CA on appeal from Oldham County Court (Mr Recorder Fordham QC) before Pill LJ; Sir William Aldous. 21st May 2004

**LORD JUSTICE PILL:**

1. This is an appeal against a judgment of Mr Recorder Fordham QC delivered on 15th September 2001, a subsequent *"Revised Judgement"* being delivered in 2002 in circumstances to which I will refer.

2. Even as litigation goes, the course of this litigation has been unfortunate and the dispute itself is a most unfortunate one. The hearing lasted for six days; three days in July 2001 and a further three days in September 2001. Points having been made about the judgment, and errors which are plain having occurred in it, the judge arranged an oral hearing for a date in March in 2002.

3. While the first defendant, Dr Hamid, appeared at that hearing, the claimant, Mr Medtia, did not and the judge declined to hear either the first defendant or second defendant (who takes no further part in these proceedings), but invited written submissions which were provided. It was as a result of the earlier receipt of a letter from the claimant's solicitors, and representations made in writing by and on behalf of the first defendant, that the revised judgment was given. The effect of the revised judgment was that judgment was given in favour of the first defendant in the sum of £6,898.75.

4. This was a dispute between a builder, Mr Medtia, and his client, Dr Hamid. The Recorder sets out the history of the dispute: *"I shall refer presently to the various contentions in summary form but it suffices at this stage to say that, almost inevitably the Plaintiff and the First Defendant fell out as to the contract price, as to the work included in the contract, the extent to which this was satisfactory, the alleged shortfall due to the Plaintiff and the First Defendant's claimed cost of putting right."*

5. The judge referred to the fact that on the morning of the trial he was presented with a large bundle of documents by the plaintiff. It appears, also, that a document to which we will refer, and which is at page 27 of the bundle and makes additional claims, was submitted at a late stage by the first defendant.

6. The judgment referred to the unhappy nature of the hearing and to the animosity between the parties. The judge referred to the expert witnesses, finding the first defendant's surveyor, Mr Taylor, *"for the most part, an impressive witness"*, although the Recorder stated that he was left with the impression that, *"although not overborne he may have been pushed to the limits of his professional integrity by the undoubtedly strong personality of the First Defendant."*

7. The judge also stated, in relation to Dr Hamid, the defendant, who had made a substantial set-off and counterclaim, that he had come to the view that it was exaggerated. The judge found that the contract price was £47,069. There is no challenge to that finding. The judge found on page 6: *"Having heard the evidence and seen the photographs there can be no doubt that the works, insofar as they were ever completed were completed badly. As will appear I do not accept the entire table of defects nor necessarily the value attributed to those defects by Mr Taylor but defective the work definitely was. Mr Taylor used the term 'cowboy' in respect of some aspects of the work and there are photographs tending to endorse that expression. That is far from condemning the whole of the work as unsatisfactory."*

8. The judge referred to his approach to the expert evidence saying, by reference to a Scott Schedule: *"Where I do disagree it is because I prefer the figures of Mr Gaskell [that was the plaintiff's expert] and/or that I accept the points made in cross-examination of Mr Naylor by the Plaintiff. Where I do not say other-wise I accept the figures of Mr Naylor. My findings appear as an annexure to this judgment. In some instances I have found it appropriate to set out a reason: otherwise I rely on what I have said above. The result of that exercise is to produce a figure of £4,620.00 by way of reduction."* That is reduction upon a counterclaim in excess of £19,000.

9. The judge referred to claims additional to the Scott Schedule, which is set out at page 27, to which I have referred. Item 2(b) totals £8,416.43. The Recorder stated: *"These various items were not the subject of close enquiry at the hearing and there is little evidence to support them. I allow a global figure of £2,500.00."*

10. He also found that a sum of £555 should be granted on the counterclaim, and there is no challenge to that finding. The result was that the judge reduced the Scott Schedule claim to £15,213. To that sum he added the sums just mentioned of £2,500 and £555, making a total of £18,268. He subtracted from that the contractual balance, the sum of £36,000, having been paid to the plaintiff by the first defendant and the contractual balance therefore being £11,069. He awarded, in his first judgment, a sum of £7,199. He rejected a claim for interest stating that no clear picture emerged about delay and the parties had a shared responsibility.

11. I refer to subsequent submissions made. The judge plainly found the submission made on behalf of the plaintiff, which was essentially an arithmetical submission, to be a powerful one. He said this about it: *"On behalf of the Plaintiff I have the letter of 26.9.01. This is an extensive commentary on my own variations to the First Defendant's Scott Schedule. Although I cannot fault the solicitor's arithmetic nor indeed work out where my own has gone wrong I find their reasoning compelling."*

12. Accepting what he understood to be the arithmetic of the plaintiff's solicitor, the judge found that there should be judgment for the plaintiff on the claim in the sum of £1,130.47. He then considered the counterclaim, and he accepted a submission made in writing by Dr Hamid that for remedial work VAT ought to be added to the sums which had been submitted. He added a sum to the counterclaim to represent VAT and found that the total figure, by way of counterclaim, was £8,029.22.

13. His conclusion then was: *"The effect of the foregoing is that there is a net sum due to the First Defendant of £6,898.75 and there will be judgement in that sum."*

14. The judge added: *"The second matter that may arise is the event of challenge to my revised figures. If my recalculation gives rise to dispute that will need to be resolved by way of appeal and not by further recourse to me."*

15. The judge plainly had a task which he found to be a difficult one. Both the parties appeared in person during the long hearing. He clearly was not impressed by the way they conducted themselves, particularly the plaintiff, and I appreciate the difficulties of the task in view of the complexities which had arisen, or at any rate the parties claimed to have arisen, in the way the matter was conducted.

16. That last conclusion of the judge was, however, an unfortunate one in my view. A great deal of time has been taken up today in this court in resolving matters, some of which were essentially for the judge to give an explanation about. Had the judge availed himself of that opportunity, and heard some of the submissions which we have heard today, the issues before this court would have been much narrower, even had the case reached here at all.

17. Unfortunately the judge made two fundamental errors. The first was, having given the first of the calculations which I have mentioned, which produced a sum of £1,130.47, he failed to appreciate that the counterclaim had been taken into account in reaching that sum. So that in adopting the approach he did, and embarking on the second calculation which gave judgment on a counterclaim of £8,029.22 (that is substantially in excess of the amount on the claim), there was a double counting.

18. The second mistake was in the first judgment. It arises out of an annexure to that judgment which accompanied it. This is the correction which essentially the judge made in the revised judgment when he said that he had found the reasoning of the plaintiff's solicitor compelling.

19. We have been referred to the Scott Schedule as submitted. It appears at pages 21 and 22 of the bundle, accompanying the letter of 26th September, which is at page 19. That sets out, under the heading, *"Original Total of Defendants Quantum"* (£19,833.59), two columns: one is an *"Allowed"* column and the other is a *"Reduction"* column.

20. It is not disputed that the effect of the annexure, subject to one arithmetical error, is correctly represented in the document at pages 21 and 22. What, however, the judge wrongly did, when giving his first judgment, was to add up the figures allowed, that is the left hand column, as if they were the reductions. What he should have done, following his acceptance of this reasoning, is to total the reductions column and to deduct that from the sum of £19,833.59 by counterclaim. That would have given a figure of £6,883.33.

21. At this hearing the plaintiff/claimant is represented by counsel, Mr Gilchrist. The first defendant appears in person. He has addressed the court, if I may say so, tenaciously, but at all times courteously. He has argued what, in my view, is unarguable; that in fact the sum of £4,620 was what the judge intended as a deduction from the counterclaim of £19,000 odd.

22. That construction simply does not bear analysis. Apart from the general format, and the nil entries under a number of items where sums were claimed, there is a reference against items 48 and 49 "Gaskell comment accepted". That can only mean that on those points it was the evidence of the plaintiff's expert witness which was accepted. Those comments appear against the figure "nil" and what is deducted is clearly the items which were claimed under items 48 and 49, sums of £80 and £640 respectively.

23. Moreover, against item 73 there is, *"Nil: this appears to be a duplicate of 2(b)(ii)"*, to which we will refer. The amount involved, which in that case is £288, would only make sense as a nil entry if the table is to be construed in the way which not only the solicitors submitted it should, but the judge accepted that it should. The combination of these two errors means that, subject to the arguments on 2(b)(ii) at page 27, and other ancillary points, the judgment must be in favour of the plaintiff.

24. The arithmetic has been set out by Mr Gilchrist and I accept it. It is that the claimant was entitled to £11,069 on his claim; that there is to be reduced from that the sum of 6,883.33 upon a correct construction of the judge's findings in relation to the Scott Schedule. There is also to be deducted the sum of £555 to which I have referred. The £2,500 in 2(b) remains in issue and I will turn to that in a moment.

25. Credit should also be given for the sum of VAT which the judge believed should be added to the sum counterclaimed for remedial work, and Mr Gilchrist accepts that and it is calculated in the sum of £1,104.64.

26. Before expressing final figures, I turn to the other main point in contention, the first main point having emerged as being the correct construction of the annexure to the first judgment. The second point is in relation to the sum of £2,500 which the judge has awarded under 2(b). That is based on a document described as *"Summary of Claim and Counterclaim, First Defendant."* It is a late submitted document at page 27, but one which was considered at the trial, and under 2(b) a sum of £8,416.43 was claimed.

27. I have referred to the judge's finding as to that. He stated that the items were not the subject of close enquiry at the hearing and there is little evidence to support them. However, he allowed a global figure of £2,500.

28. The court has spent a good deal of time today in considering both the general submissions and the detail under claim 2(b). Dr Hamid makes the point - and he makes this in relation to both the main points at issue - that the judge, having made the comments he did about the standard of the plaintiff's workmanship, and the generally

favourable approach to Mr Taylor, cannot have intended the claimant to achieve a result, on balance, in his favour in this case. Indeed the judge did say, in the course of his revised judgment that: *"I make it clear that from an early stage it was always my view and intention that the Plaintiff should emerge from this litigation as a debtor to the First Defendant."*

29. Dr Hamid makes the further point that he was only permitted one expert witness. Mr Taylor was not prepared to give evidence about matters which he had not seen for himself. Dr Hamid says that he himself gave evidence on the points set out under the headings in 2(b), and he submits that there is documentary evidence to support the claim. He submits that the judge was justified in awarding the comparatively small proportion of that total in the sum of £2,500.

30. Mr Gilchrist submits that whatever general impressions a judge may have, in a case of this kind it is essential to go into detail and to consider matters point by point; that is the whole object of a Scott Schedule, and cases are determined on a point for point basis, not under any general impression as to who has behaved better as between the parties.

31. Mr Gilchrist makes the point that the Scott Schedule was prepared at least three years after the plaintiff had left the site in 1997. It was prepared by responsible experts and he relies on the sheer unlikelihood, first, of substantial matters coming to light in the comparatively short interval between the preparation of the Scott Schedule and the hearing before the judge, and, secondly, the absence of any evidence from Mr Taylor on these points. It is very surprising, he submits, that had the substantial fresh items appeared, Mr Taylor would not have made some comment on them. He could have had material, such as the snag list prepared by Dr Hamid and photographs which have been shown to us, to form the basis for an opinion. The Scott Schedule was prepared close on four years after the work was done, signed by the experts in February 2001, and the hearing was within a few months of that.

32. We see great force in those submissions, notwithstanding the general point made by Dr Hamid. Moreover, an examination of the documents provides little support for Dr Hamid's additional claims under this head (additional in the sense of being separate from the Scott Schedule). He has taken us through the 11 items, item by item.

33. Mr Gilchrist of course makes the point that any award must condescend to individual items; that a succession of nils does not make a positive figure. The judge has to be satisfied, on the balance of probabilities, on specific items, that a sum is due, and it was an unsatisfactory way of approaching these disparate items to make the global award which he did.

34. One of the substantial items is at (v), *"Windows repair and report"*. Mr Gilchrist draws attention to the judge's finding at page 4 of his judgment, point 3, *"The various documents deriving from Security Windows failed to impress."* Those documents appear at page 126 and 149, first, by way of a detailed report at page 126, and then by way of what purports to be an invoice for remedial work in the sum of £1,885.88, which appears at 149.

35. That is the judge's comment about the Security Windows documents. It is, in my judgment, very surprising, and we accept what Dr Hamid has said about the attitude of Mr Taylor, but I do find it very surprising that a defect which is claimed to have been present, which potentially was present when Mr Taylor made his examination late in 1997, was not found by him. The photographs show leading which clearly is not properly positioned, and we have seen a very long Security Windows report which refers to a considerable number of alleged faults.

36. It is difficult to accept, though confusion can occur, that serious problems arose between the date of Mr Taylor's report late in 1997, and the Security Windows report, about which the judge made the comment he did, of 28th January 1998. I have already made the comment how surprising it is that Mr Taylor did not see fit to deal with this point. That, of course, is one of the substantial items making up the figure of £8,000 odd.

37. The other substantial item is the sum of £3,701.25, under the heading *"No or wrong cavity ties used - cavity ties - holes to be drilled for ties and make good, and stone..."* Again, I find it extremely surprising that something which was going to cost £3,700 had not been detected by Mr Taylor, especially when it appears from the Scott Schedule that an item which appears to cover the same territory, or at any rate a part of it, does appear (item 72) in the sum of £288. No invoice has been provided, and no receipt, in any event, to support the payment of £3,701.

38. I have indicated to Dr Hamid, and I believe he understands, that we are not a trial court. Our task is to consider points of law. Of course it may amount to a point of law if a judge has misconstrued, or failed to take account of, evidence, and that is why we have been prepared to consider, with Dr Hamid's help, in some detail the various items which arise. But there were occasions when plainly Dr Hamid sought to call fresh evidence or reargue points argued below. He says that he gave evidence as to some of the matters which are set out, and we have no reason to doubt that he did so. However, where we have been able to look at these claims, by reference to documents, and I have referred to examples in relation to the main items, it has not provided a case on which a judge could legitimately make a global award.

39. Reference was made to leaking radiators which had been made good, but no evidence of payment to third parties for remedial work has been produced. The first defendant was invited to but did not refer to documents during submissions. After judgment, he referred to two documents. These would not have altered the view of the court. Item 11, *"no guarantee for boiler"*. I find it difficult to understand how that can be laid at the door of the claimant in any event.

40. I sympathise, not only with the problems faced by the Recorder in this case, but also the sense of frustration felt by Dr Hamid who had the ear of the judge it seems, and the judge believed that matters were going to end up in Dr Hamid's favour. But in relation to the £2,500, in my judgment the award cannot survive the scrutiny which this court must apply to it.

41. Is there evidence which justified a judge in taking the rather unusual course of making a global award in the way that he did? At the invitation of the parties we have considered the evidence on this issue in some detail and I have come to the conclusion that the judge was not entitled to make that global award.

42. That is subject to one point where, in my judgment, there has in the court been a double deduction. In the annexure to which I have referred, the judge, under item 73, (that is a part of the roofing) states, *"This appears to be a duplicate of 2(b)(ii)."* It is the item which I quoted a little while ago. Since the reason why the judge did not allow it on the Scott Schedule was that he had allowed a portion of it under 2(b), and now that this court has come to the view that there should be no award under 2(b), it seems to me that the sum of £288, under item 73, should stand.

43. That leaves some necessary adjustment to the arithmetic to which I referred earlier. An amendment to the calculation put before us can be made. The claimant was entitled to £11,069 on his claim. The defendant was entitled, first, to the sum of £6,883.13 on his counterclaim, then to the sum of £555, by way of the additional item accepted by the judge, and then the sum of £1104.64 by way of VAT on the remedial work. To that sum must now be added the sum of £288 to which I have just referred. Without that, the arithmetic is that the defendant is entitled on his counterclaim to £8542.97, and by deducting that from the claim leaves a figure of £2,526.03 from which the sum of £288 falls to be deducted.

44. Accordingly, the appeal will be allowed, and a judgment for the claimant in the sum, now to be arithmetically calculated, will be substituted. A claim for interest is made on behalf of the claimant on the basis that, whereas the counterclaim arose later, his claim was for a sum due under a contract, and even though the judge thought interest inappropriate for reasons he gave, interest should be awarded now that the claimant has succeeded in the sum mentioned.

45. I do not accept that submission. The judge's approach to interest was such that it should, in my judgment, apply equally to the claim. The judge had a discretion in the matter. He referred to the conduct of the parties, and I would not award interest to the claimant.

46. **SIR WILLIAM ALDOUS**: I agree.

MR D GILCHRIST (instructed by Wrigley Claydon) appeared on behalf of the Appellant
THE RESPONDENT APPEARED IN PERSON

**Medtia v Hamid** [2004] EWCA Civ 666

**LORD JUSTICE PILL:**

1. This is an appeal against a decision given in the Oldham County Court in favour of Dr Hamid against the claimant, Mr Medtia. A second defendant, Mr Richard Clare, was involved. Judgment was given in his favour with costs, which we are told have since been certified at £6,900.

2. To the surprise of the members of the court, Mr Clare has appeared on the hearing of the appeal. The appeal is only against the judgment in favour of Dr Hamid. Dr Clare has, however, referred to the letters received from the court in relation to today's hearing. What is more, he has referred to the fact that the order for costs in his favour has been stayed by an order of the County Court of its own initiative, dated 8th December 2003, *"Enforcement of the final costs certificate be stayed until the finalisation of the appeal or further order."* It is clear from correspondence that the claimant has sought to rely upon that stay and the reference to the finalisation of the appeal. In all the circumstances we do not find it surprising, now we have been told of the circumstances, or blame Mr Clare, for his attendance today.

3. The only matter we deal with now, pending a possible further argument as to what part he should play at the hearing, are two matters. First, to indicate that the stay cannot any longer stand, and Mr Gilchrist rightly and inevitably concedes that. Second, Mr Clare does apply for the costs of today.

4. In principle we consider that he is entitled to an order for costs. However, we bear in mind all the circumstances, and his lack of enquiry with the claimant's solicitors as to the object of his appearing today and whether it was necessary for him to do so. It is clear that this is a protracted and unfortunate piece of litigation. We shall hear submissions about the substantive appeal, I hope, very shortly, but we deal with this as a preliminary point and we need to do justice between the parties.

5. We think an award of anything like the figure of £2,730, which Mr Clare claims, is quite out of proportion and would not do justice between the parties. It is claimed on the basis of 40 hours' work at the architect's rate (he works as an architect) of £65 an hour. He relies on the fact that the judge making the costs order was prepared to accept that figure. We consider that he should only have a figure relating to today. He has pointed out what a long day it is for him. We cannot get anywhere near a figure of 40 hours as being reasonably attributable to costs which the claimant ought to pay. It is not clear to us how that amount in time can be spent.

6. What we consider Mr Clare should fairly receive is his rail fare, £180, and a further sum representing his time as a litigant in person for the day. The total order we make, including that for the rail fare, in his favour, is one of £350.

**ORDER:** Stay no longer to stand; costs of £350 awarded to Second Defendant.

MR D GILCHRIST (instructed by Wrigley Claydon) appeared on behalf of the Appellant
THE RESPONDENT APPEARED IN PERSON
THE SECOND DEFENDANT APPEARED IN PERSON