give directions.*

MR GRANTHAM: *The position under 0.14 was you were not entitled to if you dismissed, but you were entitled if you gave unconditional leave to defend.*

JUDGE MACKAY: *It just shows you what a balmy rule it was to start with.*

MR GRANTHAM: *I agree, your Honour.*

MR JESS: *Case management Powers, CPR3, general powers, the court may ------*

JUDGE MACKAY: *Do what it likes basically.*

MR JESS: *----- do whatever it likes, whatever it likes.*

JUDGE MACKAY: *Yes. I am not luxuriating in an excess of zeal. I am just thinking of when we get his defence in and things.*

MR GRANTHAM: *Absolutely. Acknowledgment of service has to be given and there has to be a defence if you are going to acknowledge service.*

MR JESS: *If you give us a chance to acknowledge service, we will be happy to acknowledge service.*

JUDGE MACKAY: *We have prevented him so far. Defence: I would have thought defence by 19th November.*

MR JESS: *Certainly, yes, your Honour.*

MR GRANTHAM: *I would not have thought one needs four weeks from now.*

MR JESS: *It is not four weeks.*

JUDGE MACKAY: *It is the 29th today.*

MR GRANTHAM: *I still say it is excessive but anyway, 19th November.*

JUDGE MACKAY: *Do not fight over everything!*

MR GRANTHAM: *I know, your Honour, it is Friday afternoon)*

JUDGE MACKAY: *Further directions hearing beginning of the New Year. A reply if so advised by ----*

MR JESS: *Perhaps three weeks again, your Honour, from the 19th?*

JUDGE MACKAY: *17th December. Further directions hearing 21st January?*

MR GRANTHAM: *Your Honour, yes. Three-quarters of an hour?*

JUDGE MACKAY: *Half an hour. Fit for counsel. Not before 12 noon.*

MR GRANTHAM: *Is it now before your Honour's list?*

JUDGE MACKAY: *Oh, yes.*

MB. JESS: *Could I just clarify. Are we still in the County Court or are we now in the high Court?*

JUDGE MACKAY: *I do not know.*

Mr GRANTHAM: *It is the County Court.*

JUDGE MACKAY: *You are in the County Court but the application has been made in this court.*

MR JESS: *Yes, the TCC operates within the County Court.*

JUDGE MACKAY: *Yes, certainly. Putting it more accurately, the County Court operates within the TC.*

MR GRANTHAM: *Indeed.*

JUDGE MACKAY, *The only thing is the payment will need to be made on the filing of the defence, because you have to pay an extra amount to get within the rarefied and always right air of this court - big laugh, all. concerned! So if you could organize that in due course, I would be very grateful.*

MR GRANTHAM: *Can I just clarify. The hearing on the 21st January, that will be a CMC, case management conference?*

JUDGE MACKAY: *Yes, and you will need to fill in the appropriate booklets which will be provided for your instructing solicitors by Frank.*

MR GRANTHAM: *I am obliged.*

JUDGE MACKAY: *Thank you very much.*

Mr Grantham appeared on behalf of the claimant
Mr D Jess appeared on behalf of the defendants