

Before Judge Overend : Exeter County Court 28th January 2000.

Abbreviations : Judge Overend – O : Mr Dooley – D : Mr Watson – W.

- D. I appear in this case for the claimant and the applicant. My learned friend Mr. Watson appears for the defendants, Mr. and Mrs. It is an application for summary judgment in respect of the whole of the claim. The claim itself started life in Bridgwater County Court and is a claim based upon an adjudication award made on 6th September last year. That award was to the effect that the defendants pay to the claimant a sum in respect of building works carried out by the claimant for the defendants, together with VAT, retention moneys and costs. The total in question was £46,826.84. The detail of that claim appears at pages 4 and 5 of the bundle, which your Lordship has, I trust. (A bundle was given to his Lordship). There you see the details of the adjudicator's award. That award was made under the 1996 Housing Grants Construction and Regeneration Act, a piece of legislation with which your Lordship has no doubt become familiar.
- O. No, I do not know anything about it, other than reading this case.
- D. Indeed. I will start from the beginning. First of all, as a matter of housekeeping, apart from the trial bundle your Lordship should have a skeleton argument from myself, faxed to you yesterday afternoon, and one from W. With my skeleton there are -- or should be -- a small bundle of authorities, including the statute, and the statutory instrument promulgated under the statute, which is the Scheme for Construction Contracts Regulations.
- O. Yes, I seem to have that.
- D. Also in that bundle - I hope it is of assistance - is a copy of the chapter from Emden on Adjudication.
- O. Chapter 1?
- D. Chapter 1.
- O. Yes.
- D. I do not wish to be trite, but if your Lordship wishes to go into it in depth, that provides a much better synopsis of what the Act scheme is all about than I am about to give you, I am sure; but, essentially, what the Act did was to provide a system and scheme for those involved in construction contracts for the binding, but temporary, resolution of disputes. May I confine my comments to disputes involving payment. The Act provides, at section 111, that payment "shall not be withheld beyond the proper period" - which in this case is 17 days - "other than in circumstances where a notice of withholding is served by the withholding party". In the event of things going wrong, either party can apply to an adjudicator for a decision, which must be provided within 28 days of the reference - I think the precise terms of the notice of adjudication being served.
- Paraphrasing it, it is a scheme which is intended to ease the cash-flow problems of the construction industry, and provides a temporary solution to many of the more minor disputes that arise and, in many cases, no doubt a permanent solution; but the Act does provide that the decision of the adjudicator is binding until arbitration or litigation has resolved the issue. Can I take you to page 21 of the extract ---
- O. So it is temporarily binding?
- D. Yes.
- O. So you have to pay up?
- D. Yes.
- O. Although you may have to pay it back?
- D. Only if in subsequent litigation it is found that that should be done, yes. At page 21 of the extract from Emden there is a chapter, or section, on the enforcement of adjudicators' decisions - V21 is what I have at the bottom.
- O. I see; they go from left to right.
- D. Could you go to the bottom, please, my Lord. The "V" - this is section 5 of the main volume, so paragraph No. 151 to 152 on page V21, "Enforcement of Adjudicator's Decision". May I invite your Lordship to scan that page.
- O. I think I am sitting in the TCC court - oh, gosh - are we called "Lord" now?
- D. Yes, you are.
- O. But that is in London.
- D. I thought it was everywhere, my Lord.
- O. Oh, I am not so sure about that. Those London boys, you know - they like their Lordships! You can call me "your Honour"; I am quite happy.
- D. I am grateful. It is going to be difficult to change, having got the ---

- O. *Well, you call me whatever you like; I don't mind.*
- D. *If you would be kind enough to read the first three paragraphs*
- O. *(After a pause) 154: "There will be few circumstances in which a losing party, faced with the adjudicator's decision (inaudible) will be able successfully to contest an application".*
- D. *I do rely very strongly on that, yes.*
- O. *Well, you would, would you not?*
- D. *And also on the fact that the proper course, having had an adjudication in favour of the claimant, is to enforce it summarily if at all possible. My learned friend will argue that in fact there is a want of jurisdiction on the part of this adjudicator because of one exception that appears in the 1996 Act.*
- O. *So he is going to take a technical point on jurisdiction?*
- D. *Yes.*
- O. *That is what we are here for?*
- D. *That is what it is all about.*
- O. *Yes.*
- D. *Can I just take you back to the adjudicator's decision, which is page 59 - top right. This is the basis of the action. The adjudicator set out the background of the dispute. He dealt with jurisdiction, and validity of the adjudication notice, at the second. page, page 60, at paragraph 12.*
- O. *12 o'clock?*
- D. *Yes - architects' numbering.*
- O. *Architects' numbering, is it? Oh, right. Well, 12.00.*
- D. *And at 1 o'clock in the afternoon, on the following page, he dealt with his response. At paragraph A*
- O. *Just a minute. Was it a construction contract with a residential occupier?*
- D. *That is going to be the issue at this stage.*
- O. *Yes.*
- D. *Despite the adjudicator's decision on that point, and his decision that you see at the summary - which is page 62 - that the claimant is entitled to the net sum of £37, 261 odd, and interest, and VAT, and so on, no part of those sums has ever been paid. That is the basis of the claim. It is based entirely upon the adjudicator's decision. I do not know whether your Honour has had an opportunity to read the evidence.*
- O. *No.*
- D. *The evidence in support of the claimant's case consists of two statements, one from Mr. Kelly, and the other, more important, statement from Mr. Boobyer, who is the sole director of the ---*
- O. *How do you spell that?*
- D. *"B-O-O-B-Y-E-R". He is at page 63, and the statement of Mr. Kelly is at page 23.*
- O. *Is it intended that that they should be called live, or is this a documentary point?*
- D. *I had assumed that you would wish to read the documents. Mr. Boobyer is here. As far as the defendant is concerned, I am not sure there is any live evidence available anyway.*
- O. *It is a documentary case, is it?*
- W. *It is an application on written evidence, your Honour.*
- O. *Yes, summary judgment. Away we go. I had better read it then, had I not?*
- D. *Yes, your Honour. (After a pause) Can I deal briefly with the works in question, and contract. The contract, in its written form, is at page 150. It is a JCT agreement for minor building works. I just say about that that that was produced by the claimant, and handed to the architect for the development, Mr. Robin Jones. According to the defence, one of the copies of the contract was signed by or on behalf of the defendants; we have not seen that; this copy is signed by the claimant; but I understand from my learned friend that no issue is taken on a possible exception that arises under the Act where a contract is not in writing. I think your Lordship can regard that as being a decided issue. This, for the purpose of the Act, was an agreement in writing. The work in question was to be done to a site of derelict barns. There are some drawings in the bundle.*
- O. *Ah, that is more fun. There we go.*

- D. *I think you will find these enlightening.*
- O. *Is this all this stuff in polybags?*
- D. *Of that I am not sure. If I may say so, your Honour is lucky; I did not have the advantage of bags.*
- O. *This sort of stuff - is this what you want?*
- D. *183 is the page number I have.*
- O. *I do not know about page numbers.*
- D. *Drawing number - and it is at the bottom of the notation, bottom right-hand corner - 498-10. You will see a proposal for a barn development - barn A, barn B, barn C, and a garage block.*
- O. *I thought there were four.*
- D. *There were four barns on the site. One of them was to be demolished.*
- O. *A, B and C. Where is the garage block? D. Bottom, to the right slightly.*
- O. *Oh, down there. Right, yes.*
- D. *That is the layout drawing. Can I take you to the next one, which shows elevations, and that is 398-23. That is the conversion of the garage block, and shows the detail of the building.*
- O. *What is the bit - the sort of tenement bit - "ridges to be level", on the thing that sticks out towards you? What is that?*
- D. *Looking at the layout plan, that is an access road. The access road as proposed in the application for planning permission went through the garage block.*
- O. *Oh, it went through?*
- D. *Yes, it goes through it.*
- O. *As a hole?*
- D. *There is a hole. The elevation of the barns, drawing 498-21A - that is what they ought to look like - sections and elevations_ There is another hole through the middle of the barn in the upper part of the drawing. North and south elevations are shown at barns A and B, and there is a hole through the middle.*
- O. *Yes.*
- D. *The final drawing I will take your Honour to is 498-20.*
- O. *It has a "C" after it.*
- D. *Yes, that is right, yes. The only point in taking you to this drawing is to show the detail that was produced, and which was to be built. This shows the layout for barns A and B.*
- O. *Which is which? Does it matter, or are they all the same?*
- D. *The bigger one is barn B, and that must be the one on the left. You will see in the middle drawing that there are dotted lines joining the bedrooms of barn A and barn B. In fact, they are all under the same roof construction, with a hole through the middle; and you see that on the survey drawing, which shows the north and south elevations - 498-10.*
- O. *Sorry, what am I seeing again?*
- D. *On 498-10, at the top of the drawing, you see the north elevation and the south elevation for barns A and B. The bigger of the two is barn B - indeed, they are labelled "barn A" and "barn B"; and there is an access driveway between them, but covered by the same piece of roof.*
- O. *Yes; and they were all derelict before we start?*
- D. *Yes. The point I would make very briefly about that - because I will have to come back to this - they were not dwellings at the time this contract was made.*
- O. *Is that the material time?*
- D. *Yes, I say it is. The bill of quantities is at page 187. I refer to it simply for this reason, that it is a bill for the full development of barns A, B and C and the garage block. The total is £188,590 - that is at page 224. That figure includes painting - so, effectively, finished buildings. It also includes works to the courtyard between the barns, and the access. I had better explain to you about the access; it means referring you, again, to 498-10 -- that is the survey drawing. I regret the only way I can do it is by pointing. The access to the barns came in here. One can see a driveway - an embryonic driveway - here, driving into the main courtyard.*
- O.: *Is that where it says "gate"?*
- D. *Yes; but it was proposed that, when developed, the access would be through the garage block, coming up from the bottom.*

O. *Oh, I see, yes.*

D. *That is why there is a hole in the garage block.*

O. *Yes.*

D. *For the briefest of histories of the contract, my skeleton has a chronology which might assist. It is page 3. As so often is the case, the claimant company - which is, in fact, an one-man company, for all practical purposes -- Mr. Boobyer ran it himself, and worked on the ground. He had done some work in December 1998 for this customer, Mr- and Mrs. who traded, incidentally, as J & B Developments - a partnership; but work on this part of the development took place, or started, on 4th January last year. The quotation is, effectively, the figure in the bill of quantities. The bill of quantities having been produced by the architect, Mr. Jones, it was completed by the claimant, and that quotation was accepted, we say on 18th February 1999. At the same time, an invoice for £34,000 odd was submitted for work already carried out. On 2nd March there was a site meeting. For your note, the minute of that site meeting is at page 70.*

O. *Yes.*

D. *That is the occasion when the JCT form of contract was handed over to the architect, and at that stage only the site programme was left to be finalised.*

Just running through the chronology, 5th March 1999, the contract programme and cash-flow forecast was submitted by the claimant to the architect. They were never finalised, in the sense that there was never a final decision reached; but what had become apparent by that time was that the defendants wished to have the work on barn B accelerated in front of the rest of the work, and it was around then, or somewhat later, that the claimant company became aware that there was an intention - or just possibly an intention - on the part of the defendants to occupy barn B as their residence when complete.

By 31st March further work had been done, and a second invoice for the balance due, of £25,144, was submitted. The numbers in square brackets are the numbers in the trial bundle of the documents in question.

On 13th April 1999 both parties were dissatisfied with the situation. Mr. Boobyer, for his company, was dissatisfied with the lack of payment - he had received £17,000, and no more. Mr_ and Mrs_ were dissatisfied with the progress on the site. They agreed to go their separate ways, and the contract was terminated. The adjudication followed because no further payment was received.

During the course of the adjudication the defendants declined to accept the jurisdiction of the adjudicator. The adjudicator himself decided that he had adjudication. That stance has been kept up by the defendants throughout these proceedings. There are two basic arguments that were advanced at the time of the defence, and the defence is at page 13. I do not take your Honour to it in detail - just to this extent. The two points raised are that first there was no contract in writing, and therefore there was not a contractual situation upon which the 1996 Act was effective or bit.

O. *That is not pursued today?*

D. *It is not pursued.*

O. *Is that right?*

W. *That is right.*

O. *Thank you. I will strike it.*

D. *The other point, which is pursued today, is that this was a contract with a residential occupier, and therefore excluded from the provisions of the HGCRA.*

Can I turn to that, because that is what today's hearing is all about. It is at page 5 of my skeleton. You will need, as well, the Act itself, and in particular section 106. If your Honour is not familiar with the Act, may I perhaps start at section 104, just for a brief resume of its contents. This is an Act of Parliament which covers a multitude of matters; fortunately only a few sections are relevant to adjudications. That particular section starts at 104, and that is an introductory provision only dealing with construction contracts. They, in turn, are contracts for the carrying-out of construction operations. I do not think I need take you further into that section.

Section 105 deals with what a construction operation is. We are not concerned with any of the definitions there today.

Section 106 deals with exclusions, and reads: "This part does not apply to a construction contract with a residential occupier, or to any other description of construction contract excluded from the operation of this part by order of the Secretary of State." The only order that has been made under that section was made in 1998, and does not affect the circumstances of this case.

There is then a definition of the expression "construction contract with a residential occupier", and quote: "The construction contract with a residential occupier means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence." The words that I ask your Honour to underline are "principally" and "on a dwelling".

The subsection goes on: "In this subsection 'dwelling' means a dwellinghouse or a flat", and then proceeds - and although this may not appear to be directly relevant, I would seek to put it before you - "'dwellinghouse' does not include a building containing a flat, and 'flat' means separate and self-contained premises" - and I emphasise these words - "constructed or adapted for use for residential purposes" - and then it continues - "and forming part of a building from some other part of which the premises is divided horizontally."

- O. *I do not at the moment see what the significance of that reference is.*
- D. *May I come back to it? Essentially, it is this. It is a suggestion that in the case of a flat it must be constructed - not in the course of construction, but anticipated as being about to be constructed - or it must be adapted for use for residential purposes; so in the case of a flat, it must exist already for residential purposes. I say that is material when considering the meaning of a dwellinghouse ---*
- O. *No, it does not. I do not think it does - "which principally relates to operations on a dwelling"; and the dwelling is a flat - a flat on which it is(?) constructed or adapted, rather than being constructed or adapted.*
- D. *Yes. I pray that provision in relation to flats in aid. It is rather starting at the back end of the point, if I may put it like that.*
- O. *I am sorry. Well, you flagged it, and I thought I would nip your flag."*
- D. *I think it belongs at the end rather than the: beginning.*
- O. *All right.*
- D. *I will take you to the skeleton, if I can, at page 5. There are a number of submissions which form the kernel of my answer to Mr. Watson's case, and those are set out at paragraph 19 in the skeleton. Essentially, my case is that the term "dwelling" refers to an existing dwelling, not a dwelling in the course of construction - that is not a dwelling at all - and not a derelict agricultural building which it is proposed should be turned into a dwelling.*

The scheme of the Act is perhaps of some importance in relation to the definition. The Act is designed to assist the construction trade and resolve those numerous disputes that arise, but it is easy to understand how Parliament would wish to exclude from the effect of the Act the multitude of contracts between residential occupiers and small builders, perhaps, for small building and maintenance works, all of which are covered by the scope of the Act otherwise. To introduce it in those circumstances would produce a multitude of adjudications which would probably not benefit the trade a great deal.

- O. *You mean when the plumber comes along and puts in central heating?*
- D. *Yes, or mends the washing machine pipe, or something of that kind.*
- O. *Yes.*
- D. *Then the full panoply of adjudication decisions, if the contract was in writing, could be brought to bear upon the payments to be made. At paragraph (iv) on page 6 in my submissions I deal with the definition of the flat point; I take that no further. I also mention that at section 21 of the County Courts Act ---*
- O. *Where is that?*
- D. *Page 6 of the skeleton.*
- O. *Where is the "flat" reference? Yes, I have that, yes.*
- D. *If a flat is going to be in existence, surely the same definition must apply to the dwellinghouse.*
- O. *if so, why not spell it out?*
- D. *It does, I would submit. The words "on a dwelling" do spell it out - "operations on a dwelling". I bear in mind that the particular exception relates to a "residential occupier". Mr. and Mrs. , were clearly not residential occupiers at the time of this contract.*
- O. *So, "intends to occupy as his residence".*
- D. *Yes, but it still must be a dwellinghouse.*
- O. *Hold on. That certainly goes to whether he is in occupation or not. It makes it perfectly plain that if he merely intends to occupy it, then that is sufficient; but*
- D. *That would cover the situation, if I may provide an illustration, where somebody buys a house and wants work done on it before he or she moves in, and the builder is instructed, and the work goes ahead; but it is a purchase of a house - it is a habitation and a dwelling - from the start. In this contract the subjectmatter of the construction process were some agricultural barns.*
- O. *It could not be simpler, you say - "an agricultural barn, derelict or otherwise, ain't no dwelling".*
- D. *Exactly.*
- O. *Simple as that?*

- D. Yes, absolutely. The next point relates to the word "principally". This is at (v) on the same page of the skeleton.
- O. This is a question of (inaudible) and degree, and you say it ain't "principally".
- D. It certainly is not principally in the circumstances of this case, and that is also sufficiently clear to enable you to deal with the (inaudible as someone coughed) summarily. The fact that barn B was to be occupied by Mr. and Mrs. was a matter which may or may not have been within the knowledge of my client at the material time - probably not important - but Mr. Boobyer's evidence is he did not know until later in the contract.
- O. Does that matter?
- D. It may do, and I would like to reserve my position on that; but I find it difficult to understand how knowledge of a director of the claimant company can make a difference to the scheme laid down by the Act; and, as Mr. Watson points out in his skeleton, the Act does not mention knowledge at any point, and it is not a matter I am placing before you with any great weight today.
- O. Or at all.
- D. I cannot raise - I mean, I say the situation is absolutely clear anyway, regardless of that point.
- O. Yes.
- D. But I may have to deal with it if Mr. Watson wishes to deal with it.
- O. He will give me his best, I expect.
- D. This contract related to three barns and a garage block. This was, on any view, even if one of them was to be used for the private occupation of the developers, a commercial development. In fact, at the meeting in March 1999, the programme was amended so that barns A and B were to progress ahead of the remainder of the development, and in particular barn B was to be accelerated; and of course it is easy to understand that if the defendants were going to occupy it, they wanted it completed as soon as possible, and in advance of rest of the conversions.
- O. But the contract related to three barns.
- D. Yes it did, and the garage block.
- O. And the contract was not amended to exclude barns - or was it?
- D. No
- O. A and B to go ahead, and B ahead of A.
- D. That is right.
- O. But still A, B and C.
- D. Yes.
- O. Why do you say at (v)(i) "at least one other barn conversion"? It sounds to me as though it is at least two.
- D. Because the way - it is, and that is the case I put to you; but really this was intended to answer what I anticipated was the defendant's case. The defendant's case is that the development was in fact barn A and barn B, and they produce evidence from the architect of the split of value of work between barns A and B to show that barn B was in fact the higher proportion of the value, therefore suggesting that principally this was a contract for residential occupation. I say that is not to the point, but the reason I am dealing with this in this way is because of the way Mr. Watson puts his case. You will see at (ii) I say the value of the work is Lot material to the decision as to whether this was principally
- O. So these are pre-emptive points?
- D. Yes, I hope so. There is no doubt at all that Mr. and Mrs. intended to develop barn A and barn C for profit. That also suggests that this was not principally a contract which related to operations on a dwelling for the occupation of the _
- Your Honour, I could go to the architect's evidence and deal with the apportionment that he sets out, but frankly it is probably better to deal with it after Mr. Watson has addressed you on his points, because I do not know quite how he puts that issue; but I would flag up one point, really for your Honour's note. In the architect's evidence, at paragraph 4 on page 173, he sets out the split of the value of work between barn A and barn B, and he reaches the view, towards the bottom of the page, that the barn B works amount to 64 per cent. Then he goes on: "I should point out, however, that I have treated all of the works to the courtyard and garage block as relating to barn B, because all of this was necessary ancillary work to the conversion of barn B. It should be noted that virtually all of the works to the garage block needed to be carried out as part of the conversion of barn B in order to keep the structural integrity, as this formed the only access to the development."
- O. To which you say "rubbish".
- D. To which I say, first, that the amount of work on the garage block included in the bill of quantities was about £30,000. My difficulty is there is no evidence of that in the papers you have before you, but I do have Mr. Boobyer here to deal with it, if

required; and therefore it amounted to a significant proportion of the total value. Also the real reason for the work being done was in fact a condition attached to the planning consent, which . I quote: "The converted barns hereby approved shall not be occupied until the garages, parking and turning areas shown on the approved plan have been surfaced and completed to the satisfaction of the local. planning authority"; so the garages had to be completed as a condition of planning consent, not to keep structural integrity_ Again, there is no copy of this in the bundle- May a hand this copy of the planning consent

- O. Yes. I do not suppose you to object to that, do you?
- W. I reserve my permission on that. I do not wish to be obstructive, but your Honour I think laid down a timetable for exchange of evidence - and I have just seen this this afternoon - and if there is something my client wants to tell me about it he is not here to do that- I am not going to stop your Honour seeing it, but I do reserve my position on it. From what my learned friend has said, however, if it was a condition of occupying the property that the property should not be occupied until the garage is built, it sounds as if that condition rather helps my clients rather than hinders them.
- O. Well, if that is the case, you do not want to reserve your position at all; you want to have your cake and eat it!
- W. I think that is probably right.
- O. Do you want me to see it or not?
- W. Your Honour, yes. I think it completes the picture on this point that the architect made.
- O. He is playing both ends of the field.
- W. I do not think it helps at all, no.
- O. Well, do you want me to see it or not?
- W. Yes, please.
- O. Where is it?
- D. It is the first page, no. 4.
- O. (After a pause while his Honour read it to himself) It does not go either way really, does it? it refers to each barn.
- D. On one view none of the barns can be occupied until the garages as a whole are complete, and at least two-thirds of the garage development, as it were, attached to the other plots other than barn B.
- O. I forget. There are four garages, or ---
- D. There are three garages.
- O. I am just trying to remember. I did look at how many garages there were, and I have forgotten. You say there are three, do you?
- D. Three garages = one for each barn.
- O. Three and a hole.
- D. Three, and a hole in the middle.
- O. All right. Yes; so that is your pre-emptive point.
- D. Essentially it comes to this. The scheme of the Act - and this is my conclusion - is clear. There is an outstanding debt found by the adjudicator to be due and, I should add, found by him to be proper for peremptory enforcement; that is part of the adjudication.
- O. Yes, but the sole issue is the point taken whether it is a contract with a residential occupier.
- D. Yes, whether section 106 applies or not. Of course, my learned friend has to satisfy you on that point that it is proper to review the decision of the adjudicator on that matter.
- O. "Should he have decided it at all?"
- D. That is a matter with which Mr. Watson will no doubt deal.
- O. What do you say?
- D. I say about the adjudicator that he can decide upon his own jurisdiction.
- O. So he can bootstrap it?
- D. Yes; but I have to accept that it is a matter which can be reviewed by the court, and indeed one of the authorities that my learned friend produces, and that I have in my bundle, says exactly that.

We are in the early days of this legislation. There is no guidance from the Court of Appeal as yet, except, I think, in the case of **Maycock**, which you have in the bundle; but there is nothing that comes out of it which really affects this primary issue for your decision. My position is that the definition of "residential occupier" is absolutely clear - it does not cover the contract in this case

– Mr. and Mrs. were not residential occupiers - and the claimant should be entitled to judgment. I also say there is no other reason - and, indeed, none is advanced - for this matter to proceed to trial. In that I am referring to the test of part 24, rule 2. Unless I can assist further?

O. No, thank you very much. Mr. Watson?

W. May it please your Honour, the issue is whether section 106 of the Act applies - specifically, was this a construction contract with a residential occupier as defined in that section? If that section applied, then this contract was excluded from part 2 of that Act - the adjudicator did not have jurisdiction, his award would be of no effect, and the 'claim would fail, because the claim is a claim on the award.

There are two questions to consider in relation to that issue. First, were these operations on a dwelling? Second, was this a contract which principally relates to operations on a dwelling? I shall come to my submissions, which are fairly short, on both of those in a moment. May I deal with one or two matters before I reach that, though. Maybe this can be described as -a technical point, and one sometimes -

O. Gets a reverse answer?

W. Well, one sometimes gets the feeling the courts do not like parties to take technical points; but what I want to submit on that is that it is a point which **Emden** anticipates as a point that could be proper to take. Secondly, it is a point which Mr. Justice Dyson accepted - in a case that I will show your Honour in a moment - would defeat the application for summary judgment if correctly taken; so it is a point which it is proper for my clients to take, and important and significant because it would defeat the application, and indeed the claim, if it were a good point. Can I just take your Honour, please, to that decision of Mr. Justice Dyson of **the Grey Trust**. It is one of the cases in my learned friend's bundle. I did include it with my own materials, but that was a transcript of the judge, and this report that my learned friend ---

O. **Macob?**

W. No, it is the **Project --Consultancy Group** – there are three photocopies by my learned friend - reported in [1999] Building Law Reports 377. Just to short-circuit things, can I take your Honour straightaway to page 379, and just read the first of the four issues that his Lordship had to determine. Paragraph No. 2 of the judgment:

"The following issues arise (1): is it open to a defendant in proceedings to enforce the decision of an adjudicator to challenge the decision on the grounds that the adjudicator had no jurisdiction to determine the dispute? This involves the true construction of section 108(3) of the Act, and I shall refer to it as 'the construction issue'."

If your Honour goes to the bottom of that page, from paragraph 4 through on to the next page to paragraph 9 is his Lordship's consideration of that construction issue, and it concludes, in paragraph 9, in this way:

"I conclude therefore that it is open to a defendant in enforcement proceedings to challenge the decision of an adjudicator on the grounds that he was not empowered by the Act to make the decision".

O. I am not quite sure whether that point is taken against you.

W. No, I do not think it is, but ---

O. If so, it is taken so faintly as to disappear down the corridors.

W. That was a case of an attempt to enforce jurisdiction by an applicant for summary judgment, and it was an application that failed. The issue in that case was whether the contract had been made before or after the ---

O. Well, let us not waste time on this point; it is not being taken against you.

W. Secondly by way of preface, can I take your Honour to the reasons the adjudicator gave for finding against the defendants. That can be found on page' 235, the very last page of the bundle. That is part of a letter sent by the adjudicator dated 20th August 1999 to both parties following their letters to him about that issue. Perhaps I should start on page 234, because it is relevant now to a point my learned friend was submitting just a moment ago. Does your Lordship see, at the foot of that letter, the subheading "Jurisdiction"? "The parties are agreed that the contract was for the conversion of two barns into two dwellings". Can I just stop there. My learned friend submitted to you a moment ago that this was a contract for the conversion of three barns. That is not correct; it is not what his clients said in their case to the adjudicator. Page 31 relates; if I need to take your Honour to that, I will do so. There is only one paragraph on page 31.

O. I am surprised that an error of this sort, if it be an error, is being made.

W. Yes.

O. I mean, if these are not contractual drawings

W. These were drawings for planning permission, and formed the basis of the works, but the bills of quantity relate to the two barns, barn A and barn B. There were not any

D. Can I interrupt to make it shorter. I am wrong

- O. *There you go.*
- D. *It is barns A and B and the garage block, and somehow I have transposed that into barns A, B and C; so barns A and B are included in the bill of quantities and the contract. The contract itself does not specify a number of barns.*
- W. *I am grateful to my learned friend for that. I was just inviting your Honour to read the reasons given by the adjudicator for rejecting ---*
- O. *Well, I think I have read those. He said there were two, and that is it.*
- W. *Yes, and they are set out in my own skeleton argument. I quoted from that.*
- O. *You will have to show me your skeleton argument. Where is that? Is there a top copy? (A Copy was handed to his Honour).*
- W. *Paragraph 16 of the background that I set out - the second page of my skeleton - quotes from that letter. I set it up there because that was at a time when I did not realise it was in the bundle, but certainly it has not been exhibited to anybody's witness statement.*
- O. *(After a pause) Yes.*
- W. *The third matter by way of preface to my technical arguments on the language of the section is to invite your Honour, please, to look at our evidence. I do not need to take your Honour through the exhibits, but if I might ask your Honour, please, to read the three affidavits - they are quite short; the first one from there is the longest of the three. His statement begins on page 88. I think the more important paragraphs of his evidence are 9, 10 and 11, but of course I would ask your Honour, please, to read the - whole lot of it.*
- O. *(After a pause) withholding payment? Well, it is not raised before me, anyhow.*
- W. *I do not know. I cannot raise that before your Honour, anyway; I cannot go behind the substantive issues determined by the adjudicator - only his jurisdiction. I think, in fairness to Mr. Sick, that is the main reason why his resistance to the application fails. Although his architect raised various matters in response to the invoices, they were not raised in the correct form as required by the Act.*
- O. *(After a pause) Yes.*
- W. *72(?) is Mr. James's short affidavit. He was the architect. (After a pause) Mr. Cox's twelve-paragraph affidavit. Mr. Cox was the friend of Mr. and Mrs. who introduced them to these builders and this architect.*
- O. *(After a pause) Yes.*
- W. *Against that background, I go straight to the two questions- The first one is: was this operations work on a dwelling - "on a dwelling"? - and my learned friend's submission that there should be a pre-existing dwelling.*
I make seven points in response to that. First of all, if my learned friend's submission were correct, it would mean that if the contract begins with a derelict barn to convert into a house, it is outside the Act, but if it is a derelict house which has to be knocked down and reconstructed, it is within section 106, and therefore excluded; and one wonders what is the significance between the demolition and rebuilding from a derelict barn starting point and the demolition and rebuilding from a derelict dwelling starting point; and one must query whether the point taken is a sensible one.
My second point is the ---
- O. *So your first point is "why?"*
- W. *"Why?" The second point is, as a matter of. language, the preposition "on" can mean, amongst other things, "concerning" or "relating to" - Chitt on Contract. Perhaps that is not a very good example, but it is an example of the use of the English language.*
- O. *I hope your points are going to get better.*
- W. *The third point, use of language. "What are you working on?" The answer may well be the end product, and not what one is starting with. That is a legitimate use of language.*
The fourth point is that the definition in the statute, in fact, looks to the end product. That is why the statute goes on to say, in the very same subsection - 106, subsection 2 - "relates to an operation on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence" - looks towards the end product, in my submission.
My fifth point is that the draftsman did not use the word "to"; it is not "operations to a dwelling". If it had been "to a dwelling", then my learned friend's submission might have had a better reception; but it is not the word "to".
My sixth point is: "Well, yes, the draftsman", I suppose my learned friend might say, "could have used, instead of the word 'on', 'to' or 'in connection with' if he wanted to be broad"; but in my submission the choice of one word - the single word "on" - serves that purpose adequately -- means in fact "to" or "in connection with", and the draftsman should be congratulated for using a single word instead of half a dozen.

My seventh point is that this was not something the adjudicator thought of; it was not part of his reasoning. I respectfully suggest that the reason why was because it was not a good point, and is simply a matter of impression.

If one puts all those seven points together, my submission is. that "operations on a dwelling" can mean "operations concerning or relating to a dwelling". It does not have to start out life as a dwelling; it can start with a bare - a vacant plot; and if the builders are engaged to build a house on a vacant plot, that is "work on a dwelling". If it is a derelict building, they are knocking down and rebuilding it, that is work on a building. Yes, of course it does also include building an extension, or gutting a building and ---

- O. *Sorry, just hold on. A derelict building, knocking it down and rebuilding it is "work on a dwelling" - from the beginning?*
- W. *Well, imagine if it is a derelict cottage in the country*
- O. *Yes. On any view, derelict or otherwise, it has the soubriquet "dwelling".*
- W. *Yes.*
- O. *"Disused dwelling", but nevertheless "dwelling"; but say it is a disused agricultural barn which you knock down and rebuild. Is the ---*
- W. *Rebuild into a dwelling?*
- O. *No, rebuilding ---*
- W. *Rebuild into a dwelling - oh, yes, it has to be rebuilt into a dwelling. That is why I emphasise in those submissions that one looks to the end product. Yes, if one was rebuilding it into a brand-new agricultural barn, then section 106 would not apply; I accept that, of course.*
- O. *I, for my part, would not think that knocking down an agricultural barn would amount to "an operation on a dwelling", even if it later is then translated into - is converted into -- is then replaced by a dwelling. I would not have thought that knocking it down prior to rebuilding it as a dwelling - I would not have thought that the knocking it down was "an operation on a dwelling" at all.*
- W. *If one looks - 'I may be misunderstanding your Honour - if one is looking at just knocking it down, full stop, and then walking away from the site, and that is the end of the contract, then I accept that would not be "work on a dwelling"; but if the totality of the contract involved the creation of a dwelling, from whatever it be - be it a bare site, be it a derelict barn, be it a derelict cottage - then I would submit, viewed as a whole, using ordinary language, looking at the end product, looking at the nature - the purpose - of the contract, then one would say: "Well, one was working on a dwelling" - "What are you working on here?" "Building a house".*
- O. *What you are really, I think, submitting is that you should not be myopic on the word "dwelling", because the exclusion relates to the phrase, or the collection of words, "principally relates to operations on a dwelling". Is that not what you are effectively saying?*
- W. *That is another way, and perhaps a better way, of encapsulating my submission. I began, in fact, by submitting, in effect, that one should not be myopic on the word "on", because in effect my learned friend is submitting that this really reads "relates to operations to a dwelling" to an existing dwelling, is what he is inviting your Honour to construe this as, in effect, saying_ I am inviting the court to say that really what this means is "to operations to or concerning or relating to" the provision of a dwelling, or a dwelling. Then going on: "Which one of the parties to the contract occupies, or intends to occupy?" Really, those submissions, short as they be, I do not think can be enlarged upon. They either appeal or they do not, and if they do not appeal, that is the end of my case, in effect, because it does not matter what the contract principally relates to. If these are not operations on a dwelling, then we are not within the section. If we are, then I still have to establish that the contract "principally" relates to such operations; and I move to that point, if I may.*
- "Principally" must mean "mainly", or some such synonym. The use of the word "principally", I would submit, must envisage, or permit the possibility, that something else is being constructed as well_ There is one exclusion, and that is if it is a block of flats, even if the employer is going to live in one of the flats, then he cannot argue the exclusion; but that is where premises are divided horizontally - that is the last word in subsection 2. if the premises are divided vertically, though, then the court can look at the question: "Does the contract relate principally to operations on a dwelling?".*
- There are, I think, two ways that I can think of of looking at that question and attempting to answer it. One is to look at the issue broadly - perhaps on a subjective basis; the other is to look at the question technically, perhaps on an objective basis. Looking at the question, broadly one might pose the question: "What were the parties' main objectives? What was their main concern?" The answer in this case, on the evidence, I would submit, is to complete a dwelling house so that Mr. and Mrs. could move into it. True, there was to be a development of a further property so that that could be sold in order to pay for the work, but the principal purpose, looking at the contract broadly, was to provide Mrs. and Mrs. with a home. That is my submission there, looking at the matter on a broad way.*

The evidence relating to that - some of it is in issue, some of it is not in issue. There is no doubt that Mr. and Mrs. did intend to occupy barn B, and have done so, and have completed that property, and are living there. It is not in issue either, I think, that at the meeting - at the very least at the meeting - on 2nd March -- the minute my learned friend referred your Honour to - I do not think your Honour looked at it.

O. *I did not look at it. Do you want me to look at it?*

W. *Yes. It is on page 70. If your Honour looks at it, your Honour will see that the main focus of concern was barn B. It is a page and-a-half long, pages 70 and 71. You will see who was present at that meeting - Mr. Mr. Boobyer, Mr Cox, whose statement we have, and Mr. Jones, whose statement we have. (after a pause) ... Are the conversations which Mr. Contends he had with Mr. Boobyer much earlier on in the proceedings, and which are dealt with in paragraphs 9 and 10 of his witness statement, which your Honour has just read. What is also in issue are the conversations which Mr. Cox said he had with Mr. Boobyer, and which are dealt with in paragraphs - I think it is - 6 and 9 of his statement, which your Honour has read.*

Both conversations, in which the intention of Mr. And Mrs. To move into barn B, and the desire that that property be completed first - those conversations are material, I would submit, to the issue of whether the principal purpose of this contract was "operations on a dwelling" - operations on a dwelling which Mr. And Mrs. Intended to occupy. It is not so much that they are relevant to an issue of knowledge on the part of Mr. Boobyer; they are relevant to the broad question of what was the principal purpose of the contract.

Insofar as those conversations are material to assist the answering of that issue, your Honour perhaps cannot resolve those issues today on paper. Those are issues on which evidence would be needed.

Moving on to the objective, or the technical, approach to the question: "Was this contract principally relating to operations on a dwelling?" , I turn then to Mr. Jones's evidence. There are the two barns, not the three - yes - and there are the garages, and yes, there is the planning permission which requires the garages to be built before Mr. And Mrs. Can move into barn B. Barn B is the bigger property. Yes, my learned friend might say: "Well, that is all very well, but the contract might require more work on the smaller of the two barns - you cannot just answer this question of "principally" by reference to size"; so if one needs to look at the costing of the work, that is something Mr. Jones has done.

O. *He says 65 per cent.*

W. *He says 65 per cent. My learned friend can say all he wants to pick away at that. I do not think he has - I have not seen any evidence to contradict that. It is not a matter on which Mr. Jones is so obviously wrong that the court should reject his evidence out of hand; it is a matter which either the court accepts, or the court says: Well., should be dealt with at a hearing when Mr. Jones can be cross-examined. That is not a matter to deal with on an application for summary judgment.*

Which of those two approaches does the court adopt - the broad approach -- the subjective one -- or the objective one, the more technical one? In my submission, your Honour does not need to answer that question, because on both tests the answers emerge in favour of the defendants.

Those are my submissions on the two questions. Let me just finish with some other shortish points. My learned friend's skeleton argument, I think, suggests that this was a commercial contract, or there was a measure of profit involved in it. Whether commercial or not, whether profit is to be made to pay for the work in the first place or not, is not really the issue. The issue is whether section 106 applies; but - I make this observation - the contract was not handled in a very commercial manner. It was started before the terms were discussed, or the price was agreed. The claimants themselves speak of the semi-informal nature of its administration, and that is language they used in their submissions to the adjudicator.

Secondly, my learned friend's skeleton argument describes the defendants, Mr. and Mrs. as "building contractors". Whether or not they are building contractors is, again, also an irrelevant issue - thank you, "property developers". They were inexperienced, they say, in building matters, hence they went to Mr. Cox, hence, no doubt, their complete ignorance of the 1996 Act, and the requirements in relation to notices withholding payment on invoices that are challenged.

Finally, though, I make this point. The decision that your Honour reaches is of considerable importance to Mr. and Mrs. The evidence at the very end of the exhibit to Mr. statement - let me just take your Honour through it at page 68 of that exhibit, top right-hand corner, page 166. This is a letter, August of last year, written by Mr. Boobyer. The penultimate paragraph says: "We confirm that the company has no assets to speak of, and ceased trading some time ago, that our bank account has effectively been frozen for the purposes of paying out." The next page, 167, are the most recently filed accounts which have been obtained for the period to March 1998, and one can see, on page 169, the material figures there - that there is a negative balance sheet, and that the profit and loss account for that trading period - presumably the last trading period - was a loss.

O. *So your point, I anticipate, is that if you have to pay out, you will never see it back again.*

W. *That is right. Those are my submissions. That may be tough, but that is why the matter is of particular importance to Mr. and Mrs. , and why I am taking this particular point, and urging it. My learned friend is right to say that this is a new area - a relatively new Act, decisions coming out quite frequently and currently, and there is no decision, as far as I am aware, or my learned friend is aware, on the question of what is a dwelling, and .it is obviously an important exclusion from this Act. The Act*

- I accept my learned friend's summary - is intended to assist the cash-flow of builders, but really intended to protect them from those who delay paying bills.that are justly due, and the playing field is tilted in their direction; but when it is a householder on the other side - to just use a word that is not in the Act - then the playing field is made more level. Your Honour's decision is whether this is such a case.

Those are my submissions, unless I can help your Honour.

D. *I am mindful of the time, and I will be as short as I possibly can.*

As far as the financial position of the company is concerned, it is a classic illustration of the problem that the Act tries to resolve to some extent. This company is in a difficult financial position, and it was put there by this particular contract, and by the fact that it had done a great deal of work and not been paid for it. Bearing in mind what I said about it being effectively a one-man company, it is not really surprising. It is that which adjudication was designed to solve, in that it produced quick payment; not in the present case, however.

As far as the commercial nature of the development that I have emphasised is concerned, can I just point to the fact that Mr. and Mrs registered for VAT purposes, and have traded under the style of J & B Developments during the course of this particular barn conversion operation.

My learned friend's points in connection with the word "principally" adopted two approaches - first the subjective approach, as he put it - that of Mr. and Mrs, and their intentions. May I encourage your Honour to look further than that; it really is a case of looking at the purpose of the contract. I have to accept entirely that I was not correct in the way I analysed the contract to you to start off with. If I could take you to page 65, paragraph 6 of Mr. Boobyer's statement, one can see the extent of it there, and that is the way I should have described it - the second sentence: "The quote was for ._. ", and then he deals with the extent of the work included in the quotation ... "All works on barns A and B, garage block" and, as he put it, "for all four barns" - which includes some demolition - "the courtyard and the drainage for all four barns". It does not go quite as far as I suggested to your Honour, but it goes a long way. If one looks at that, and if one accepts that evidence - and it does not appear to be disputed - then this was a contract which was not principally for the provision of a residence for Mr. and Mrs.

Mr. Jones's evidence is relied upon by my learned friend to show that when one carries out a valuation exercise, some 64 per cent of the value is attributable- to the building of Mr- and Mrs. eventual home. Can I pray that fact in aid, if it be correct at all, in this sense - that that suggests very strongly that the object of this operation was not principally the provision of a residence, but it was a two-fold object - the provision_ of two houses -- A and B, as it were. If one takes into account the garage, although I am accused of picking away at it - and I suggest it is an important point - at least two thirds of that part of the development was not attributable to barn B. Can I turn to the points made in relation to the definition of "dwelling". First of all, the question of knowledge was touched upon. Your Honour may think that the question of somebody's knowledge does go to the intention of the parties. If that be material in the present case, it is important that the parties understood that they were contracting, in a manner which would not have been covered by the Act, for the provision, principally, of a residence.

Therefore the lack of knowledge, as it is put, on the part of Mr. Boobyer is material. I have to accept that thence is countervailing evidence, both from Mr. Cox and Mr. , and that is an issue of fact which cannot, I suggest, properly be decided summarily at this stage.

You had an example put before you of demolition and reconstruction. Can I take the point your Honour has made and, I hope, amplify it. I would say that the demolition of a derelict property cannot be within the definition of "operations on a dwelling". Presumably if it is a derelict property it has ceased to be a dwelling; but applying the definition to the facts of the present case, it is suggested that you should extend the wording of the statute by adding words such as "in relation to" or "in connection with".

May I say, first of all, that I do not accept that the addition of such words would necessarily extend the meaning of the statute as it presently stands; but if you did adopt that interpretation, can I point to an anomaly that would result. A dwellinghouse contract would encompass a contract for the clearance and preparation of land for the purpose of building a new house, and all preparatory works that went with it, and the construction work upon that new house- However, in relation to a flat, and bearing in mind the definition of "a dwelling" means "a dwelling house or a flat", and continues "and for this purpose 'flat' means separate and self-contained premises constructed or adapted for use for residential purposes", taking the literal meaning of the statute in relation to the definition of "flat", one has the anomaly that a contract for the construction of a flat would not be covered because of the use of the word "constructed" in the past tense, and the use of the word "adapted" in the past tense, whereas the contract for the construction of a dwelling house would be covered by the exclusion.

It was suggested that the points now put before you were not part of the adjudicator's reasoning. I am not quite sure what Mr. Watson draws from that, but I would suggest that I am not bound for one moment by what the adjudicator thought were his powers at the time, or by the particular decision he made - or the wording of that decision - in relation to his jurisdiction. That is the way he saw it at the time. The way my learned friend puts it is that there was a residential occupier involved in this case, and therefore there was a want of jurisdiction. That is the question for this court.

Finally, can I just point to that expression "residential occupier". It is the way in which the exception or exclusion was phrased, and I point to the commonsense - I think - argument that Mr. and Mrs. could in no circumstances, at the time of the contract, qualify as a "residential occupier" of barn B. You would have to extend what I suggest is the obvious interpretation of the statute quite considerably

- O. There is a technical use of the words "residential occupier". It is not what you and I understand by "residential occupier" - namely, someone who is sitting there; and that is perfectly apparent, is it not, from the words "or intends to occupy as his residence"?
- D. I would say that that is a logical extension, and obviously applies to somebody who owns a property and intends to occupy it; but that property must be a dwelling. I say the words "intends to occupy" go to the identity of the contracting party encompassed in this exclusion, but do not go to the question of whether a dwelling is or is not a dwelling. Unless I can assist further?
- O. No; thank you very much indeed.
- D. In those circumstances I seek judgment in the sum of £46,826.84, together with interest up to the date of proceedings of £174.42; and I regret I will have to work out the remaining interest, which I have not done so far.
- O. Well, it is now 26 minutes past 4. How long will that take you?
- D. About three or four minutes.
- O. Yes. Well, you can pass the figure in, I think is the best way of dealing with the matter, Yes
- D. The other question is costs. I seek the costs of the action.
- O. Are you asking for them to be summarily assessed?
- D. I think the parties are in a 'position to do that. Given the extent of the action, it may be that a detailed assessment is more appropriate. I am in your Honour's hands from that point of view_ I have not seen the summary assessment. I have not seen the --
- O. Have you seen them, Mr. Watson?
- W. To answer your Honour's question, yes, I have seen them.
- O. Before we get there, I want ---
- W. There are issues on them to be taken if ---
- O. Forgive me; I do not want to cross-examine you on summary assessment. Is there anything you want to say about the amount of the judgment which is sought, or the implicit order for costs?
- W. I assume my learned friend has taken faithfully the precise of the amount of the arbitrator's award, plus interest - £46,826.84 was, I think, the adjudicator's award and fees - and I cannot dispute his application for interest, I do not think. Your Honour, there is one other matter which I can flag at this point. I have instructions to ask for leave to appeal.
- O. Can we deal with that after the question of costs has been dealt with?
- W. If your Honour wishes.
- O. Yes. Well, hold on - let us just deal with this, while you have raised it. Yes, go ahead
- W. All I say in support of that. application are the obvious points - that this is a novel area, and an important one, not only to my clients, but in general, and the question of statutory interpretation is open to argument. Of course, your Honour has found one way, quite clearly, and I do not go behind that; but the issue itself, I submit, is an interesting and important one, as I say, not only to Mr. And Mrs. , but on a broader level. The practice direction encourages me to make this application.
- O. I appreciate that. I am just thinking whether I should grant it or not.
- W. Of course, that is not to say that we will automatically take an appeal. It will be considered, obviously, in the light of your Honour's reasoning; but I am bound to make this application now.
- O. I do not think you have a jurisdiction to answer that, do you?
- D. I do not. It is a matter for your Honour.
- O. Yes; in which case you can sit down! I am going to grant you leave to appeal on the basis that it is a novel area, and it is a question of construction upon which the Court of Appeal may wish to form their own views. Whether you take it to the Court of Appeal, at great expense, is a matter for you. Yes, now on to
- D. I am told the interest figure, in addition to those figures that I have given you, is £1,313.28.
- O. Is that in addition to the £174.42?
- D. It is indeed, yes.

- O. *And the total figure?*
- D. *Allow me one moment - £48,314.54.*
- O. *Yes. Now then, costs?*
- W. *Can I just ask what rate of interest my learned friend took to calculate that?*
- D. *The figure that is in the particulars of claim.*
- O. *Costs? You do not get 140 an hour down here! Who is Mr. Adams? How many years' post-qualification experience does he have?*
- D. *May I take instructions?*
- O. *Yes - lots. 120 top whack down here. Yes.*
- D. *Has it, I wonder, been taken into consideration that his practice is in fact elsewhere, and the going rates in different places(?) do vary in the course of a summary assessment of costs that ---*
- O. *You have chosen to bring the claim in the Exeter County Court.*
- D. *No, your Honour, no. It was brought in the Bridgwater County Court, and transferred here because of your Honour's particular expertise.*
- O. *Which you discovered I did not know anything about! Well, you are not going to say that they let you get away with 140 in Bridgwater, are you?*
- D. *I do not know the answer to that, but I do know that ---*
- O. *He is shaking his head.*
- D. *--- that the guidance on summary assessment does depend upon the area of practice, not the area in which the court is situated. It is the blue booklet that everyone since has received.*
- W. *Can I just indicate, I have some points I will make in due course, including on VAT. I do not know how your Honour intends to deal with it - whether it would assist if I highlighted the areas that are in issue rather than have my learned friend trying to guess which ones I was going to ---*
- O. *Well, I am going to tell you what - I am going to take my points, because I believe this is the way it should be done, and then you can take such other points as are left.*
- W. *Thank you; that is helpful.*
- O. *Samuel Thomas Construction are registered for VAT, are they not?*
- D. *I am sure that must be so.*
- O. *Yes?*
- D. *No, they are not registered for VAT purposes.*
- O. *They are not registered? Were they?*
- D. *I think it is now that matters, your Honour. Yes, it must be the present situation that matters.*
- O. *Right, in which case you can claim VAT in it.*
- D. *Yes. We cannot reclaim it. That is the difficulty.*
- O. *I understand. Why was it necessary for both solicitor and counsel to attend on this hearing?*
- D. *Speaking personally, it has been of considerable assistance to me to have the attendance of a solicitor.*
- O. *It is a perfectly straightforward case which you have - have you advised on before? Yes. You have had a conference. What do you want a solicitor for?*
- D. *I am in your Honour's hands on that.*
- O. *Oh, I think you are, yes. He is charging for his attendance today. Where is that? At the hearing, page 3 - estimated hearing - he is charging nearly £800, £900. I think that should all go. (There was a noise of crossing out) Who is charging parking? Counsel?*
- D. *If only.*
- O. *Well, there is a disbursement for parking. That has to go.*
- D. *Oh, I see, yes. The actual parking fee is £1.50, I am told.*
- O. *Well, it says £5.*
- D. *Yes, the figure was estimated, I am told.*

- O. Yes. Well, I am not going to permit parking. (Counsel took instructions) Preparation and perusal of documents - in the main action there is nearly three and-a-half hours -- item 4, page 1 -- and for this application, item 4, 8 hours and 12 minutes. That seems to be rather high.
- D. Can I take instructions?
- O. Yes. (Counsel took instructions) That relates to papers for the purpose of preparation of witness statements for the purpose, in turn, of this hearing, and the preparation of documents for counsel, and it does not overlap or duplicate the initial preparation and perusal for the main action - that is page 1, paragraph 4.
- O. Well, I will hear what. Mr. Watson has to say about that, but why was it necessary to have two conferences or advices - an advice and a conference - with counsel?
- D. Could I have one moment?
- O. Yes. (Counsel took instructions again).
- D. It is all a conference fee, and it is split between the main action and the summary judgment application; that is the reason it appears twice. I think it is fair to say that the amount of time involved in preparing for this application - and no doubt my learned friend has found the same - has been considerable, and one of the difficulties is the fact that this is in new territory. There is no doubt that that creates difficulties in timing.
- O. Mr. Watson?
- W. Can I just hand up our schedule of costs so that your Honour can see it by comparison. That only relates to this application. (The schedule was handed to the court).
- O. Is that just this application?
- W. That is just this application. I am instructed to take the point on counsel's brief fee, and just invite your Honour to compare the two. It is true I had to prepare this case in this unfamiliar territory myself, as my learned friend did, and I did not have the benefit of having already looked at it in connection with a conference earlier, or with an advice, which is part of the claimant's costs' schedule. There is, as you will see, a disbursement for a counsel's advice earlier in the matter as well as today - a brief.
- O. There is in fact a TCC - what is it called? - Techbar, or something, have recently distributed some highly contentious document in which they say: "These are the figures that should be granted to counsel". Have you seen that?
- W. I have seen it.
- O. It came round the other day.
- W. I regret I do not have it with me. I do not think the fees that appear on my schedule are out of line with that proposal., but I do not know - apart from knowing its provenance, I do not what response it has had from the Bench. I believe that it had Bench involvement when it was first promulgated.
- O. Yes. Well, it is the difference, is it not, between Techbar in London and the occasional TCC trip down to the West Country.
- W. The issues will, of course, be the same; but I make that observation, comparing briefly with that of the defendants, especially in the light that the claimant's counsel has had the benefit of earlier preparation in connection with earlier advice given. I am instructed to take the point in relation to parking which your Honour has already identified. I have a trainee solicitor sitting behind me, it having been considered that that was sufficient in the light of the fact that my skeleton argument was sent to my instructing solicitor, and considered and discussed with him over the telephone.
- O. I have already deleted the attendance of a solicitor.
- W. I have some points on the summary judgment application fees, page 2, in particular the number of letters and telephone calls. It is simply a case with a summary judgment application; that is simply not understood why there should have been so many, or - and your Honour has observed this - the length of time on preparation and perusal of documents, given (a) that the claimants only put in two statements, both with very easy and straightforward and quite short exhibited material, and (b) that counsel, in fact, will have had the task of perusing the defendant's witness statements in the main; they were not responded to by any further evidence, so there was no need, really, for the solicitor to read them or study them in any detail, as counsel do that for the purpose of this hearing. Travelling under "Summary Judgment", item 5 - I query that.
- I will just check whether there are any other points I was asked to take. (After a pause) I am told that item 5 is the travelling, presumably at partners' rate, it would appear, to a conference with counsel - query whether that is a fair rate for travelling -- £140 an hour the defendants will have to pay.
- I think those are the main items, and I think the largest items. As far as the interest calculations are concerned, I can just say that that appears to be agreed - £1,313_28. Thank you.
- O. Do you want to reply to what Mr. Watson has just been submitting?

- D. *I do not think that I can add anything more. Your Honour has already raised most of the points that be had covered. As far as the travelling time is concerned, I would suggest it is a matter of rate rather than time.*
- O. *I will make the following alterations to the schedule of costs. Firstly, the rate of Mr. Adams of £140 will be reduced to £120 an hour, and so there will have to be consequential amendments to every single item which remains in the schedule.*

On the summary judgment application, page 2, on line 2, "Letters sent", I will reduce that to an allowance for 20 letters. "Telephone calls" - I will reduce that to 25 units.

I note that counsel has advised in conference in this case, and accordingly I will reduce counsel's brief fee to £1,350. I am not saying, of course, he cannot recover it from his client, but they cannot recover it from their opponents. You will have to work out what the consequences of all that are. It is beyond me at 4.45 on a busy Friday?

- D. *.I am much obliged.*
- W. *Your Honour did indicate earlier, I think, though did not in that sum, that on the third page ---*
- O. *I am sorry, I meant to indicate that the hearing fees, 1, 2, 3 and 4, all go. Is that the one you were referring to?*
- W. *That was. Yes, thank you.*
- O. *And parking - 5 Do you have a figure now of £48,314.54?*
- D. *That is agreed.*
- O. *And costs in the figure of £ pounds, which you will notify to the court before five o'clock, please. I have dealt with leave to appeal. Is there anything else? Have you drawn up that certificate - the leave to appeal certificate?*

THE CLERK: *Yes, your Honour.*

- W. *Can I just raise one matter that occurs to me - I had not thought of it before. Obviously we have a certain time limit within which we have to make our decision as to whether we are going to appeal. if we are going to appeal, we would want to make an application for a stay of judgment for the reasons that I have explained in my submissions and in my skeleton. There are two possibilities. I can make that application at such time as we do, if we do, lodge a notice of appeal to this court or to the Court of Appeal, or alternatively your Honour could consider the matter now and say that the judgment is not to be enforced for four weeks, and that if within that time I lodge a notice of appeal, then there is a stay of execution pending the hearing; but I think there are two possible ways of dealing with it.*
- O. *Well, there is a third - to have a stay for 28 days, or until further order, whichever is the sooner.*
- That gives you the opportunity of a telephone conference application saying: "We have appealed; here is the notice of appeal" which you have faxed in. "Can we have a stay?"*
- W. *And that is perhaps the best of the three selections.*
- O. *Then at least I have (a) knowledge and (b) control.*
- W. *May I ask your Honour to consider making that order, please?*
- D. *I am concerned, because of the scheme of the Act, the object it is intended to achieve and the fact that it is not being achieved by anything except payment in accordance with the adjudication. I appreciate the difficulty of what would happen to the money - that is quite clear; there is no doubt at all that my client company is in some difficulty - but delay of the sort that is anticipated, I would suggest, is not appropriate, given the scheme of the Act. In those circumstances, I would discourage your Honour from making that order. I, of course, would like judgment to stand with no further order. If there is to be any order, then at least I suggest the money ought to come into court and be earning more interest.*
- O. *It will earn more interest anyhow, will it not?*
- D. *Theoretically. We do not know the position of the defendants, of course.*
- O. *Well, you have not - well, there you are. Very well. There will be a stay of the judgment for 28 days, or until further order. The intention is that if a decision is made to proceed with the appeal, then the appellant would have to lodge notice of appeal, and the easiest way for getting a further order is a telephone conference, which you can get with me on BT, using "Barney" -Anything else?*

MR A DOOLEY (instructed by Messrs Pardoes of Bridgwater) appeared for the Claimant

MR. WATSON (instructed by Messrs. Bevan Ashford of Exeter) appeared on behalf of the Defendant