JUDGMENT : HIS HONLOUR JUDGE TOULMIN: TCC. 5th April 2000

1. This is an application for the enforcement of an Adjudicator's decision made pursuant to s.108 of the Housing Grants (Construction and Regeneration) Act 1996 ("the 1996 Act") and the Scheme for Construction Contracts (England and Wales Regulations) SI 1998 No. 649 ("the Scheme"). The Act and the Scheme came into force on 1st April, 1998. The parties have agreed that the hearing of this application is to be treated as the hearing of the action.

2. The case raises the novel point, on which there is no decided authority, of whether, and if so in what circumstances, an Adjudicator can alter his own decision to correct a clerical mistake or error arising from an accidental slip or omission.

The facts

3. On about 18th November, 1998, Bowmer & Kirkland (London) Limited ("Bowmer"), as main contractors, entered into a contract with Bloor Construction (UK) Limited ("Bloor") as subcontractors, under which Bloor was to undertake labour and plant ground-works (including sub-structure, drainage, groundfloor slabs and external works) for a development at Whiteley Village, Fareham in Hampshire. The subcontract included clause 24, which stipulated that, if any dispute should arise under the contract, either party could refer the dispute for the decision of an Adjudicator. Clause 24.4 provided that:
"The Adjudicator shall reach a decision within 28 days of referral, save that the period may be extended by up to 14 days with the consent of the party by whom the dispute was referred, or by any time agreed by both parties after the dispute has been referred."

4. The main contract was in the JCT standard form 1980 edition, incorporating the amendments issued in April 1998 to comply with the 1996 Act.

   Clause 41A.5.3 provides:
   "The Adjudicator shall, within 28 days of his receipt of the referral and its accompanying documentation under clause 41A.4.1, and acting as an Adjudicator for the purposes of s.108 of the Housing Grants (Construction and Regeneration) Act 1996, and not as an expert or arbitrator, reach his decision and forthwith send that decision in writing to the parties ..."

   The provision then continues in a similar manner to clause 24.4 set out above.

5. A dispute arose under the contract and, on 5th January 2000, Bloor served notice on Bowmer of its intention to refer the dispute to adjudication.

6. On 11th January, 2000, Mr Matthew Bastone of Matthew Bastone Associates, a Chartered Surveyor, was appointed as Adjudicator. He received notice of his appointment on 12th January, 2000. It is agreed that, unless time was extended in accordance with the Scheme and the agreement between the parties relating to adjudication, Mr Bastone was required to reach his decision by the end of 9th February, 2000.

7. On 18th January, 2000, Mr Bastone asked Bloor for a 14 day extension of time in which to give his decision. This was refused by Bloor.

8. Thus far there is no dispute between the parties as to the facts. Thereafter, there was a dispute as to the facts on the papers before me at the hearing. However, Mr Sweeting, for Bloor, started the hearing by abandoning his client's contentions on the facts in so far as they differed from the defendant's evidence. He made his submissions on the basis that his clients accepted the defendant's versions of the facts.

9. The claimant's case as it appeared from the papers relied on two witness statements from Mr Bloor, who said that the Adjudicator reached his final decision on 9th February, 2000 but did not communicate his decision until 11th February. The Adjudicator's decision was, therefore, reached, so the claimant said, within the stipulated time. This was important because Mr Bloor said that the claimant had refused any extension of time beyond the 28 days. Mr Bloor says in his witness statement that, having made an adjudication, it was not open to the Adjudicator to alter it. He goes on:
   "In spite of the fact that the Adjudicator may have made a mistake, this decision is enforceable."

10. In his second witness statement, dated 28th March, 2000 (three days before the hearing), Mr Bloor said that, at a meeting between the parties and the Adjudicator on 4th February, 2000, he understood the Adjudicator to be saying that he would reach his decision on 9th February, 2000 and would communicate it to the parties on 11th February, 2000. If this case had been persisted in, I should have concluded that the word "forthwith" in clause 41A.5.3 meant what it said and required that the process of communicating the decision should have started immediately after the decision had been reached, i.e. that the decision has two elements: first, reaching the decision and, secondly, sending that decision to the parties. Clearly, if the decision was sent only by post, it would not be received immediately. In this case it was sent by fax on 11th February, 2000. In the absence of consent to an extension of time by the party referring the dispute (Bloor), the decision was rendered out of time. This issue and its consequences have not been decided by a court, but the Scheme lays down in paragraph 19(2) that, where the Adjudicator fails for any reason to reach his decision, any party to the dispute may serve a fresh notice for a new Adjudicator to act, i.e. a new Adjudicator must be appointed (in the absence of agreement between the parties) and the adjudication starts again.

11. I note that in his second statement Mr Bloor again makes no suggestion that the revised adjudication was incorrect or unfair to the claimant.

12. The claimant now accepts that, at the meeting on 4th February, 2000, Mr Bastone said that he would arrive at his decision in principle on 9th February, 2000 but would publish his decision on 11th February, 2000, to allow himself a short period to complete his calculations and to finalise his decision for publication. Neither party dissented from his proposal and this was rightly taken to signify that both parties agreed to this short extension of time.

13. At 3.32 p.m. on 11th February, 2000, Mr Bastone sent a fax to the parties containing a covering letter and his decision.

14. This decision was dated 9th February, 2000. The covering letter said as follows:
"Please find enclosed my decision in respect of the above dispute. Although only the summary sheet of the appendix is included with the faxed copy of my decision, the posted copy contains full details of my assessment."

15. The decision was that:
"4 (b) Within 14 days of the date of this decision the respondent shall pay to the applicant the following amount.
Issues: £118,803.19.
Interest: £3,295.57.
TOTAL: £122,098.76."

16. The letter was not signed, but I am satisfied that this makes no difference. The letter was intended at the time that it was transmitted to be the Adjudicator's final decision.

17. On receipt of the fax, Mr Boreham, a managing surveyor employed by Bowmer, realised that in making the adjudication Mr Bastone had failed to take into account payments on account made by Bowmer. The error was pointed out to Mr Bastone, who corrected what he described in his letter to the parties dated 21st March 2000, as "an obvious slip". He sent another covering letter, together with a corrected decision, by fax, at 5.53 p.m. on the same day, 11th February, 2000. This decision was also dated 9th February, 2000. The second covering letter said:
"Further to my advance issue earlier today by fax of my unsigned decision in respect of this adjudication, it has been brought to my attention that the summary to the appendix to my decision contains a mathematical error. This, while not affecting my decision as to the value of the applicant's works, does affect the final outcome.
I have now corrected the mathematical error and enclose a revised copy of my decision. This now correctly reflects the true position as regards payments made to the applicant by the respondent.
As before, while only the summary sheet of the appendix is included with the faxed copy of my decision, the posted copy contains full details of my assessment."
This letter was signed, but this is not a relevant factor.

18. This version of the decision differs from the previous version only in that paragraph 24 in the previous version said that the applicant (Bloor) had managed to demonstrate that it was entitled to a further

interim payment, but in a substantially lesser amount than that claimed. The revised version added the sentence:

"However, since the respondent has made further payments on account to the applicant since the last detailed valuation, this increased assessment does not result in an additional entitlement to payment."

19. The decision was amended to conclude that, although Bloor had received a small over-payment, it had continued with the works since the date of the valuation and, therefore, it should not be required to refund the over-payment. The decision in each case was that each party should bear its own costs and bear in equal proportion the Adjudicator's fees and expenses.

20. In his letter to the parties dated 21st March, 2000, Mr Bastone, whose conduct cannot be criticised (except for the human fault of making a mistake in the calculations), said that he received final submissions from Sloor by fax, timed at 23:19 on Tuesday, 8th February, 2000, and from Bowmer by fax timed at 17:11 on Wednesday, 9th February, 2000, and proceeded to finalise his calculations and complete the drafting of his decision over 10th and 11th February, 2000. He said that, regrettably, he did not change the date of his decision, the skeleton of which had been drafted some days previously. He concluded his letter as follows:

"Having corrected an obvious slip, I consider my decision accurately recording what I had decided is that which I sent out under my second letter dated the 11th of February, 2000."

Bloor's case

21. Mr Sweeting, for Bloor, readily admits that there is no merit in his case and that, if Mr Bastone's altered decision is not upheld, the final result would be unjust to Bowmer. He says that this is not relevant_ Once the Adjudicator has communicated his decision to the parties, his duty is at an end and he has no power to correct any errors, except perhaps clerical errors. He says that Parliament laid down a quick and certain interim procedure for resolving these disputes on the basis that any temporary injustice can be corrected at a later date. He contends that the Adjudicator has a semi-judicial role which terminates at the delivery of his decision. He says that there is no similar provision to that by which a judge can change his decision until the order is drawn up. There is also no equivalent in the Act or the Scheme to the slip rule which may enable a judgment to be corrected even after it has been entered. The parties are bound by the Adjudicator's earlier decision.

Bowmer' s case

22. Ms Dumaresq, for Bowmer, says that there must be an implied term in the contract between the Adjudicator and the parties that the Adjudicator has the power to correct manifest errors and clerical errors; i.e. to apply the slip rule. It is to be expected that, in a process which has a tight timetable, errors will be made and the Adjudicator should be permitted to correct these. In support of this contention she argues, by analogy, that the principle in **Hanks v. Ace High Productions** [1979] IRLR 32, a decision of the Employment Appeals Tribunal, applies to adjudication. In that case it was argued that the industrial tribunal had no power once it had given its decision to recall a case for further argument. Phillips J held that the court had the power to recall the decision. He said that this could be done where there was obviously an error or omission which could perfectly well have been remedied after a review, or by a recall of a decision before it was perfected.

23. He went on: *"Putting the matter negatively, it would obviously be wrong to make use of the power in effect to re-hear the case or merely to hear further argument on matters of fact, with the possibility of changing the mind of the tribunal on the facts when already a clear decision has been reached upon them. It is intended for a plain omission which can be put right, or the simple error which can be put right; of that sort."*

24. Ms Dumaresq also relies on the decision of the Court of Appeal in **Falilat Akewushola v. Secretary of State for the Home Department,** decided on 20th August, 1999, [1999] Immigration Appeal Reports 594, where, in the course of the leading judgment, Sedley LJ referred to the slip rule and said at page 600:

"For my part, I do not think that, slips apart, a statutory tribunal, in contrast to a superior court, ordinarily possesses any inherent power to rescind or review its own decision."

25. Ms Dumaresq says that this indicates that, where there has been a slip, a statutory tribunal may possess such an inherent power.

26. Harvey on Industrial Relations and Employment, paragraph 989, which was also cited to me, emphasized that almost invariably, apart from **Hanks,** industrial tribunals which have altered their decisions following a reconvened hearing have been held to have acted ultra vires.

27. It is also noteworthy that in **Casella (London) Limited v.Banai** [1990] ICR 215, Wood J held in the Employment Appeals Tribunal that a chairman's decision in an interlocutory matter becomes effective as soon as it is given; if orally, at that moment; if in writing, when it is sent through the post. The chairman becomes functus officio as soon as the decision is given. If this line of reasoning was followed in this case, it would tend to support the applicant's case.

The law :

28. Section 108 of the Act provides:

"1. A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section ...

3. The contract shall provide that the decision of the Adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration if the contract provides for arbitration or the parties otherwise agree to arbitration, or by agreement."

29. Part 1 of the schedule to the Scheme sets out the framework for the adjudication from the notice of intention to seek adjudication (paragraph 1) to the Adjudicator's decision (paragraph 19) and the substance of the decision requiring the Adjudicator to decide the matters in dispute (paragraph 20). The Act and the Scheme do not address the question of whether and, if so, in what circumstances a decision once taken can be amended. It is, therefore, solely a matter of contract. In this case, the agreement between the parties is silent. The question is whether or not any terms can be implied under which an Adjudicator can amend his award.

30. Assistance can be derived from the Arbitration Act 1996, which extends s.I7 and s.18(4) of the 1950 Arbitration Act. It provides:

"57(i) The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.

(ii) If, or to the extent that, there is no such agreement, the following provisions apply.

(iii) The tribunal may, on its own initiative or on (a) the application of a party - correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission, or clarify or remove any ambiguity in the award.

These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal."

31. What amounts to an accidental slip or omission was considered by the Court of Appeal in **THE MONTAN** [1985] 1 Lloyd's Reports 189, where the court consisted of Sir John Donaldson MR, Robert Goff LJ and Sir Roger Ormrod. In that case the arbitrator had accidentally transposed the names of the parties. This was described by Sir John Donaldson MR at page 190 as *"a patent error"*. At page 198, Sir John Donaldson MR referred to his own analysis of the slip rule (the former RSC Order 20, rule 11) in **R v. Cripps (ex parte Muldoon)** [1984] 1 QB 686.

"It is the distinction between having second thoughts or intentions and correcting an award to give true effect to first thoughts or intentions which creates the problem. Neither an arbitrator nor a judge can make any claim to infallibility_ If he assesses the evidence wrongly or mis-appreciates the law, the resulting award or judgment will be erroneous, but it cannot be corrected under s.17 (of the Arbitration Act 1950) or under the old Order 20, rule 11. It cannot normally be corrected under s.22 (where the arbitrator has made a mistake). The remedy is to appeal, if a right of appeal exists. The skilled arbitrator or judge may be tempted to describe this as an accidental slip, but this is a natural form of self-exculpation. It is an intended decision which the arbitrator or judge accepts as having been erroneous."

32. Robert Goff LJ approved the passage cited above at page 196 and held that the slip rule had been embodied in s.17 of the Arbitration Act 1950. He had no doubt that an arbitrator had the same power to correct errors under s.17 as the High Court had to correct errors under order 20, rule 11.

33. Sir Roger Ormrod held at page 198 that, although the power should be used sparingly, at common law the courts would interfere if the interests of justice demanded it and the circumstances permitted.

34. In **King v. Thomas McKenna Limited** [1991] 1 All ER 653 at 659 (a construction case) Lord Donaldson of Lymington MR affirmed his reasoning in **THE MONTAN**.

35. It is clear that the error in this case falls into the category of a slip. Mr Bastone was giving effect to his first thoughts and intentions in his amended ruling. In my view, in the absence of any specific agreement to the contrary, a term can and should be implied into the contract referring the dispute to adjudication, that the Adjudicator may, on his own initiative or on the application of a party, correct an error arising from an accidental error or omission. The purpose of the adjudication is to enable broad justice to be done between the parties. Parties acting in good faith would be bound to agree at the start of the adjudication that the Adjudicator could correct an obvious mistake of the sort which he made in this case.

36. Clearly, there must be a time limit within which such an amendment can be made, but in this case the amendment was made within three hours of the communication of the original decision. This must in the circumstances of this case be within any acceptable time limit. I bear in mind that both parties agree that the revised decision corrected a manifest error and that there is no suggestion that Bloor was prejudiced by the amendment.

37. I note that the time limits under s.57(3) of the Arbitration Act 1996 stipulate a period of 28 days within which any application for the correction of an arbitrator's award must be made. I am not prepared to say that such a long time limit is necessarily appropriate for an adjudication.

38. An additional reason for holding that the slip rule applies is the lack of ability of the High Court to correct obvious errors in adjudications except in very restricted circumstances, even where such errors cause manifest injustice. In a number of cases that have come before the Technology and Construction Court, the court has held that a decision of an Adjudicator which could be challenged as to its factual or legal conclusions remains a decision and will ordinarily be enforced - see, e.g. **Macob Civil Engineering Limited v. Morrison Construction Limited** [1999] BLR 93 (Dyson J); **Sherwood and Canon Limited v. Mackenzie**, 30th November, 1999 (HH Judge Thornton, Q.C.); VHE **Construction plc v. RB STB Trust Co. Limited,** Internet 13th January, 2000 (HH Judge Hicks, Q.C.); and **Northern Developments (Cumbria) Limited v. JJ Nichol**, Internet 24th January, 2000 (HH Judge Bowsher, Q.C.).

39. Unless the Adjudicator has exceeded his terms of reference or there is no underlying construction contract, an Adjudicator's decision will be upheld, even if it is manifestly wrong. This is on the grounds that adjudication is intended to be a speedy process, providing a provisional decision which is not subject to immediate appeal but where errors can be corrected subsequently, at the time of the final definitive resolution, after the final date for payment.

40. It is recognised that this may cause serious adverse consequences to a party which cannot be rectified at a later stage; e.g. a party may, in extreme circumstances, go into liquidation as a result of the adjudication.

41. A case which was similar on the facts to the present case was **Bouygues (UK) Limited v. Dahl-Jensen (UK) Limited**, [2000] BLR 49. In that case there was an error by the Adjudicator which Dyson J concluded, at page 55, was a mistake. The Adjudicator refused to admit that it was a mistake. Dyson J held that the adjudication had to stand because the Adjudicator was not exceeding his terms of reference. *"He was doing precisely what he had been asked to do and was answering the right question, but he was doing so in the wrong way."*

Conclusion

42. The primary reason for my decision is that, in the absence of a specific agreement by the parties to the contrary, there is to be implied into the agreement for adjudication the power of the Adjudicator to correct an error arising from an accidental error or omission or to clarify or remove any ambiguity in the decision which he has reached, provided this is done within a reasonable time and without prejudicing the other party. That is the situation in this case, subject to one matter, that I am prepared to hear argument as to whether further opportunity should be given to Bloor to make representations to the Adjudicator. My preliminary view is that, in the light of the concession that Bloor is relying solely on the plea that the Adjudicator has no power to correct his decision, this would not serve any useful purpose. Subject to this, I conclude that the corrected decision communicated by fax at 17:53 on 11th February, 2000 represents the decision of the adjudication.

43. This decision concludes that Bloor has no additional entitlement to payment. Subject to argument on the one point, I find for the defendant (Bowmer) in the action and dismiss this application.

MR SWEETING: *My Lord, on the point which your Lordship has left over for argument, may I approach it in this way: firstly, on the point as to the adjudicator's failure to take into account payments which had been made by Bowmer, the extent of the argument is limited to that which I set out at the hearing and which your Lordship has correctly recorded. My Lord, I would simply add this, though, because it is a matter that I canvassed with those who instruct me and indeed the representatives from Bowmer, which was the question of whether there were other errors in the schedules which were received subsequently, because of comment which was made to me in relation to those. And the answer I was given, which did not bear on the issues which arose directly in the application which was made, was that there were errors. My Lord, it may be, I do not know how wide a latitude for further argument your Lordship is allowing, but that is the only context in which the issue of error and application by Bloor to the Adjudicator arises, I think.*

JUDGE TOULMIN: *I take it from that, that on the basis of the matters which have been before me, there is no point in referring this matter back to the adjudicator?*

MR SWEETING: *My Lord, on the issue of whether the payments made by Bowmer are properly taken into account, that is plainly right; there would not be any further submissions to be made to the adjudicator.*

JUDGE TOULMIN: *Can we take it by stages? If that is right, then my judgment stands.*

MR SWEETING*: Yes.*

JUDGE TOULMIN: *The question which is not for me to answer but is a separate question is whether or not, since decisions in a sense are provisional, pending a final decision, whether or not it is appropriate to reopen the other matters with the adjudicator. All I say about that is that it may be appropriate for the parties, within the spirit of the legislation, to arrive by agreement where possible at sensible, pragmatic conclusions. But beyond that - I say that simply because the parties are able by agreement to raise issues, I am not in a position to express any view as to the position as a matter of legal right in the absence of agreement, and I would not propose to do so.*

MS DUMARESQ: *My Lord, I hear what Mr Sweeting says. I must say I am totally unaware of any other errors or mistakes in the calculations in the adjudicator's decision. I am afraid it is the first that I have heard and I am not aware of those instructing me - it being suggested that there were any others.*

There may well be, I simply do not know. I would submit that it is irrelevant for today's purposes.

JUDGE TOULMIN: *I do not thank I have said anything which prejudices either side's position. Mr Sweeting has very fairly said that he does not think there is any point on the matters which are strictly before me, in his clients going back to the adjudicator, and in those circumstances my judgment stands.*

MS DUMARESQ*: I am obliged. My Lord, it certainly would raise an interesting point if in fact Mr Sweeting's clients decided that, in light of your Lordship's judgment, they did go back to say, "Well, actually there are some other errors and the final product may be something else again." I simply do not know, but it would certainly create an interesting situation if in fact there was a second bite at the clerical slip/accidental errors and omissions.*

JUDGE TOULMIN: *Well, Ms Dumaresq, you are not going to tempt me into saying more than I have said already.*

MS DUMARESQ: *My Lord, I hope not. My Lord, in view of that, then I would ask for judgment for the defendants and the defendants' costs of the action.*

MR SWEETING: *My Lord, I cannot resist, obviously, either of those applications. As to the amount of costs, as set out on the schedule which has been served on the claimant, then I do have one or two submissions to make.*

JUDGE TOULMIN: *Yes, I have got that somewhere. It may be that the question does not arise, I do not know, but do you want to deal with the question of permission to appeal?*

MR SWEETING: *My Lord, I do want to deal with the question of permission to appeal, certainly, and I was going to deal with my learned friend's applications first, but I certainly seek leave to appeal. And I simply add in relation to that, my learned friend told me last week, and she is better informed than I am, that the* ***Bouygues c****ase - I think that is the correct pronunciation - is on its way to appeal, and it may be that there would be some prospect if this matter were to go to appeal, that they could be heard at the same time. It does occur to me that it raises different but similar issues. So, my Lord, I do ask for leave to appeal. As your Lordship says, it is a novel point and, on the basis of your Lordship's decision, this would be of wide application. As I indicated to you, with one exception, as far as I can see, none of the schemes which have been promulgated have a slip rule, and I doubt whether there would be a contrary intention which would displace the implied term in most situations which your Lordship has ruled does apply in adjudications.*

MS DUMARESQ: *My Lord, I do not think I can resist that.*

JUDGE TOULMIN: *I raised the matter on the basis that it seemed to me to be appropriate to give permission to appeal. We these days have to fill in a form. Can I take it that presumably you, Mr Sweeting, will order a copy of the judgment?*

MR SWEETING: *Yes, certainly.*

JUDGE TOULMIN: *My information on* ***Bouygues*** *is, I am happy to say, exactly the same as both of yours, and I can certainly see an advantage in the cases being heard together because, although they raise different points, it will be the first time that the Court of Appeal has dealt with questions of adjudication, and there may be something to be said for it considering, that is the same Court of Appeal considering both points on the basis that they are considering the Scheme as a whole.*

MS DUMARESQ: *Whilst they do raise different points to some extent, my Lord, I think there are sufficient similarities as well; in one sense the jurisdictional elements cover similar grounds_*

JUDGE TOULMIN: (Pause) *What I have written is that this raises a novel point in relation to adjudication; i.e. whether and in what circumstances an adjudicator has power to amend his decision to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity. I will pass this down and you can see it. Does that seem to both of you to reflect the broad issue?*

MR SWEETING: *My Lord, I think that is precisely it, with respect, yes.*

MS DUMARESQ: *Yes*. (Further pause)

JUDGE TOULMIN: *I would also say that I am sorry that I did not manage to get the judgment typed in time. It seemed to be important that I should give it at the earliest possible moment.*

MS DUMARESQ: *My Lord, that seems to cover it very well indeed. Obviously, the issue as it was argued was wider than just an implied term. As framed, it deals with both aspects and covers it either way.*

MR SWEETING: *My Lord, I assumed that the case would be subject to summary assessment on the basis that it lasted less than one day, and schedules have been served by the parties.*

JUDGE TOULMIN: *I am quite happy to deal with it since I have the information here, unless somebody suggests to me that I should not deal with it.*

MR SWEETING: *My Lord, can I quickly run through what the claimant would say in relation to the schedule which has been served by the defendant? I can take them point by point, I think. The first is the question of*

the extent of the involvement of the partner in the matter. You will see that Mr Sherman is the partner involved, at grade 1, his fees are £250 per hour, as opposed to grade 2 fees for the solicitor involved, at £140 per hour. It is the claimant's contention that Mr Sherman was not and should not have been involved to the extent that it is claimed he was. In relation to the following matters, firstly attendances on clients, that is a matter which could and should have been dealt with by the solicitor dealing with the matter and therefore should be reduced to £630, at her rates. Equally, attendances on opponents, on the same principle, £140. Counsel, £742. On witnesses--

JUDGE TOULMIN: *So, you say that the partner should not have been involved at all?*

MR SWEETING: *Well, this work should have been done by the solicitor who had the conduct of the case, rather than the partner.*

JUDGE TOULMIN: *So, you are saying that there should have been no attendance on the client by the partner?*

MR SWEETING: *Or a minimal amount of attendance by the partner, but that the lion's share of the work ought to have been done at the grade 2 level. Your Lordship will see that perhaps in relation to the last category, attendances on documents, where there are some 6.9 hours of Mr Sherman's time. In relation to that, that figure ought to be reduced to £1,105. And I think I have given you the figure for the attendances on witnesses, which was £595. In effect, this was the backbone of the work on the case, and as a matter of staffing, we would all want to be staffed at partner level, but the partner will be supervising rather than doing the lion's share of the work.*

JUDGE TOULMIN: *So, the 14 hours in total should have been by Vanessa Hall or somebody more junior?*

MR SWEETING: *Vanessa Hall's are the figures that I have given to your Lordship.*

JUDGE TOULMIN: *So, it should be 11.05 for attendance on documents, plus 994.*

MR SWEETING: *Yes, I do not contend that there is a duplication there; it is just the staffing arrangement that is challenged. My Lord, attendance at the hearing, the same principle; that should be £280 - the grade 2 rate of the solicitor who was dealing with matters. My Lord, in relation to counsel's fees, my instructing solicitors, I think, draw a comparison with my own brief fee for the hearing and submit that that would be the appropriate figure for counsel's fees, which is £500.*

JUDGE TOULMIN: *Let me just have a look at other matters. (Pause) So, you think that Ms Dumaresq should lose £2,250?*

MR SWEETING: *My Lord, yes. My Lord, may I say I make the submission, but I do not entirely adopt the wording, but I think that should be the case. That is the submission that I am asked to make in relation to the fees, and your Lordship will see, in relation to the advice, that there is a lot of attendance on counsel in any event, apart from the advice which is being included in the counsel's fees. I do not know whether the advice is advice given in conference. My Lord, the last point is under VAT, where in fact, as the claimant understands it, both companies are VAT registered, so it is not appropriate for there to be VAT claims on either side, because that VAT would, of course, be reclaimed in the normal course of events.*

My Lord, that would result in a reduction from the total statement of costs on my calculation to some £3,992.

JUDGE TOULMIN: *Which is significantly less than your side's.*

MR SWEETING : *I wonder if I have got the figure ... my Lord, I wonder if I could check my arithmetic on that? It did not on the face of it look as if it was quite that much of a reduction.* (Pause)

JUDGE TOULMIN: *Ms Dumaresq, what do you say?*

MS DUMARESQ: *My Lord, in relation to the involvement of the partner, my Lord, given that these are extremely important and novel points, but they have far-reaching consequences, clearly, in my submission, it is appropriate for there to be involvement of a partner in a case such as this. My Lord, there has been no challenge made as to the amount of time actually spent; it is only as to whether it should be a partner. And in relation to the attendance on the client, my Lord, I would submit that that is in fact wholly appropriate in the circumstances of a case such as this. Attendance on opponents, my Lord, if any*

reduction, I would accept that that could be reduced to the solicitor level. As for attendance on counsel, my Lord, I make the same point; that again that is because of the nature of the application, it involves considerable and difficult considerations to be taken into account and it is appropriate for a partner. My Lord, the only other area I would accept that, if there was to be any reduction from the bill, would be in relation to some attendance on documents. My Lord, in my submission, it is quite appropriate, perfectly appropriate for there to be some attendance by the partner in relation to the documents, but it may be that your Lordship would consider that should be reduced, perhaps to a half of that, to the time claimed, which is 6.9 hours and the balance be as to a solicitor's charge for that time as opposed to the partner. My Lord, in relation to my own fees, I find it a little difficult but, my Lord, the fact that Mr Sweeting has a very modest fee, given the nature of the matter with which we have been concerned, is not grounds, in my submission, for reducing my fee. Advice was required. Clearly, it involved consideration, considerable consideration, both as to the law and whether it was appropriate to proceed with defending the action for summary judgment, it involves considerable, both practical and legal considerations and, in my submission, that is an appropriate fee. As for the attendance by the partner at the hearing, my Lord, again, this is an unusual situation, it is one of far-reaching consequences in relation to adjudications which are going on, as we know, every day of every week, and it is an important matter and it is perfectly appropriate for there to be attendance by a partner, in my submission. My Lord, as for the VAT, I am afraid that I do not quite understand that. In the normal course of events, even if one is entitled to claim the VAT back, as I understand the way in which Customs & Excise requirements, they require one to claim the VAT, even if it means one is then going to claim it back.

JUDGE TOULMIN: *As far as VAT is concerned, what I am going to do is simply to arrive at a figure - if somebody wants to argue that VAT should be on top, I will give permission to apply in relation to that. But you obviously, neither of you, have come here to argue it today in any detail and I am not in a position to deal with it. Do you have any further submissions, Mr Sweeting?*

MR SWEETING: *My Lord, no, I think the figure I gave you was incorrect and I have revised it, and I think the reduction produces a figure of £4,428.50, which is still below the amount for which the claimant was asking, but not by quite as much.*

R U L I N G (Re costs)

JUDGE TOULMIN: *I have had an opportunity to consider the question of costs in this case. The defendants are asking for a total of £7,559, excluding VAT. The claimants say that the appropriate figure is £4,428. The claimant's own figure for costs is £5,750, excluding VAT. I think some adjustment is required to the defendant's costs. There are many ways in which it can be done and one should arrive at a rough and ready figure. The rough and ready figure is that the attendances on client, opponents and counsel should be reduced by £550, the attendance on witnesses should be reduced to reflect the fact that part of that should have been done, in my view, by the grade 2 solicitor. Equally, as far as attendance on documents is concerned, it seems to me that some reduction should be required, in respect of the partner's time spent. 6.90 hours seems a great deal of time for a partner to spend on that. The greatest difference between the parties relates to the attendance at the hearing, where the partner's time is claimed; in the defendant's case, a newly qualified solicitor, the claimant's case being the partner. Doing the best I can, it seems to me that the appropriate figure for costs in this case is £6,250. That is subject to argument as far as VAT is concerned. Neither party is in a position to argue that matter today and I will therefore give permission to apply in relation to that matter, unless the parties can sort it out, which I have no doubt in fact they can.*

Thank you very much for your assistance.

MR D.A. SWEETING (instructed by Messrs Masons, Bristol) appeared on behalf of the claimants.

MS D. DUMARESQ (instructed by Cameron McKenna) appeared on behalf of the defendant.