

**JUDGMENT : HHJ Hickinbottom.** TCC, Cardiff District Registry. 29<sup>th</sup> November 2007

**Introduction**

1. Some of the circumstances in which this claim has arisen are in dispute between the parties, but it might assist if at the outset I set out the background briefly and I hope uncontentiously. I shall elucidate upon the controversial areas later in this judgment.
2. The Claimant Sanclair Construction ("Sanclair") is a building and electrical contractor. The Defendant Mr Abdul Noor ("Mr Noor") is the proprietor of an Indian restaurant.
3. On 15 June 2006, the parties entered into a written agreement ("the Agreement") incorporating the JCT Minor Works Building Contract Conditions ("the Conditions"), under which Sanclair undertook to carry out building works at Mr Noor's take-away restaurant in Nantgarw to convert it into a seated dining restaurant for a contract sum of £140,000 payable by progress payments at 4 week intervals. Under Article 3 of Agreement, Lewis Webb Associates were named as the Contract Administrator.
4. Although the Agreement gave an unspecified date in November 2006 for the date of completion, it is common ground that 30 November 2006 was the agreed completion date. However, by May 2007 the works were not complete and various disputes had arisen between the parties.
5. Article 6 of the Agreement and Clause C1.7.2 of the Conditions contained adjudication provisions entitling a party to refer a dispute arising under the Agreement to an adjudicator, the adjudication provisions expressly being those set out in the Scheme for Construction Contracts (England & Wales) Regulations 1998 ("the Scheme": see Paragraph 15 and following below). The Agreement provided for the adjudicator to be appointed by the President of the Chartered Institute of Arbitrators, but on 29 May 2007, in circumstances to which I shall come, Mr Dennis Baldwin was invited to act as adjudicator. He agreed on 15 June, and the issues that he was to decide were sent to him on 28 June.
6. The adjudication proceeded under the Scheme, and Mr Baldwin published his decision on 24 August 2007 ("the Decision"). Amongst other things, the Decision provided (at Paragraphs 307-309) that:
  - (i) Mr Noor shall, by 4pm on 31 August 2007, pay Sanclair the sum of £32,952.54 inclusive of £25,243.52 VAT;
  - (ii) Sanclair shall send Mr Noor a VAT receipt for £25,243.52, within 7 days of receipt of that payment; and
  - (iii) Mr Noor shall, by 4pm on 31 August 2007, pay to the adjudicator the sum of £18,741.96 being the total of Mr Baldwin's fees and expenses, inclusive of VAT.
7. Notwithstanding the terms of the decision, Mr Noor made no payment to Sanclair, nor did he pay the adjudicator's fees and expenses. Consequently, these proceedings were issued on 25 September 2007 to enforce the Decision and, on the same day (although dated by the solicitors 21 September), an application was made for summary judgment.
8. The matter came before me for hearing on 16 October. By that time, unfortunately, the standard directions found in Appendix F to the Court Guide of this Court had not been given because the required rubric was not on the Application Notice, with the result that the papers were not put before a judge as they ought to have been. That involved unfortunate delay.
9. However, Mr Noor appeared at that hearing by way of solicitors, who indicated that, despite the limited scope for defending an application to enforce an adjudicator's decision:
  - (i) they had sought public funding for Mr Noor to contest the proceedings; and
  - (ii) there was a potential issue as to whether the Claimant (Mrs Sandra Williams) was the contracting party under the underlying building contract, and consequently as to whether she was the correct person to pursue the adjudication and this claim, because Sanclair Construction was the trading name for Mr Cliff Williams (Mrs Sandra Williams' husband) and he was both the contracting party and the party to the adjudication.
10. I was sceptical of the chances of Mr Noor obtaining public assistance to fund the defence of this commercial claim: but it was clearly appropriate to give his recently-instructed solicitors an opportunity to investigate the issue concerning the contracting parties. I therefore gave directions in more or less standard form, with a hearing date for the Claimant's application for summary judgment fixed for 8 November. I also ordered Mr Noor to pay the sum claimed (£32,952.54) into court by 23 October, with permission to apply.
11. On 18 October, Mr Noor filed a short Defence and Counterclaim, in which he denied liability in the claim because the Claimant (Mrs Sandra Williams) was neither a party to the building contract nor a party to the adjudication: which of course reflected the submissions made before me two days previously.
12. Mr Noor duly applied to vary my order, particularly to delete the requirement to pay in. That application was dated 23 October, but was accompanied by a statement of Mr Noor dated 24 October and was received by the court and issued on 30 October. The application was again made on the basis that Mr Williams was the party to both the building contract and the adjudication (Defendant's Statement 24 October 2007, Paragraph 4). It sought an order for the substitution of Mr Clifford Williams trading as Sanclair Construction as the Claimant, and permission to amend the Defence and Counterclaim to raise a substantive defence in the form of various issues in respect of which Mr Noor alleged the adjudicator erred. Given that substantive defence which he now put forward, Mr Noor also asked for the order for payment in to be revoked.

13. When the matter came before Mr Recorder Jarman QC on 8 November, he adjourned Mr Noor's application and the Claimant's application for summary judgment to 27 November. I heard those applications (together with other applications made by the parties in the meantime) that day, and this is the reserved judgment from that hearing.

#### **The Applications**

14. There are four applications before me:
- (i) The Claimant's application issued 23 November to amend the claim, notably to include a claim for Mr Baldwin's fees. Mr Noor consented to the amendment, and at the hearing I gave permission to amend the Claim Form and Particulars of Claim, dispensing with re-service. I deal with the claim for adjudicator's fees etc below (Paragraphs 81-83).
  - (ii) The Defendant's application issued on 30 October for relief from sanction and for permission to amend. The application for relief from sanction was misconceived, as the Order of 16 October provided for no sanction in default. I gave Mr Noor permission to apply in respect of the payment in once his enquiries were complete and, although his application was late (so he needed an appropriate extension of time to make it), he did not require relief from any sanction. As explained above, Mr Noor's substantive application was to (a) substitute Mr Williams for Mrs Williams, as Claimant; (b) amend his Defence and Counterclaim to raise substantive issues in respect of the Decision; and (c) vary the Order of 16 October to delete the requirement for the payment in, on the basis that in defending the claim he has a real prospect of success. I deal with that issue - the merits of any defence - in the context of the Claimant's application for summary judgment below (Paragraphs 21 and following). For the reason given below, at the hearing before me Mr Noor did not pursue this application to join Mr Williams as a party and for permission to amend.
  - (iii) The Claimant's application issued 24 October for judgment in default, on the basis of the Claimant's failure to make the payment in ordered by the court on 16 October. Again, in considering whether judgment should be entered in default, one important matter which the Court must take into account is the merits of any defence to the claim, which I deal with below (again, see Paragraphs 21 and following below).
  - (iv) The Claimant's application of 25 September 2007 for summary judgment under CPR Part 24 to enforce the Decision. This was the main substantive application before me, and I propose to deal it with first, before returning to any remaining issues from the other applications.

#### **Enforcement of Adjudicator's Decisions: The Statutory Provisions and General Principles**

15. Section 108(1) of Part II of the Housing Grants, Construction and Regeneration Act 1996 gives a party to a construction contract the right to refer a dispute to adjudication. That right can be incorporated into the contract expressly - although it must then contain at least some core adjudication provisions - but, if the contract does not provide for adjudication, then the adjudication provisions of the Scheme for Construction Contracts applies. That scheme is provided for in Section 114(1) of the 1996 Act, and is now made and set out in Part 1 of the Schedule to the Scheme of Construction Contracts (England and Wales) Regulations 1998 (1998 SI No 649, "the 1998 Regulations").
16. Paragraph 1 of the Scheme provides:
- "(1) Any party to a construction contract ('the referring party') may give written notice ('the notice of adjudication') of his intention to refer any dispute under the contract to adjudication.*
- (2) The notice of adjudication shall be given to every other party to the contract.*
- (3) The notice of adjudication shall set out briefly*
- (a) the nature and a brief description of the dispute and the parties involved,*
  - (b) details of where and when the dispute has arisen,*
  - (c) the nature of the redress which is sought, and*
  - (d) the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices)."*

17. Paragraph 23(2) of the Scheme (which reflects the requirement of Section 108(3) of the 1996 Act) provides:

*"The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration... or by agreement between the parties that the Decision is binding on the parties."*

That provision is a vital component of the statutory scheme. It requires the parties to comply with an adjudicator's decision. It provides that an adjudicator's decision shall be binding on the parties and enforceable unless and until the dispute is finally resolved by proceedings or agreement. The force of this provision was underlined by this Court in a line of early decisions. For example, in *Macob Civil Engineering Limited v Morrison Construction Limited* [1999] BLR 93, (1999) 64 Const LR 1, [1999] Adj LR 02/12 at Paragraph 14 the Principal Judge of this Court Dyson J (as he then was) said, of adjudication:

*"The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement... Crucially, [Parliament] has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is resolved."*

This passage has been cited with approval by the Court of Appeal (see, e.g., *Pegram Shoplifters Limited v Tally Weil (UK) Limited* [2003] EWCA 1750, [2004] 1 All ER 818 at Paragraph 5, per May LJ; and *Carillion Construction Limited v Devonport Royal Dockyard Limited* [2005] EWCA Civ 1358 at Paragraph 26, per Chadwick

- 11): and, with other similar sentiments expressed by this Court in other early cases under the 1996 Act, it illustrates the correct general approach to the relevant provisions. The Courts have repeatedly stressed the importance of enforcing adjudicators' decisions, even if they result from errors of procedure, fact or law.
18. There have subsequently been a significant number of cases which have addressed the legal principles arising from the scheme of Part II of the 1996 Act, which were helpfully drawn together by Jackson J in *Carillion* at first instance as approved by the Court of Appeal (at Paragraph 39). Having comprehensively reviewed the authorities, he set out these four principles which he derived from them as follows
- "1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish).*
- 2. The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law...*
- 3. Where an adjudicator has acted in excess of his jurisdiction with in serious breach of the rules of natural justice, the court will not enforce his decision....*
- 4. Judges must be astute to examine technical defences with a degree of scepticism consonant with a policy of the 1996 Act. Errors of law, fact and procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice..."*
19. The final paragraph is particularly worthy of note. The cases to which I was referred in the course of argument are replete with attempts by parties disappointed by an adjudicator's decision to avoid the enforcement of that decision - attempts which are usually found to be more inventive than successful.
20. Given the narrowness of the grounds on which a claim to enforce an adjudicator's award can be defended, as in this case such claims normally involve an application for summary judgment under CPR Part 24 on the basis that there is no real prospect of successfully defending the claim. To defeat an application for summary judgment a respondent merely has to show some prospect or chance of a successful defence, the relevant criterion being not probability but "absence of reality" (*Three Rivers District Council v Bank of England (No 3)* [2001] 2 All ER 513 at Paragraph 158, per Lord Hobhouse dissenting but not on this point).

#### **The Potential Defences to the Application**

21. In response to the standard form application for summary judgment to enforce the adjudicator's decision in this case, Mr Noor has raised four potential defences, namely:
- (i) Lack of jurisdiction in the adjudicator: In Paragraph 8 of his proposed Amended Defence and Counterclaim, Mr Noor challenges the decision of the adjudicator on the ground that he lacked jurisdiction to make the Decision that he did (see Paragraphs 22-23 below).
- (ii) The Invalidity of the Adjudication: This is merely a different ground on which Mr Noor submits Mr Baldwin acted without jurisdiction, but it demands separate consideration. Mr Noor submits that the party to the adjudication was Mr Cliff Williams, rather than the contracting party to in the building contract was Mrs Sandra Williams (trading as Sanclair Construction). Not only had the adjudicator no jurisdiction to consider disputes between Mr Williams and Mr Noor, but (i) there were no such disputes, and (ii) because she was not a party to the adjudication, Mrs Williams does not have the benefit of any adjudication award which she can enforce. On this basis, Mr Noor submits that the claim against him should be struck out (Paragraphs 24-72).
- (iii) The Invalidity of the Notice of Adjudication: Mr Noor submits that the notice of Adjudication was invalid because (a) it was made in the name of Mr Williams (and not Mrs Williams, the contracting party), and (b) it failed to comply with the mandatory requirements of Paragraph 1(3) of the Scheme (quoted at Paragraph 16 above) (Paragraphs 73-76). If the notice were invalid, again the adjudicator would be without jurisdiction and his Decision invalid.
- (iv) Business Names Act 1985: Mr Noor submits that, in breach of Section 4 of the Business Names Act 1985, Mrs Williams did not set out in correspondence, invoices, receipts etc the proprietor of Sanclair Construction, as a result of which he has suffered some financial loss. As a consequence, the claim should be dismissed under Section 5 of the 1985 Act (Paragraphs 77-80).

I shall deal with these in turn.

#### **Lack of Jurisdiction in the Adjudicator**

22. In Paragraph 8 of his proposed Defence and Counterclaim, Mr Noor sets out a substantial number of matters in respect of which, he submits, the adjudicator erred in coming to his decision. It is suggested in the draft that these amount to at least a sufficient defence to avoid judgment being entered summarily.
23. This ground was however not pursued by Mr Andrew Green at the hearing. It was rightly abandoned. Although the challenge to the decision was phrased as one going to the adjudicator's jurisdiction, the individual matters raised (in Paragraphs 8.1-8.11 of the proposed Defence) are not jurisdictional in nature. I make no comments on the merits of the points raised: but, insofar as the adjudicator did make any of the errors alleged, that would not vitiate the decision or make it unenforceable pending final resolution of the disputed between the parties.

#### **The Invalidity of the Adjudication I: Introduction**

24. This was the main ground relied upon by Mr Noor to defeat the application for summary judgment.

25. By the time of the hearing, Mr Noor accepted that the contracting party in the building contract (“the Contractor”) was Mrs Sandra Williams trading as Sanclair Construction. Again, with respect, on the evidence (to which I shall return) that concession was properly made. However, he submitted that the party to the adjudication was not Mrs Williams, but her husband Mr Cliff Williams: and consequently Mrs Williams (the Claimant in these proceedings) did not have the benefit of any adjudication decision which could be enforced by way of action.
26. This ground requires some further consideration of the facts, to which I now return. The Invalidity of the Adjudication II: The Facts
27. I have already referred to the building contract (see Paragraphs 3 and following above), which was in the JCT Minor Works form. Under Article 6 of the Agreement:  
*“If any dispute arises under this Contract either Party may refer it to adjudication in accordance with Clause 7.2 [of the Conditions].”*  
By Clause 7.2 of the Conditions:  
*“If a dispute or difference arises under the Contract with either party wishes to refer to adjudication, the Scheme shall apply except that for the purposes of the Scheme (the Adjudicator shall be the person (if any) and the nominating body shall be the stated in the Contract Particulars.”*  
By Clause 1.1, “the Scheme” is defined as Part 1 of the Schedule to 1998 Regulation: (see above, Paragraph 16): and “Party” is defined as “either the Employer or the Contractor”, and “Parties” as “the Employer and the Contractor together”. On the first page of the Articles, “the Employer” is “Abdul Noor trading as India Kitchen”: and “the Contractor” is “Sanclair Construction”: and by Article 6 of the Agreement, the Principal Contractor is said to be “Sanclair Construction”. Similarly, the interim payment certificates appear to have been made in exactly the same names.
28. The terms of the Agreement themselves give no indication as to who is behind the business name “Sanclair Construction”. Throughout the period of the contract, Mr Noor appears to have believed that Mr Cliff Williams was trading as a sole trader under that name. However, in his Statement of 6 November, Mr Williams said:  
*“4. The Claimant in this matter, Sanclair Construction (“Sanclair”), was set up in 1997. At the time that the contract (“the Contract”) the subject of the adjudication to which these proceedings relate was entered into, it was owned by [my] wife although I ran and managed the business.*  
*6. [Mr Noor] has made great play of the fact that he dealt with me throughout the term of the Contract and also that I signed documents on behalf of Sanclair. I did so on behalf of Sanclair and was duly authorised to do so at all times. However, at all such times I was an employee of Sanclair.*  
*7. The fact that Sanclair was owned by my wife at the time that the Contract was entered into is evidenced by the attached bank statement and Inland Revenue Registration card ..”*
29. The bank account referred to is in the name of “Mrs S A Williams trading as Sanclair Construction”. The Inland Revenue card indicates that “S A Williams” trades as a sole trader under the name “Sanclair Construction”. In the face of this evidence, Mr Noor conceded that the contracting party in the building contract - “the Contractor” - was Mrs Sandra Williams trading as Sanclair Construction. That was consequently not in issue before me. Mrs Williams owned the business.
30. However, Mr Williams did run and manage the business. It is clear from his statements of 30 July 2007 (made for the purposes of the adjudication) and 6 November 2007 (made for the purposes of these proceedings) that he is an experienced builder and electrician, and has been involved with building and electrical contracts since the early 1970s. In relation to this project, he signed the Contract on behalf of Sanclair, and similarly signed receipts for moneys paid. During the currency of the Works, he was on site; and was the “person-in-charge” for the purposes of Clause 3.2 of the Conditions. He was involved in much of the contractual correspondence.
31. Mrs Williams’ role in the project on a day-to-day basis was smaller. However (i) she was involved in some of the contractual correspondence, to which I refer below, and (ii) although many of the contractual payments were made in cash to Mr Williams, there is evidence that at least one payment made direct into her bank account (i.e. the account to which I have already referred, in the name of “Mrs S A Williams trading as Sanclair Construction”), namely £28,500 on about 3 September 2006. However, since the hearing, Mr Noor has filed further evidence (in the form of a letter dated 27 November and a further statement dated 28 November 2007), in which he states that this payment was actually paid into the bank by Mr Williams, and Mr Noor did not know that it was being made to Mrs Williams’ account. For the purposes of these applications, I accept that evidence.
32. Although Mr Noor (and the Contract Administrator, Lewis Webb) dealt with Mr Williams on a day-to-day basis, they do not appear to have given any thought as to who was behind the name “Sanclair Construction” during the course of the Contract, and certainly raised no queries as to who that might be.
33. By March 2007, relations on site had become strained. On 8 and 9 March, Sanclair wrote to Lewis Webb formally requesting the issue of an interim payment certificate and saying that works would be suspended unless such a certificate were issued. Both of those letters are on Sanclair notepaper (which did not identify the proprietor(s)), and were apparently signed by Mrs Williams (“S A Williams”). Underneath the signature there was typed, “pp S A Williams” and “C J Williams” on the line below - suggesting that, although in these cases the letters were actually signed by Mrs Williams, they were perhaps prepared on the basis that her husband would or at least might sign on her behalf. The letter of 9 March also appears to have been sent to Lewis Webb from

Mrs Williams' email address, although under cover of a message to Mr Webb from "Cliff". Lewis Webb responded to that email address (on 20 March 2007): and Mrs Williams' email address appears to have been used regularly for contractual correspondence (e.g., email to Lewis Webb of 24 March which attached a letter and invoice). On 25 March, a further email was sent by Lewis Webb addressed to "Mr & Mrs Webb".

34. In the chronology, I pause there - at 25 March 2007. Up to that date, although Mr Williams was clearly playing an important part in the project, there are no documents that identify him as a sole trader, trading as "Sanclair Construction". The Agreement was signed by him: but that is consistent with him signing on behalf of the owner as well as being the true owner himself. The contractual correspondence went to and from both Mr and Mrs Williams: and, as I have indicated (Paragraph 33 above), as late as 25 March itself Lewis Webb were writing to Mrs Williams in a contractual context.
35. On 26 March, Sanclair wrote to Lewis Webb, as follows:  
*"We hereby formally notify you of our requirement to refer the disputes matters on the above contract to adjudication under Clause 7.2. of the Contract, namely  
Failure to certify payment by the due date, failure to make payment by the final date of payment of all sums due (Clause 4.7 and 6.8)  
Failure of the Contract Administrator to issue information for the proper carrying out of the Works (Clause 2.4)  
Please advise us of the proposed adjudicator, together with, profession, relevant experience and suitable qualifications to act in this capacity for our agreement."*
- The letter was presumably signed by Mr Williams because, although I have not seen a signed copy, "C J Williams" is typed at the foot of the letter.
36. Two days later, on 28 March, Mr Noor's solicitors wrote to "Sanclair Construction Ltd", stating that:  
*"On the 15 June 2006 our client employed Sanclair Construction Limited ("the Company") as the Contractor to undertake and complete the works... in respect of the restaurant and Car Park at Lower Nantgarw."*
- That letter indicates that Lewis Webb had served a notice on "the Company" under Clause 6.4 of the Contract because "the Company" had without reasonable cause suspended the Works: and that "the Company" had replied to the effect that they would not be returning to site. On any view, that letter is wrong - because, whoever the Contractor might have been, it was never a limited company. What is clear from that letter is that the precise identity of the contracting party was less important to Mr Noor than the substantive issue which had arisen between him and the Contractor, which required resolution. In any event, there is no suggestion in that letter that Mr Williams was the Contractor.
37. There were the various attempts to agree the identity of a suitable adjudicator to deal with the adjudication prompted by Sanclair's letter of 26 March. Mrs Williams was involved in seeking the name of a suitable candidate (see, e.g., emails to and from a Mr Entwistle 16 April 2007), although it seems that none of these emails was shared with Mr Noor at the time. Mr Noor pressed for Mr Baldwin to be appointed, and Lewis Webb wrote to Sanclair on 22 May confirming that (by that date) both Mr Noor and Sanclair had accepted him as adjudicator. In the terms and conditions sent by Mr Baldwin on 31 May, the "Referring Party" is described simply as "Sanclair Construction" and "the Responding Party" as "Mr A Noor". Following a preliminary meeting that same day, Mr Baldwin confirmed that he accepted the appointment in an email dated 15 June (sent to Mrs Williams' email address): and that was the effective date of the adjudication agreement between Sanclair, Mr Noor and Mr Baldwin. That is confirmed in Paragraph 14 of the Decision.
38. In that same email, Mr Baldwin gave certain directions for the adjudication. He was able to do so because by that time (15 June) there was a tripartite adjudication agreement between him, Mr Noor and Sanclair. By 22 June (later extended to 28 June), the parties were to send him an agreed list of issues he was to decide: he said, "I will treat that list as Sanclair's Notice of Adjudication (Scheme para 1)". That was effectively a deeming provision, because by then the tripartite adjudication agreement had been made and was "up and running". However, by this direction it was made clear that that document triggered the tight adjudication timetable required by the Scheme. Sanclair would thereafter send him their "Referral Notice", i.e. their statement of case: and directions were then given for Mr Noor's response, and Sanclair's reply to that response. There was then to be a site visit, before Mr Baldwin produced his decision.
39. Again, to pause momentarily in the chronology there - say, 25 June 2007 - there are still no documents that indicated that that the person behind Sanclair was Mr Williams trading as "Sanclair Construction": although Mr Noor and Lewis Webb, having dealt with Mr Williams in respect of the contract, assumed that this was the case.
40. Sanclair appointed a quantity surveyor (Mr Ian Smeaton) to represent them in the adjudication. On 26 June, Mr Noor's solicitors wrote to Mr Smeaton with various issues they had identified between the parties to the building contract, being both claims on Sanclair by Mr Noor and vice versa. Mr Noor had substantial claims against Sanclair that he wished to pursue. The letter from Mr Noor's solicitors was headed:

***Adjudication - JCT Minor Works Contract Restaurant and car park at Lower Nantgarw Our client: Mr Abdul Noor v Contractor Cliff Williams t/a Sanclair Construction***

This is the first occasion on which the term "Cliff Williams trading as Sanclair Construction" appears in the documents. The letter asks Mr Smeaton to send a draft letter addressed to Mr Baldwin setting out the disputes he was to consider for signature by Mr Noor.

41. I have not seen a copy of the letter to the adjudicator as sent, but a draft is attached to the Statement of Peter Fitzgerald (the solicitor for Mr Noor) dated 27 November 2007 which, subject to two insignificant changes, he says was the final version sent to Mr Baldwin on 28 June. I accept it as such. For the purposes of this judgment, I shall assume it was eventually sent on 28 June 2007, as suggested on Mr Noor's behalf.
42. The letter is headed exactly the same as the letter Mr Smeaton received from Mr Noor's solicitors on 26 June, except the last line reads:  
**Parties Mr C Williams t/a Sanclair Construction v Mr A Noor**  
That heading appears to have been used by Mr Smeaton throughout his dealings with Mr Baldwin (see, e.g., his letter dated 4 July which covered the statement of case or formal Referral Letter)
43. The letter of 28 June to Mr Baldwin began:  
*"As you are aware, I have been appointed by Mr Williams to act on his behalf in the above dispute..."*  
As I have indicated, under Mr Baldwin's directions of 15 June, that letter was to stand as the Notice of Adjudication. Mr Green for Mr Noor relies heavily upon this letter, to which I shall return in due course.
44. In the course of the adjudication, Mr Williams played a substantial part. He submitted a statement (dated 30 July 2007) in which he stressed his experience as a building and electrical contractor: and (on Page 5) he referred to the contract with Mr Noor in the following terms:  
*"I therefore reiterate that my appointment was simply accepted by Mr Noor and Mr Webb by the standard of work Mr Noor witnessed [on another contract being performed by Sanclair]"* (emphasis added).  
Mr Green also relies upon that document, and particularly that passage, to which again I shall return in due course.
45. Mr Baldwin published his Decision on 24 August 2007, and sent it out under cover of a letter headed simply, "Adjudication: Sanclair v Noor". It was sent to Sanclair at Mrs Williams' email address, as well as to Mr Smeaton. The Decision itself describes the parties to the adjudication "Abdul Noor t/a India Kitchen, Referring Party" and "Sanclair Construction, Responding Party": although, of course, these are the wrong way round, Sanclair in fact being the referring party. Paragraph 2 of the Decision says:  
*"[Sanclair] is a building and electrical contracting firm based in Talbot Green, Mid Glamorgan. Sanclair appears to be the trading name of Mr Cliff Williams who is a sole trader."*  
In the Decision, there is no other reference as to who might be behind that trading name.

#### **The Invalidity of the Adjudication III: The Parties' Contentions**

46. On the basis of this factual background, Mr Green for Mr Noor submitted that, although Mr Noor now conceded that the party to the building contract ("the Contractor") was Mrs Williams trading as Sanclair Construction, the party to the adjudication was not she but Mr Williams in his personal capacity. He submitted that that was fatal for the validity of the adjudication process: and particularly Mrs Williams had no adjudication decision in her favour which she could enforce through these proceedings. As a result, not only should the application for summary judgment for the Claimant be dismissed, I should strike out the claim.
47. Mr Kearney for Mrs Williams submitted that Mrs Williams was not only the contracting party in the building contract, but also referring party in the adjudication. If and insofar Mr Williams was described as a party to the adjudication, this was a simple mistake in description and I should rectify this by making a declaration that Mrs Williams was the true party to the adjudication process. She consequently has the benefit of the adjudication decision, which I should enforce by entering summary judgment.

#### **The Invalidity of the Notice of Adjudication IV: The Law**

48. The proper approach to a contention that the party to an arbitration was not the same as the contracting party was considered in *Unisys International Services Limited v Eastern Counties Newspapers Limited* [1991] 1 Lloyd's Rep 538. The claimant contracted with Eastern Counties Newspapers Limited for the sale and purchase of computer equipment. By the time disputes had arisen under that contract, the purchasing company had changed its name (to Eastern Counties Group Limited), and the name "Eastern Counties Newspapers Limited" had been given to a new company within the same group. The arbitration was commenced in the name of "Eastern Counties Newspapers Limited".
49. The Court of Appeal found that the arbitration proceedings had been taken by the right party but in the wrong name. Parker LJ said (at page 550):  
*"It appears to me clear that, when, in their letter of June 29..., the sellers' solicitors said that "proceedings have been taken in the wrong name..." they correctly stated the position. They did not say "by the wrong party" and rightly so for, as Mr Parker the sellers' solicitor accepted in evidence, and the notice of arbitration and subsequent documents clearly show, it was 'fairly obvious' that the party was intended to be the contracting party..."*
50. Ralph Gibson LJ (with whom Parker and Balcombe LJ agreed) said that the proper approach of apparent misnomer on the face of the notice was to construe the notice by reference to its terms and the surrounding circumstances known to the parties. He said (at page 560):  
*"For my part, it seemed that the question whether the arbitration proceedings were validly commenced was to be decided by the proper construction of the notice of July 1979 which contains the terms of the agreement to refer the named disputes for settlement by an arbitrator. That agreement would have to be construed by reference to the terms*

therein stated and the surrounding circumstances known to the parties.... Evidence as to the uncommunicated intentions of the solicitor acting for [the purchaser] and as to the nature or origin of the mistake made by him, or as to what the solicitor for [the seller] thought was the intention of the claimants, would for this purpose be of no assistance or relevance.”

51. In support, he relied upon the words of Lord Wilberforce in **Prenn v Simmonds** [1971] 1 WLR 1381 at page 1383H:  
*“The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations... We must... enquire beyond the language and see what the circumstances were with reference to which the words were sued, and the object, appearing from those circumstances, which the person using them had in view.”*  
Those sentiments are no less true now, even after more recent decisions such as **West Bromwich Building Society v Wilkinson** [2005] UKHL 44, [2005] 1 WLR 2303.
52. Having considered the relevant circumstances in **Unisys**, Ralph Gibson LJ found that, on a proper construction of the agreement to arbitrate, the party to the arbitration was the party to the original commercial contract. He said (at page 560):  
*“I find it impossible to contemplate that the law could justify any other answer.”*
53. **Unisys** was a case concerning arbitration: but, as both Mr Kearney and Mr Green agreed, the same principles must be applicable to adjudication.
54. In respect of the issue as to whether in a particular case an adjudication has been brought by the wrong party or by the correct party in the wrong name will be dependent upon the facts as found in that particular case. Ralph Gibson LJ makes that clear in **Unisys**. However, in the course of their submissions, in an attempt to assist me Mr Kearney and Mr Green referred me to cases which had been held to have been on one side of the line or the other.
55. **Total M and E Services Limited v ABB Building Technologies Limited** [2002] EWHC 248 (TCC) concerned a labour only subcontract between the defendants and a company called “Total M and E Services Limited”: but the reference to adjudication was made in the name of “Total Mechanical and Electrical Services Limited”. The defendant submitted that the Claimant could not seek to enforce an award between a different company and the defendant. The claimant submitted that:  
*“The Defendant company can at no time have believed that a party other than the named party to the subcontract had commenced adjudication proceedings against it”* (Paragraph 18).  
HH Judge Wilcox found that the proper description of the referring party was indeed Total M and E Services Limited, i.e. the company which was the party to the underlying contract and the claimant in the enforcement proceedings. He said (at Paragraph 23):  
*“This is a clear case of misdescription where the Claimant and Defendant at all stages were aware of the true identities of the contracting parties and no one could be misled. Where there are similar company names, as for instance in a group of companies or where there are subsidiaries with overlapping management systems and some common directors a precise description of the referring Party could be critical.”*
56. Judge Wilcox - who appears to have had more than his fair share of cases where these issues have arisen - had such a case in 2006. In **Rok Build Limited v Harris Wharf Development Company Limited** [2006] EWHC 3573 (TCC), the contracting party was a company called “Walter Llewellyn & Sons Limited”. An associated company (Rok Build Limited) performed some of the contract work for the titular contractor and the defendant sent various notices and paid various monies due under the contract to Rok Build Limited; but the contract was never formally assigned. Judge Wilcox found that the referring party was (in substance, and not only in name) Rok Build Limited: and that, when Rok Build attempted to enforce the adjudication award, it could not obtain summary judgment because it had no right to adjudication under the underlying contract. This was consequently a case of the correct description of an incorrect party, rather than an incorrect description of the correct party.
57. In the case before me, I therefore have to consider whether the party in reality was Mrs Williams trading as Sanclair Construction (the contracting party in the underlying contract), or whether it was Mr Williams on his own personal account. In addressing this question, I am acutely aware that I am dealing with an application for summary judgment, and that (i) I am only concerned with whether Mr Noor has a real prospect of defending this claim and (ii) it is not open to me to conduct any form of “mini-trial”.
58. However, I respectfully agree with the approach taken by HH Judge Kirkham in **Andrew Wallace v Artisan Regeneration Limited** [2006] EWHC 15 (TCC), that it is open to the court in cases such as this to review the evidence and come to a view on it without conducting a mini-trial. In that case, the defendant alleged that the contracting party was a private individual and not the claimant company. Judge Kirkham reviewed the evidence, and the allegations of fraud that were being made, and concluded that that was unlikely: and she gave summary judgment for the claimant. The same approach is also implicit in **Total M and E**. In such a review of the evidence, it is no doubt correct to look at “factual matters in the round and with robust commonsense” (**Rok Build** at Paragraph 21: see also **Three Rivers** at Paragraph 158, per Lord Hobhouse): and also bearing in mind the low threshold for allowing a defendant to continue to defend a claim on an application under CPR Part 24.

**The Invalidity of the Notice of Adjudication V: This Case**

59. In support of his submission that the party to the adjudication was not Mrs Williams but Mr Williams in his personal capacity, Mr Green for Mr Noor relied upon the following:
- A. The letter of 28 June from Mr Smeaton to the adjudicator (referred to in Paragraphs 41-43 above). That letter was (he submits) the Notice of Adjudication, and it was clear that Mr Smeaton wrote it on behalf of Mr Williams trading as Sanclair Construction. That is clear from both the letter heading, and the text of the letter I have quoted above. The adjudication was therefore commenced and pursued, not by Mrs Williams, but by Mr Williams in his personal capacity. That letter was the rock upon which Mr Green's submission was based, the other matters being relied upon by way of general support.
  - B. The letter of 4 July from Mr Smeaton to the adjudicator covering the referral letter (the statement of case), which again in its heading refers to Mr Williams trading as Sanclair being the party to the adjudication.
  - C. The evidence of Mr Williams in the adjudication, particularly the reference on page 7 of his statement of 30 July 2007 to "my appointment" by Mr Noor in respect of the contract.
  - D. Paragraph 2 of the Decision, in which the adjudicator says that, "Sanclair appears to be the trading name of Mr Cliff Williams who is a sole trader".
  - E. The proceedings which have been issued by the adjudicator against Mr Noor and "Cliff Williams t/a Sanclair Construction", for his unpaid adjudicators' fees and expenses.
  - F. The fact that Mr Williams signed the contract, and played a very active part in the execution of the contract works almost to the exclusion of Mrs Williams.
60. With respect to Mr Green's submissions - which could not have been put more endearingly - I do not find any of this to be compelling evidence in support of his submission. I will deal with the matters in turn, before taking an overview of their aggregate weight.

**A. The letter of 28 June from Mr Smeaton to the adjudicator**

61. Mr Green's submissions were based very heavily upon this single document. On its face, of course, it does refer to Mr Williams trading as Sanclair Construction as being the party to the *adjudication*: and, within the adjudication, it was directed to be the Notice of Adjudication. However:
- (i) The letter has to be seen in proper context. A binding adjudication agreement was reached between Mr Noor, Sanclair and Mr Baldwin by 15 June 2007 (see Paragraphs 37-38 above). Mr Baldwin directed that the parties agree the matters in dispute for him to decide (which were to be put into a letter from Sanclair, which was to stand as the Notice of Adjudication) because that would then trigger the tight adjudication timetable required by the Scheme: but for the reasons I have given, although no doubt the document that was eventually sent on 28 June was an important document in the adjudication process, it did not set that process going. The adjudication was contractually "under way" by 15 June.
  - (ii) As at 15 June, there was no reference in any document to Sanclair being the trading name of Mr Williams. As at 15 June, Mr Noor had not taken interest in who precisely the contracting party might be, i.e. who owned the business which traded as "Sanclair Construction". He thought it was Mr Williams: but he now accepts that he was mistaken - it was Mrs Williams. He takes no further point on that and does not, for example, seek to set aside that contract in any way. Any attempt to do so would be futile. In the 15 June agreement, it is clear that the parties to the adjudication were the parties to the underlying building contract, and "Sanclair" in the context of the agreement to adjudicate meant the same as "Sanclair" in the building contract. "Sanclair" with whom Mr Noor entered into the tripartite adjudication agreement on 15 June was Mrs Williams, just as much as the "Sanclair" with whom he entered the substantive building contract was Mrs Williams. Mr Noor can at no time have believed that a party other than the named party to the underlying party had commenced adjudication proceedings against him.
  - (iii) The 15 June agreement was 13 days before the 28 June 2007 letter upon which Mr Noor relies. The very first reference to "Mr Williams trading as Sanclair Construction" was in the letter of 26 June from Mr Noor's solicitors, which was 11 days after Mr Baldwin's appointment as adjudicator. By the time Mr Smeaton had sent the letter of 28 June, the adjudication agreement had already been entered into and however he described or named one of the parties could not have affected the legal position. This is fatal to Mr Green's reliance on the 28 June letter.
  - (iv) In construing the adjudication agreement, I cannot take into account the intentions of the parties, except as these were evinced. However, from his actions it is clear beyond doubt that Mr Noor intended the adjudication to be between the parties to the underlying contract. He would have been foolish to have intended otherwise, bearing in mind the very substantial counterclaims he pursued in the adjudication. But is clear from his Defence in this claim, that he was of the firm view that the parties to the adjudication were in fact the same as the parties to the underlying contract (see Paragraph 11 above). That was also the view of Mrs Williams. In her Particulars of Claim (which are supported in the usual way by a statement of truth) she avers both that (i) she entered into the building contract (Paragraph 2), and (ii) the 28 June letter (referred to in the pleading as dated 27 June 2007) was served by or on behalf of her (Paragraph 6) and the adjudication was between her and Mr Noor (Paragraph 7). The adjudication agreement as I have construed it therefore corresponds with the patent intentions of the parties.
  - (v) In any event, as I have indicated, so long as the parties to the adjudication and underlying contract were the same, neither party (or indeed their advisers) seemed concerned about precision in names used in

correspondence. In their letter of 28 March, Mr Noor's solicitors stated that the Contractor was a limited company, "Sanclair Construction Limited" (Paragraph 36 above). Correspondence was sent by Mr Noor (or by the Contract Administrator) was variously sent to Mr Williams, Mrs Williams, and both. Payments were made by Mr Noor to Mr Williams in cash, but also to Mrs Williams' bank account. With respect to them, neither party appears to have been particularly experienced in contractual mechanics, procedure or paperwork, concentrating more on substantive matters than matters of form. In construing the adjudication agreement, that is something which I can properly - and do - take into account

(vi) Although the letter of 28 June (and the letter of 4 July covering the Referral Letter) referred to Mr Williams trading as Sanclair Construction, the Adjudicator's Decision referred to the relevant party simply as "Sanclair Construction". I return to the Mr Green's reliance on the Decision below (Paragraphs 65-67), but even in Paragraph 2 of the Decision, the adjudicator merely indicated that "Sanclair appears to be the trading name of Mr Cliff Williams who is a sole trader". That is not a firm assertion: there is no other reference as to who might be behind the Sanclair name: and it is clearly not relevant to the issues before Mr Baldwin. The letters of 28 June and 4 July did not affect the mind of the adjudicator at all in respect of the issues which he had to decide. He clearly proceeded on the same basis as the parties, i.e. that the parties to the adjudication before him were the parties to the underlying building contract.

62. For these reasons, the reliance of Mr Noor on the letter of 28 June is, I am afraid, misconceived.

**B. The letter of 4 July from Mr Smeaton to the adjudicator covering the referral letter (the statement of case)**

63. For the same reasons, the 4 July letter (which merely uses the same heading as the letter of 28 June) provides no support to Mr Noor's case.

**C. The evidence of Mr Williams in the adjudication, particularly the reference on page 7 of his statement of 30 July 2007 to "my appointment" by Mr Noor in respect of the contract**

64. Mr Noor's reliance on this evidence is again unwarranted, because:

(i) As Mr Kearney pointed out, this was a statement used in the adjudication: but has the final rubric of a CPR Part 35 expert's report. That indicates that (a) with respect to him, Mr Williams is fairly unsophisticated in these matters, and (b) the purpose of the statement was to show the adjudicator that Mr Williams was an experienced builder and therefore his evidence should be given some weight -hence the focus of the statement on Mr Williams and the part that he played in this (and other Sanclair) building projects. As I have indicated above, Mr Williams was the "person-in-charge" for the purposes of Clause 3.2 of the Conditions (see paragraph 30 above).

(ii) In any event, at most in this statement Mr Williams may suggest that he was the contracting party in the building contract (which Mr Noor now accepts he was not) - he does not suggest that he was the party to the adjudication. He certainly does not suggest that the Contractor and the party to the adjudication were different persons.

**D. Paragraph 2 of the Decision, in which the adjudicator says that, "Sanclair appears to be the trading name of Mr Cliff Williams who is a sole trader"**

65. I have already touched upon this evidence (see Paragraph 61(vi) above).

66. Of course, Mr Baldwin could not have made a finding with regard to the identity of the contracting party or the identity of the parties before him, as that would be a jurisdictional issue with which he was not seized. For the reasons I have given above, his adjudication agreement of 15 June was with Mrs Williams, and nothing he said in his Decision could have affected that.

67. However, in any event he did not purport to make any finding in relation to identity. Even in Paragraph 2 of the decision, he merely indicates that "*Sanclair appears to be the trading name of Mr Cliff Williams who is a sole trader*". That is not a firm assertion. Mr Baldwin acted on the basis that the Sanclair Construction" before him was the same as the "Sanclair Construction" who was the Contractor - as did the parties.

**E. The proceedings which have been issued by the adjudicator against Mr Noor and "Cliff Williams t/a Sanclair Construction", for his unpaid adjudicators' fees and expenses**

68. I have dealt with the substance of this in Paragraph 61(vi) above. Nothing Mr Baldwin did after 15 June 2007 could have affected the identity of the parties in the adjudication before him. In these proceedings, Mr Baldwin has apparently sued Mr Williams (as well as Mr Noor, of course). If Mr Williams was not the party to the adjudication, then he has a defence to that claim. In those circumstances, no doubt Mr Baldwin will seek permission to amend to substitute Mrs Williams for Mr Williams as the appropriate defendant.

**F. The fact that Mr Williams signed the contract, and played a very active part in the execution of the contract works almost to the exclusion of Mrs Williams**

69. Mr Green did not place any great reliance upon this general evidence, and was right not to do so. Mr Williams clearly played an important part in performing the contract works and in the contractual correspondence etc. However, that part was equally consistent with him being an employee of Sanclair Construction (with appropriate authority from the owner to do what he purported to do), as being the owner himself.

70. Therefore, in conclusion, I am unimpressed by the evidence relied upon by Mr Green for Mr Noor in support of his contention that, whilst the party to the underlying contract was Mrs Williams, the party to the adjudication was Mr Williams.

71. In truth, when the relevant documents are looked at in proper context, it is clear beyond any sensible doubt that the adjudication was substantively between Mrs Williams and Mr Noor. That was the agreement with Mr Baldwin that they entered into on 15 June. Mr Noor may have been mistaken about the identity of who "Sanclair" was. However, at all times he intended to deal with whoever that person was. He now accepts that, when he contracted with Sanclair in the building contract, he was contracting with Mrs Williams. Equally, I have no real doubt that, when he agreed with Sanclair to appoint Mr Baldwin as adjudicator on 15 June 2007, he was again contracting with Mrs Williams. Where, in the adjudication documents (including the letter of 28 June) there are references to "Mr Williams trading as Sanclair Construction", that is a simple misdescription.
72. Insofar as it is necessary, and for the avoidance of all doubt in the future, I shall make a declaration that the parties in the adjudication before Mr Baldwin were (1) Mrs Sandra Williams trading as Sanclair Construction (Referring Party) and (2) Mr Abdul Noor trading as India Kitchen (Responding Party).

#### **The Invalidity of the Notice of Adjudication**

73. By Paragraph 1(3) of the Scheme, "the notice of adjudication shall set out briefly... the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices)." Mr Green submits that that is a mandatory requirement. As the Notice of Adjudication in this case (i.e. the 28 June 2007 letter) did not set out the name of Mrs Williams as the contracting party, the notice was invalid. That effectively invalidates the entire adjudication proceedings.
74. In terms of approach, as Chadwick LJ stresses in *Burman v Mount Cook Land Ltd* [2001] EWCA Civ 1712 at Paragraph 11, whether Paragraph 1(3) of the Scheme is mandatory or not turns the intention of Parliament as evinced in the wording they have used in the statutory provisions, including any subsidiary legislation.
75. I do not consider that the requirements for the notice of adjudication set out in Paragraph 1 of the Scheme (e.g. for a party to be named) are mandatory in the sense that, if the prescribed information is not given in the notice, then the notice and indeed any ensuing adjudication is bad, for the following reasons:
- (i) The 1996 Act itself makes no such requirement. Any requirement stems from the Scheme, which forms part of the 1998 Regulations (which are of course made under the 1996 Act). The Scheme deals with practical matters, rather than matters of principle.
  - (ii) The main practical purpose of Paragraph 1(3) is to ensure that, when a reference is made to an appointing body, that body has sufficient information to be able to appoint adjudicator. There are cases (such as this) where an appointment is made by agreement between the parties.
  - (iii) I have stressed the nature and purpose of the adjudication scheme of the 1996 Act. It is contrary to that purpose to construe the terms of the Scheme in a legalistic manner. The purpose would be undermined if a party, who might have obtained an unfavourable adjudicator's decision, could take advantage of a failure to identify a contracting party in the notice of adjudication in circumstances in which (a) the name and address of the contracting parties was clear, and (b) no party was prejudiced by the failure. The robust nature of 1996 Act adjudication is contra-indicative of a construction that makes such matters as this set out in the Scheme mandatory rather than merely directory.
  - (iv) There is authority of this Court to the effect that the requirements of Paragraph 1(3) of the Scheme are directory and not mandatory (see *Aveat Heating Limited v Jerram Falkus Construction Limited* [2007] EWHC 131 (TCC), HH Judge Havery QC). Whilst that authority is not binding on me, it is persuasive: and, for the reasons given by Judge Havery in that case (and those which I give above) I consider it is correct.
76. The requirements of Paragraph 1(3) being merely directory, it was not fatal to the notice of adjudication that Mrs Williams was not named. As will appear from my findings in this judgment, the fact that she was not named was not prejudicial to Mr Noor in any way.

#### **Business Names Act 1985**

77. Section 4(1)(a)(iii) of the Business Names Act 1985 provides:
- "A person to whom this Act applies shall... state in legible characters on all business letters, written orders for goods or services to be supplied to the business, invoices and receipts issued in the course of the business and written demands for payment of debts arising in the course of business... in the case of an individual, his name...and... an address in Great Britain at which service of any document relating in any way to the business will be effective."*
78. Section 4(2) provides that any person to whom the Act applies must, upon written notice, provide details of name and address to any person with whom anything is done or discussed in the course of business. By Section 5(1):
- "Any legal proceedings brought by a person whom this Act applies to enforce a right arising out of a contract made in the course of a business in respect of which he was, as the time the contract was made, in breach of subsection (1) or (2) of Section 4 shall be dismissed if the defendant... to the proceedings shows:*
- (a) that he has a claim against the plaintiff... arising out of that contract which he has been unable to pursue by reason of the latter's breach of Section 4(1) or (2) or*
  - (b) that he has suffered some financial loss in connection with the contract by reason of the plaintiff's... breach of Section 4(1) or (2)."*
79. Mr Green submits that Mrs Williams was in breach of Section 4 by not revealing the true proprietorship of Sanclair in the letter of 28 June and in other contractual correspondence, and Mr Noor has as a result suffered

financial loss in the form of his costs and disbursements (including his liability for the adjudicator's fees) which, but for her breach, would not have been incurred and wasted.

80. I can deal with this claim shortly. It fails for the following reasons:
- (i) Whilst the letter of 28 June was sent by Mr Smeaton (and therefore there was no obligation under the 1985 Act to provide the name and address of the proprietor of Sanclair), I accept that there were a number of contractual documents that, by virtue of Section 4 of that Act, ought to have had on their face details of the proprietor of the business. Insofar as they did not, Mrs Williams was in breach of Section 4.
  - (ii) However, Mr Noor suffered no financial loss as the result of that breach. I have found that the party to the adjudication was Mrs Williams, i.e. the contracting party under the building contract. Therefore, no costs have been wasted in relation to the adjudication (as they would have been if Mr Williams had been the party to it). Those costs may be related to the underlying contract, but they do not amount to "financial loss" of Mr Noor, nor were they caused by any breach by Mrs Williams. These costs would have been incurred in any event, irrespective of any breach of the 1985 Act by Mrs Williams. This is fatal to this claim.
  - (iii) In any event even if it were not, there is a discretion in the Court as to whether to allow such proceedings to continue, even in the face of a breach that causes financial loss. In the light of my findings, it is unnecessary to consider this in detail. However, if it had been necessary for me to consider the exercise of that discretion, given all the circumstances of this case as set out above and in particular
    - (a) the policy approach to the enforcement of adjudicators' decisions and the other policy considerations identified by Jackson J in *Carillion* (see Paragraph 18 above)
    - (b) the costs incurred by each side in these proceedings to date (which would largely be wasted if the proceedings are dismissed)
    - (c) the absence of any intention on Mrs Williams' part to mislead
    - (d) the absence of any profit or benefit accruing to Mrs Williams by the breach
    - (e) the absence of any prejudice to Mr Noor resulting from the breach and
    - (f) the late stage at which this point has been taken on behalf of Mr Noorhad it been necessary, I would have exercised my discretion in favour of allowing Mrs Williams to prosecute this claim.

#### **The Claim for the Adjudicator's Fees and Expenses**

81. Under Paragraph 2.3 of the terms of the tripartite adjudication agreement between Mr Noor, Sanclair and Mr Baldwin, Mr Noor and Sanclair were jointly and severally liable for his fees and expenses. However, as between the parties, the fees were to be shared equally, unless Mr Baldwin otherwise determined in his decision (Paragraph 2.1). In Paragraph 309 of the decision, he decided that Mr Noor should pay all of those fees, in the sum of £18,741.96 by 31 August 2007. Therefore, as between the parties and Mr Baldwin, they are jointly and severally liable for the fees: as between the parties inter se, Mr Noor is liable for 100% of the fees. The fees have not been paid.
82. In these circumstances, Mr Kearney submits that Mrs Williams is entitled to £18,741.96 from Mr Noor now. Under the terms of the Agreement between them (e.g. Paragraph 23 of the Scheme). They have agreed to comply with any order made by the adjudicator. Mr Noor has failed to do so, and is consequently in breach of that contract as between Mrs Williams and him. Mrs Williams has, as a result, become liable to Mr Baldwin for the whole of the adjudicator's fees: and Mr Baldwin, understandably, appears intent on proceeding against both parties for recovery. In those circumstances, Mr Kearney submits, she has suffered an immediate loss which she can recover from Mr Kearney by way of damages.
83. I agree. Further, I consider this matter not only can but should be dealt with in these proceedings, rather than these parties (and Mr Baldwin) running the risk of expending further money of legal costs in separate proceedings. To ensure that Mr Noor does not run the risk of paying Mrs Williams and being faced by proceedings from Mr Baldwin in any event, I shall order that this element of these damages should be paid into Court pending further directions. I would expect Mrs Williams to make an application forthwith that they be paid out to Mr Baldwin, to satisfy her liability to him: and I would expect Mr Noor to consent to any such application.

#### **Conclusion**

84. For these reasons, I do not consider that any of the potential defences relied upon by Mr Noor stand any real prospect of success: and I shall enter summary judgment for the Claimant. In the circumstances, it is unnecessary for me to consider whether judgment should be entered in default, or whether a payment into court should be made. I formally revoke the requirement for payment in.
85. I shall hear submissions on the appropriate form of order: but, subject to those, I would propose making the following orders:
- (i) a declaration that the parties in the adjudication before Mr Baldwin were (1) Mrs Sandra Williams trading as Sanclair Construction (Referring Party) and (2) Mr Abdul Noor trading as India Kitchen (Responding Party):
  - (ii) summary judgment in favour of the Claimant in the sum of £32,952.54 plus interest to date, payable to the Claimant by 4pm on 7 December 2007
  - (iii) summary judgment in favour of the Claimant in the sum of £18,741.96, payable into Court by 4pm on 7 December 2007

(iv) an order that the Defendant pays the Claimant's costs of this claim.

85. I would ask the parties to agree the appropriate interest and costs, and submit an Order for my approval by 4 pm on 5 December: failing which I shall hear submissions in respect of anything outstanding at 9.45am on 7 December 2007. Any further hearing can be by way of telephone hearing (arranged by the Claimant's legal representatives) if both parties agree.

Andrew Kearney (instructed by Darwin Gray) for the claimant.  
Andrew Green (instructed by Thomas Simon) for the defendant.