JUDGMENT : HIS HONOUR JUDGE HUMPHREY LLOYD QC : TCC : 15th March 1999

1. This is a decision on an application for costs on which the arguments of counsel raised some points of general interest concerning the procedure for enforcing the decision of an adjudicator acting under s108 of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA). It seems that this is only the second contested matter concerning adjudication which has been argued in St Dunstan's House.

2. The facts are to be found in an affidavit of Michael Richard Draper, the plaintiff's solicitor, in its exhibit and in letters which were by consent presented to me. Some are drawn from the adjudicator's decision and since they may all be referred to an arbitrator to deal with the dispute, I mention them only for illustrative purposes. I am not of course required to make any finding about them and I do not do so. The plaintiff became a subcontractor to the defendant for groundworks and other enabling works at Borough Market Pavilions, Bedale Street, Southwark, pursuant to a order from the defendant of 18 September 1998 which incorporated the terms of DOM/1 (as modified by some General Conditions - according to the adjudicator's decision). The main contract works were supposedly complete at the end of October 1998. The dispute arose over the unpaid balance of the final account, which appears to have been agreed at £51,500 gross. The plaintiff claimed the unpaid balance of £12,212.50; the defendant maintained that it was not due as the work had not in fact been done properly. (I omit the full extent of the defendant's case.) On 21 December 1998 the plaintiff gave notice requiring adjudication and asked the Chartered Institute of Building to make an appointment. Its President appointed Mr Peter Talbot. The defendant said that the contractual scheme was applicable and that the dispute should be decided under the arrangements in the main contract. Mr Talbot decided that the contract did not comply fully with s108 and he notified in the parties in letters of 8, 11, & 19 January 1999 that accordingly the Scheme in Part I of the Schedule to the Scheme for Construction Contracts (England & Wales) Regulations, 1998 applied (the Scheme). In his decision of 12 February 1999 the adjudicator rejected the defendant's case and decided that it should pay the plaintiff (a) the amount claimed within seven days of the date of the decision; (b) his fees and expenses of £1,597.30 and (c) the nomination fee of £150. Since the plaintiff paid (b) and (c) the total due to it was £16,096.98. Mr Talbot concluded by stating: "I order that this Decision be complied with peremptorily. Either Party is, subject to giving to notice to the other and to me, permitted to apply to the court for an order requiring compliance with this peremptory order." (It is not clear why the adjudicator required notice to be given to himself as, on giving his decision, he would appear to have become functus officio, but no point arises on this.)

3. The plaintiff evidently then issued, on 15 February 1999, an invoice for £16,096.98. It gave the defendant the seven days (and more) to comply with the decision before its solicitors sent a fax on 26 February stating that unless payment was received by 2 March it intended to invoke para 24 of the Scheme by obtaining summary judgment in accordance with **Macob Civil Engineering Ltd v Morrison Construction Ltd**, 12.2.1999, (see paragraphs 33 -37 of the judgment of Dyson J). On the expiry of that period, on 2 March, the defendant replied by fax to the plaintiff's solicitors. Interestingly, the letter started with the statement "We are familiar with the "Macob" decision and its implications". It went on to say that it had given notice of arbitration, that the adjudicator had erred in a number of respects, including exceeding his powers, and to contend that, since the decision was in respect of a final payment, it was not due until 30 days after 19 February, i.e. 29 March, since the payment was governed by paragraph 5 of Part II of the Scheme.

4. On 8 March 1999 the plaintiff issued a writ claiming £16,096.98 plus interest at 8% from 20 February until 5 March and thereafter at £3.53 per day. As required by RSC Order 6, rule 2(1)(b) the writ stated
"If, within the time for returning the Acknowledgement of Service, the Defendant pay the amount claimed and £89.25 for costs.... further proceedings will be stayed. The money must be paid to the Plaintiff or its Solicitors."

   On 10 March the plaintiff issued and served a summons returnable on 12 March (having obtained leave) for the following orders:
   "1. time for Service for Acknowledgement of Service be abridged to two days after the return date of this Summons or such other day as the court shall appoint.

"2. time for the Defendant to adduce evidence in opposition to the Plaintiff's summons for summary judgment (if any) in respect of the claim in paragraph 1 of the writ be abridged to 7 days from issue of the Plaintiff's aforementioned summons.

"3.... that the Plaintiff do have its costs paid by the Defendant in any event."

(The summons also contained an obviously inaccurate statement requiring the defendant to produce an affidavit in opposition within 3 days, i.e. after the return date but I imagine that when the summons was drafted it was not thought that the return date would be so early and through oversight it was not altered when the summons was issued.)

At about 11 am on 12 March the defendant delivered by hand a letter to the plaintiff's solicitors which enclosed a cheque for £16,256.83, i.e. the amount claimed in the writ plus the interest and costs sought in it. It was also faxed to the court at about 12.20.. (According to the letter the defendant's solicitors had written to the plaintiff's solicitors on the previous day notifying them of this step and informing then that they could not attend the hearing of the summons.) Since the plaintiff's claim for the costs of its application could not be disposed of by agreement it was heard on the afternoon of 12 March. On that hearing before me the cheque was treated as acceptable without need for a judgment.

5. Mr Coplin for the plaintiff sought an order for costs on the basis that all the steps taken by the plaintiff were justified. Mr Chambers for the defendant submitted that no order for costs should be made in favour of the plaintiff defendant and that on one limb of his case the defendant was entitled to its costs. In summary he submitted, first, that with the payment of the full amounts claimed the action was stayed, as provided by the writ and by Order 6, rule 2(1)(b). Secondly, the plaintiff had stated on the writ that if the amount claimed were paid within 14 days the defendant's liability for costs would £89.25. It could not now go back on that representation and seek more costs. He also referred to Order 62, rule 7(3) which provides that the defendant is entitled to tax such costs even if they are paid in full as sought. This showed that the rules envisaged only a possible reduction in the fixed 14 day costs and not an increase. Thirdly, the summons was not justified. An order for the abridgment of time was rarely made: see the note to Order 3, rule 5 at paragraph 3/5/5 in the Supreme Court Practice, especially as regards shortening the period of 10 days allowed by Order 14, rule 2(3) for service of any Order 14 summons and affidavit in support. There was nothing in the HGCRA or in the Scheme which showed that Parliament intended that enforcement of an adjudicator's order should be effected more speedily than any other debt. If Parliament had so intended it would have changed the Rules. In addition the plaintiff had acted with undue haste in pushing the summons forward, especially having regard to the time that had been taken beforehand. Fourthly, the defendant was entitled to its costs as the hearing was in the circumstances quite unnecessary as the money had been paid in the morning, in sufficient time to abandon the application. In reply Mr Coplin maintained that the intention of Parliament was clear: disputes were to be resolved by adjudication which was to be speedy and effective. There was therefore every reason to ask for abridgments and for the grant the court to exercise its discretion to grant them, otherwise Parliament's intention would be defeated. The stay did not affect the disposition of costs of applications launched before it took effect. The 14 day fixed costs did not mean that a plaintiff could not make an application and recover the costs if justified in doing so.

Decisions :

6. The Scheme which, if the adjudicator was correct, had contractual effect as implied terms of the sub-contract when it was made (see s114(2), provides in paragraph 23(2): "the decision of the adjudicator shall be binding on the parties and they shall comply with it until the dispute is finally determined...". A provision to this effect has to form part of every construction contract (as defined by s104 of HGCRA, subject to exclusions) made after 1 May 1998: see s108(3) of HGCRA. The Scheme, unlike other contractual arrangements which have been devised to comply with s108 of HGCRA Such as those of the JCT, TeCSA/ORSA (Version 1.2), and CIC. See also the useful article by Mr David Miles at (1998) 14 Const. LJ 311 (not referred to by counsel.), provides in paragraph 24 for enforcement by way of s42 of the Arbitration Act 1996 (as amended) where the adjudicator has ordered *"any of the parties to comply peremptorily with his decision or any part of it."* This novel procedure is therefore limited to a peremptory order contained in a decision. It is not expressed to be the sole method of enforcement to the exclusion

of others, and like Dyson J, I do not think that a party is confined to it. Accordingly, although this was not questioned, the course taken by the plaintiff, namely to issue a writ, was proper and prudent, given that there is no settled practice for enforcement under section 42. It is the obvious and natural way to enforce a decision which required the payment by one party to the other of a sum of money: in Macob the plaintiff did not obtain judgment but merely a declaration and was thus not much further forward. Some other adjudication schemes expressly provide for enforcement by "*legal proceedings*" (JCT) and even "*summary enforcement*" (TeCSA/ORSA, Version 1.2). Accordingly the defendant's arguments could apply to enforcement under such an arrangement, were the same or similar action to be taken.

7. First, the automatic stay that applies by virtue of Order 6, rule 2(1)(b) does not in my judgment affect the court's jurisdiction to determine liability for the costs of an application issued before the stay applied. The purpose of this part of Order 6 is clearly to facilitate straightforward debt-collecting in a cost-effective manner. The defendant may apply under Order 62, rule 7(3) for a reduction in the costs taxed, but that is the only exception since the procedure assumes that all other costs are capable of being quantified by the plaintiff in advance (e.g. those for substituted service or service abroad). It presupposes that no other costs are going to be incurred. It does not in my judgment mean that if it is necessary to take some further action (e.g. to amend to claim an injunction and to seek it) the court cannot deal with the costs of that action simply because the amount claimed was subsequently paid. Once a writ is issued the defendant is liable for costs; he cannot avoid costs by paying before service - see the note to Order 13, rule 6. In any event the court may lift a stay and I have no doubt that if a defendant had incurred costs in relation to an application made before payment in full of the amount claimed plus the 14 day costs the court would lift any stay to hear that application. Here the summons was duly served before payment was made and in the circumstances of this case it would plainly be just to lift the stay in order to hear and decide the plaintiff's application.

8. Secondly, there can be no doubt that if the amounts claimed in writ are paid the plaintiff is not entitled to more than the costs claimed in the writ in respect of work done up its issue in relation to it. Order 6, rule 2(1)(b) read with Order 62, rule 7(3) makes this clear. Lifting the stay in order to deal with the cost of the summons does not let the plaintiff under that barrier. However the bulk of the costs claimed relate to the summons.

9. Thirdly, I consider that the issue of a summons to abridge time was justified. There are three aspects. First, it may be rare for time to be abridged but in this court (as in commercial, mercantile and other courts) it is done from time to time. Order 3, rule 5(1) is wide and without material limitation. The editors of the Supreme Court Practice suggest that the guiding criterion is the avoidance of injustice, i.e. the lack of prejudice to the other party. This criterion naturally re-appear in the Civil Procedure Rules under the head of the overriding objective (see Rule 1.1). It is significant that in Rule 3.1 the list of court's typical powers of management start with *"(a) extend or shorten time for compliance with any rule..."; (b) adjourn or bring forward a hearing;"*. I see no reason why even the standard time limits for acknowledging service and for opposing an Order 14 application cannot be abridged.

10. Next, ought they to be abridged in a case such as this? In principle in my judgment the answer is: yes. Action to enforce an adjudicator's decision is not comparable to the ordinary process of recovering an apparently undisputed debt. The Rules of the Supreme Court provide a reasonable time for the defendant in an ordinary case to take stock of its position in case there is a defence to the claim. The HGCRA (and the statutory instruments made under it) constitute a remarkable (and possibly unique) intervention in very carefully selected parts of the construction industry whereby the ordinary freedom of contract between commercial parties (without regard to bargaining power) to regulate their relationships has been overridden in a number of areas, one of which is dispute resolution. The overall intention of Parliament is clear: disputes are to go to adjudication and the decision of the adjudicator has to be complied with, pending final determination. There is no provision for a "*stay of execution*" (unless it is part of the decision itself), presumably since that would undermine the purpose which is finality, at least temporarily. In addition the provisions in the Scheme for the enforcement of peremptory orders via what is thought to be a quick and effective procedure reinforce the conclusion that Parliament intended that adjudicator's decisions and orders, if not complied with, were to be

enforced without delay. It is clear that the purpose of the Act is that disputes are resolved quickly and effectively and then put to one side and revived, if at all, in litigation or arbitration, the hope being that the decision of the adjudicator might be accepted or form the basis of a compromise or might usefully inform the parties as to the possible reaction of the ultimate tribunal. Thus before a writ is issued to enforce the order of an adjudicator (whether or not declared to be a peremptory order) there will normally have been careful consideration of the underlying dispute, its ramifications and of the adjudicator's decision by all parties. The defendant's room for manoeuvre and its need for further time will be limited.

11. I do not consider that Mr Chambers is right in his submission that if Parliament really intended that adjudicator's orders should be given preferential treatment it ought also to have changed the Rules of the Supreme Court. Parliament does not work through every aspect of its intention expressed in legislation, much of which has to be interpreted purposively, as it is now commonly said. It may only set the direction. It is then for the courts to follow it through and, in so far as it affects the procedure of the courts, to do so in a manner which is fair and respects the interests of the parties. Parliament's intention is in my judgment sufficiently expressed in the Act I was not referred to any *"travaux preparatoires"*., but it is reinforced by its approval of the Scheme which, in the procedure for the enforcement of peremptory orders via amendments to s42 Arbitration Act 1996, plainly indicates a desire to improve on the timetable currently available by the use of the court's usual methods. There is nothing inconsistent between the intention that adjudicators' decisions that are properly made should be complied with promptly and fully and the utilisation of the machinery and powers of the courts, including the power to abridge time, to secure that result, the justice of which is self-evident, provided always that there is no prejudice to the defendant. In these circumstances there is seemingly no reason why a party who has not voluntarily complied with a decision that it should now honour an outstanding contractual obligation to pay should be allowed the best part of a month, at the very least, before a decision requiring payment to the claimant is converted into the order of a court. (It is rare for the minimum timetable envisaged by the Rules to be achieved in practice, even if the plaintiff is determined that it should, and even if on its part it complies with the Rules.) In my view a party seeking compliance is perfectly entitled to apply for an abridgement of time, and in this Court at the same time, perhaps even to obtain a provisional or fixed time for the hearing of an Order 14 or other application that it thinks it might need to make (subject always to liberty to apply). If this were done ex parte (as has already been done) then it would need to be supported by an affidavit which properly disclosed all the relevant factors. If there were no factors which would create an injustice to the defendant an order abridging time to a reasonable period would probably be made. The defendant will be given liberty to apply. If the defendant thought that the order so made prejudiced it, an application to vary the order and possibly to restore the status quo should be made. In anticipation of the need for adjudication matters to be heard without undue delay the judges of this court decided last year that if an application were marked as concerning adjudication it would, if possible, be heard speedily. Thus this summons came on within two days so an ex parte application might not achieve more.

12. On the other hand it should not be thought that time will be abridged in every case, i.e. that it will always be sufficient simply to rely on the fact that an adjudicator has made a decision which not been complied with. For example, the plaintiff's affidavit (which was sworn for a summons on notice) did not refer to the defendant's answer of 2 March to the "*letter before action*" of 26 February. The letter of 2 March set out some apparently arguable grounds for not complying with the decision, e.g. that the adjudicator had exceeded his jurisdiction. In addition since the parties were not represented before the adjudicator (as the adjudication was conducted primarily on a "documents-only" basis), and since the letter might not have been written on legal advice, a party in the position of this defendant who needed to take legal advice might have been able to show that some of the quite tough abridgments proposed would be unjust to it (although in this case there would still probably have been some overall shortening of the minimum timetable set out in the Rules), had it been necessary to decide the point. The defendant's abandonment of the grounds advanced and its payment obviated that need.

13. The plaintiff was in my judgment justified in issuing its summons and pursuing it. That decision was vindicated by its upshot. The plaintiff was similarly entitled to seek an order for its costs and was not

obliged to withdraw its application simply because the letter with the cheque had been delivered 4 hours earlier. I take into account the fact that necessarily the defendant may have to pay dearly for being a guinea pig, but I have also to take into account the fact that it would not have been necessary for either the writ or the summons to be issued had the defendant either complied with the adjudicator's order or taken pre-emptive action to have it set aside (if the grounds in its letter of 2 March were thought to be well-founded). As it is, the plaintiff got paid one month after the adjudicator's decision and three weeks later than that decision required and, if the defendant is unsuccessful in the arbitration, many months after the final account was agreed. Accordingly the plaintiff is entitled to the costs of its summons.

14. Each party assumed success and submitted summaries of its costs for assessment under the new Practice Direction. There is no challenge to the plaintiff's solicitors' rates or counsel's fees, all of which are on a par with the defendant's and are in any event reasonable and within the guidelines e.g. those provided for TCC work by TeCSA and TECBAR.. The plaintiff's summary does not indicate when the hours were incurred but it clearly includes time that must have been spent on considering whether to start proceedings, in corresponding with the defendant, and in issuing the writ, which is either covered by the 14 day costs or is not or may not be referable to the summons. If this time is not so related, it is excessive for the summons, even if extra consideration had to be given to it since it is not a normal application. I shall however allow £70 for general advice related to the summons. I allow only half the time claimed for *"attendances on documents*", £50 only for counsel's fee for "*advice/documents*", and £50 for the *"other expenses*", i.e. £220 in all, but otherwise all the costs and the balance of fees claimed, i.e. £460, are allowed, which comes to £750. I do not consider that there is any need for any further reduction as these amounts satisfy the standard basis which is to be applied. As provided by paragraph 22 of Practice Direction No 1 of 1994 no VAT is payable. The defendant is therefore to pay the plaintiff's costs assessed at £750 within 14 days.

15. I am indebted to counsel for their careful, comprehensive and succinct submissions.

Richard Coplin appeared for the plaintiff, instructed by Shadbolt & Co.
Adam Chambers appeared for the defendant, instructed by Susan Heads & Company.