JUDGMENT : HIS HONOUR JUDGE RICHARD SEYMOUR : TCC : 4th November 2004

1. **Introduction** : The claimant in this action, Bryen & Langley Ltd. ("*B&L*"), carries on business as a building contractor. The defendant, Mr. Martin Boston, is the husband of Orna Boston. In August 2000 Mrs. Boston exchanged contracts for the purchase of two flats, numbered 4 and 5, at 82, New Cavendish Street, London W1. The intention was that those two flats should be converted into one flat. It is convenient, therefore, to refer in this judgment to the property which Mrs. Boston agreed to purchase as "*the Flat*".

2. Although Mrs. Boston was to fund the purchase of the Flat and the undertaking of the necessary works to put it into the condition in which she and her husband wanted it, it was Mr. Boston who undertook the making of arrangements for those works to be done. It was originally anticipated that the vendor of the Flat, a company called Newthorn Properties Ltd. ("*Newthorn*"), would, as part of the purchase arrangements, cause work to be done to bring the Flat to what was described as "*the first fit-out stage*". Apparently Newthorn arranged for a company called McCabe Building (UK) Ltd. ("*McCabe*") to undertake the necessary works. There were, it seems, problems in respect of the quality of the work done by McCabe and also concerning the time which those works took. In those circumstances it was agreed between Newthorn and Mrs. Boston that the Bostons themselves would arrange for builders to be engaged to undertake fitting out work in the Flat prior to completion of the purchase.

3. Mr. Roy Welling is a quantity surveyor and practises as such under the style "*Roy Welling Associates*". In about the middle of March 2001 Mr. Boston instructed Mr. Welling to prepare a Bill of Quantities in relation to the fitting out works and to obtain quotations from builders for the carrying out of the works described in the Bill. In this judgment I shall call the works described in the Bill "*the Original Works*". Mr. Boston also engaged an architect, Mr. David Gallagher, to undertake the design of the Original Works. In the Preliminaries section of the Bill prepared by Mr. Welling it was indicated at folio A20/130 that the form of contract intended to be entered into with the successful tenderer was the Standard Form of Building Contract, 1998 Edition, Private with Quantities incorporating amendments 1 – 3 produced by The Joint Contracts Tribunal Ltd. I shall refer to that form of contract in this judgment as "*the JCT Form*". In the same folio it was stated that:- "*The Contract will be executed Under hand.*"

4. The JCT Form contains provision, in Article 5, that:- "*If any dispute or difference arises under this Contract either Party may refer it to adjudication in accordance with clause 41A.*"

5. Clause 41A of the JCT Form sets out over nearly 3 pages of text detailed provision for the procedures to be followed in an adjudication and the consequences of that process being adopted. The effect of the decision of an adjudicator is dealt with in clause 41A.7:-

   "*.1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given.*

   .2 The Parties shall, without prejudice to their rights under this Contract, comply with the decision of the Adjudicator; and the Employer and the Contractor shall ensure that the decision of the Adjudicator is given effect.

   .3 If either Party does not comply with the decision of the Adjudicator the other Party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 41A.7.1"

6. Clause 30.1 of the JCT Form is concerned with interim certificates. The basic obligation of the Employer in clause 30.1.1.1 is to pay the amount of an interim certificate by the appropriate "*final date for payment*". However, that is not an absolute obligation. By clause 30.1.1.4 it is provided that:- "*Not later than 5 days before the final date for payment of the amount due pursuant to clause 30.1.1.1 the Employer may give written notice to the Contractor which shall specify any amount proposed to be withheld and/or deducted from that due amount, the ground or grounds for such withholding and/or deduction and the amount of withholding and/or deduction attributable to each ground.*"

If no such notice is given the consequence is that for which clause 30.1.1.5 provides:- "*Where the Employer does not give any written notice pursuant to clause 30.1.1.3 and/or to clause 30.1.1.4 the Employer shall pay the Contractor the amount due pursuant to clause 30.1.1.1*"

7. One of the contractors invited to tender for the execution of the Original Works was B&L. B&L's tender was the lowest. There followed negotiation concerning the tender. That negotiation resulted, ultimately, in a reduction of the tendered amount from £532,404 to £436,923.

8. A concern of Mr. and Mrs. Boston, certainly by June 2001, was that the Original Works should be completed as soon as possible. In order to achieve that Mr. and Mrs. Boston were prepared to pay a bonus for early completion. They also wanted work to get under way promptly. Mr. Welling suggested, and Mr. Boston agreed, that to enable B&L to start work Mr. Welling should write a letter on Mr. Boston's behalf. That letter was dated 12 June 2001 and was in these terms:-

"*Further to our recent meeting, I can now confirm on behalf of our Client, Mr. Martin Boston, that it is his intention to proceed with the works with your Company in accordance with your Tender and subsequent amendments as appended in the sum of £436,923 for a Contract Period of 16 weeks, possession 18th June 2001. The Contract has been varied to include the levelling of the floors – the cost of which has yet to be ascertained. Access to the site is immediately available.*

The Contract will be executed under the Standard Form of Contract 1998 Edition, Private with Quantities and, should the project not proceed, your reasonable ascertainable costs will be recoverable from the Client but will not include any loss of profit or overhead recovery.

The Contract Documents will be drawn up shortly.

At our meeting on 6th June, Mr. Boston offered a Bonus Scheme (details to be agreed) wherein he would offer payment of £2,000 for every week by which the completion date was brought forward.

We look forward to working with you on this project, and trust that it is successfully concluded on time, within budget, and to the required quality standard."

9. After the letter dated 12 June 2001 was despatched B&L proceeded with the Original Works. However, B&L was also asked to undertake various other works, some seemingly consequent upon defects in work done by McCabe. At all events, the cost of the works which B&L in fact undertook increased substantially beyond the sum of £436,923 mentioned in the letter of 12 June 2001, and the duration of the works became extended.

10. Under cover of a letter dated 28 June 2001 Mr. Welling sent to Mr. Paul McMahon of B&L draft contract documents. The letter said:-

"*Please find enclosed Contract documents for the above project for your perusal and signature.*
When you have completed the documents, perhaps you would return both sets to us in order that we may forward them to the Employer for his signature, following which one copy will be returned to you for your records.
Should you have any queries on the documentation, do not hesitate to contact me."

Precisely what was sent under cover of the letter did not emerge from the evidence put before me.

11. B&L wrote a letter dated 28 August 2001 to Mr. Welling which was in the following terms:-

"*Please find enclosed both sets of Contract Documents duly signed and witnessed as requested.*

We trust that you find the enclosed in order, and look forward to receipt of our copy upon completion by the Client.

Whilst writing we note that within the Appendix you have advised that the majority of the works are not subject to VAT. From this I assume that yourselves or the Architects have an assessment of which bill items are applicable for VAT, and would ask that you forward a copy to ourselves."

Again, what exactly was the form of the sets of contract documents sent under cover of the letter did not appear from the evidence put before me. What was clear, however, was that B&L had commenced work before 28 August 2001 and that no JCT Form was ever signed by or on behalf of Mr. Boston.

12. As work progressed Mr. Gallagher issued what purported to be interim certificates setting out sums to be paid to B&L. The last of those certificates was one numbered 11 and dated 17 July 2002. In that certificate the gross value of work completed by B&L was recorded as £660,800. The net sum said to be due for payment in the certificate was £115,995. What happened following the issue of certificate number 11 was described by Mr. Boston in his witness statement put before me in this way:-

"*On 8 August 2002 I agreed with Mr. McMahon that, in return for payment to him of £50,000, Bryen & Langley would not seek any further payment before completing their work. I recorded the agreement in my letter of that date.*"

A copy of the letter referred to was put in evidence. The relevant part of it was a post scriptum. That was in these terms:-

"*Since dictating the above we have had several telephone conversations and I have tried to speak to Roy Welling and David Gallagher. We have today agreed that, subject to the following and the above, we will give Chris Pearson on Monday a cheque for £50,000 on the following basis:*

1. *All outstanding works will be completed immediately, except of course for matters where you are inhibited because of the roof works.*
2. *There will be an attempt by everybody while you are away to resolve all our differences, but if this is not possible there will need to be arbitration.*
3. *We are to be supplied either by your company or Roy Welling and/or David Gallagher everything contained in clauses 1 – 5 above.*

I have just seen your fax of yesterday and I in turn am more than disappointed about all that has transpired. However, we are the major sufferers and I must make it clear that the cheque for £50,000 is handed over strictly in accordance with all the above. We need your confirmation of this.

I hope you see this before you go on holiday but in any event I trust you have a good one and we resolve all our problems amicably."

13. The confirmation sought in the passage quoted in the previous paragraph from the letter dated 8 August 2002 was not forthcoming. In a facsimile transmission to Mr. Boston dated 19 August 2002 Mr. Pearson of B&L wrote, so far as is presently material:-

"*Your comments regarding the payment are totally incorrect. The money was accepted as part payment of your debt under the contract. Our acceptance of it has no implied agreement to the comments of your fax dated 8/8/02.*

In fact you may well recall asking me to acknowledge and agree your fax, and I stated that we had no intention of agreeing to your conditions. You were also advised again that you were in breach of contract."

14. Mr. Boston paid nothing further to B&L. After a long delay, by a referral notice dated 20 May 2003 B&L, by its representatives, Alway Associates, sought to refer to adjudication the question of the failure of Mr. Boston to pay the balance of £65,995 due under interim certificate number 11. Mr. Robin Orme was appointed adjudicator. Mr. Boston acted in the adjudication by Mr. Eamonn Malone. Mr. Malone wrote a letter dated 28 May 2003 which began in this way:-

"*I write to advise you that I have been instructed by Mr. Martin Boston in this matter and to request that you direct all correspondence to me. You will note that I have copied this letter to Alway Associates.*

I am in receipt of your Directions dated 20th May 2003.

The purpose of this letter is to respectfully request that you enquire into your jurisdiction to deal with this matter."

There followed a lengthy argument to the effect that Mr. Boston had not entered into an agreement with B&L which incorporated provision for adjudication. Later in the letter Mr. Malone wrote:-

"*In these circumstances I invite the adjudicator to investigate his jurisdiction. I suggest with respect that the four routes set down by HHJ Thornton QC in **Fastrack –v- Morrison (TCC 2000)** be applied.*

In order to assist the adjudicator I advise him that we will not agree to his jurisdiction being widened. The Referring Party has admitted substantial defects in their works as a result of their commissioning of expert evidence. These reports may be disclosed if the adjudicator requires. The likely remedial costs far outweigh the sums alleged as being owed in this adjudication.

If the adjudicator believes in the light of our argument that there still is jurisdiction for him to proceed then I would be grateful if he would advise me of this by 12.00 am on Wednesday 28th May 2003. If the adjudicator decides to proceed we shall be [sic] *take legal advice immediately with a view to seeking an injunction against the continuation of this adjudication.*

I am in no doubt that the adjudicator will agree that he has no power to rule on what documents constitute the contract. His power relates to disputes arising "under the contract" (Section 108(1) HGCRA 1996)

Finally I would draw the adjudicator's attention to the attached letter between Mr. Boston and Mr. McMahon of the Referring Party. It evidences a supplemental contract whose terms amongst others are that in return for payment of £50,000 that my client duly made the Referring Party would attempt to resolve their differences or arbitrate. I submit that the Referring Party are estopped from pursuing adjudication in the light of this contractual commitment if there ever was such a right. The Adjudicator will appreciate that the very substantial counterclaims that my client will be making are better dealt with in arbitration or litigation rather than adjudication."

15. What Mr. Orme proceeded to do was to consider, and to produce a decision concerning, his jurisdiction to entertain the claim of B&L. That decision was called *"Adjudicator's Decision No. 1"* and was dated 9 June 2003. He concluded that the contract which it was common ground between the parties had been made in the terms of the letter dated 12 June 2001 written by Mr. Welling did incorporate the terms of the JCT Form, including the adjudication provisions, and thus that he did have jurisdiction to entertain the claim of B&L. The core of the reasoning which led him to that conclusion was:-

"*4.4 Whether the letter records a Contract or is a letter of intent, it sets out the terms which will apply in two alternative eventualities. If the project did not proceed, reasonable ascertainable costs would be recoverable from Mr. Boston. Otherwise (i.e. if the project did proceed), the terms of Bryen & Langley's tender and subsequent amendments would apply.*

4.5 Bryen & Langley alleges, and Mr. Boston does not deny, that the conditions of tender included Article 5 and Clause 41A of the Standard Form of Contract 1998 Edition, Private with Quantities (the JCT adjudication provisions).

4.6 The project proceeded, and Practical Completion was certified as having occurred on 15th July 2002. Both parties behaved as though the terms set out in the letter of 12th June applied.

4.7 Consequently I conclude that the terms of Bryen & Langley's tender applied and that the JCT98 adjudication provisions formed part of the Contract between the parties."

16. After the promulgation of Adjudicator's Decision No. 1 no action was taken on behalf of Mr. Boston to contest it or to seek to prevent the adjudication continuing in relation to B&L's claim. Mr. Malone, on behalf of Mr. Boston, made submissions in the adjudication. One of those submissions was that Mr. Orme had no jurisdiction to continue. That submission was considered and rejected in *"Adjudicator's Decision No.2"* dated 18 June 2003. The other main points raised on behalf of Mr. Boston, and considered and rejected in Adjudicator's Decision No.2 were, first, that a supplementary agreement had been concluded in the terms of the post scriptum to the letter of 8 August 2002 which prevented B&L from claiming to be entitled to the unpaid balance of interim certificate number 11, and, second, that the works valued in that certificate were overvalued because of alleged defects in them. Mr. Orme concluded that the balance of interim certificate number 11 was due from Mr. Boston, together with interest thereon.

This Action

17. Mr. Boston did not pay the sums determined by Mr. Orme to be due in Adjudicator's Decision No.2. On 16 July 2003 a claim form was issued on behalf of B&L under CPR Part 8 seeking orders that Mr. Boston pay to B&L the sum of £65,995, being the balance unpaid of interim certificate number 11 which Mr. Orme had determined was due, interest on that sum as determined by Mr. Orme, Mr. Orme's fees for acting as adjudicator, and interest on the preceding sums. On 24 March 2004 an application was issued on behalf of B&L for summary judgment against Mr. Boston for the sums claimed against him in the action. That application came on for effective hearing on 22 October 2004, some 16 months after Adjudicator's Decision No.2 and some 27 months after the issue of interim

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certificate number 11. If, after interim certificate number 11 had been issued and it was evident that Mr. Boston was not happy that he should pay the whole sum which was expressed to be due in it, proceedings had been commenced in this court to resolve the differences between the parties, such an action could have been tried and finished long ago. It is a matter of regret that, instead of trying to resolve the substance of their differences, the parties have embarked upon a course which at best could only provide an interim solution and at worst was a complete waste of time, money and effort.

The grounds of resistance to the claims in the action

18. Mr. Boston was represented at the hearing of the application for summary judgment by Mr. Michael Bowsher. In his very thorough and helpful skeleton argument Mr. Bowsher summarised Mr. Boston's case as follows:-

"*5. The elements of Mr. Boston's case may be summarised as follows.*

i. The contract between Mr. Boston and the Claimant did not incorporate the terms of the JCT form contended for by the Claimant. Accordingly, the contract did not incorporate any terms providing for (i) adjudication of disputes under the contract or (ii) the exclusion of the right of set-off.

ii. If and insofar as either the adjudication or set-off provisions were incorporated as asserted by the Claimant, they were each of them unfair. Accordingly they were not binding upon Mr. Boston pursuant to Regulation 7(1) of the Unfair Terms in Consumer Contracts Regulations 1999.

iii. Mr. Boston did not consent to the adjudicator determining his own jurisdiction and the adjudicator's powers have not been extended by his first determination. He had no power to make any binding decision under the contract between Mr. Boston and the Claimant.

6. If either the adjudication or set-off provisions are ineffective in this case, for whichever of the reasons indicated above, this summary judgment application must fail.

7. Further, the Claimant's right to pursue adjudication to vindicate its alleged rights in respect of the supposed certificate were waived, or the subject of an agreement reached on or about 8 August 2002. The attempt to claim additional sums in adjudication is made in breach of contract.

8. Accordingly, the adjudicator's decision was invalid, or Mr. Boston is now entitled to rely upon a defence of set-off against any claim under an adjudication decision under this contract."

The status of Adjudicator's Decision No.1

19. It is convenient to consider first the status of Adjudicator's Decision No.1. Mr. Bowsher submitted that Mr. Orme was in error in deciding that by his letter dated 28 May 2003 Mr. Malone on behalf of Mr. Boston was inviting Mr. Orme to determine whether he had jurisdiction to entertain the claim of B&L which was the subject of the referral notice which had been given. The issue is one of construction of the letter dated 28 May 2003. It seems to me that, in inviting Mr. Orme to enquire into his jurisdiction and advancing arguments as to why he should conclude that he did not have jurisdiction, Mr. Malone in fact was asking Mr. Orme to make a decision as to his own jurisdiction. It is not, therefore, open to Mr. Boston to object when that is what Mr. Orme, with the concurrence of B&L, proceeded to do. However, the effect of the decision of an adjudicator as to his own jurisdiction, even if made with jurisdiction to make at least that determination, is, in my judgment, very limited. If one supposes that a decision by an adjudicator that he had jurisdiction were correct, then, certainly under the JCT Form and the statutory scheme, that decision is only binding, so far as is presently material, *"until the dispute is finally determined by legal proceedings"*. If a decision by an adjudicator that he has jurisdiction over the substantive dispute referred is challenged at the enforcement stage, what the court is then being asked to do is finally to determine whether the adjudicator had jurisdiction or not. In other words, in practical terms at the enforcement stage the adjudicator's own view of his jurisdiction, even if the subject of specific reference to him as a matter for determination and dealt with in a separate decision, is of little significance. The court must form an independent view of the matter. If the court's decision is that the adjudicator lacked jurisdiction, the adjudicator's opinion to the contrary is immaterial. In the event this analysis was not seriously in issue before me and the main argument concentrated on Mr. Bowsher's other points.

The proper construction of the letter dated 12 June 2001

20. As matters turned out, the issue between Mr. Bowsher and Mr. Graeme Sampson, who appeared on behalf of B&L at the hearing of the summary judgment application before me, as to the jurisdiction of Mr. Orme in relation to the dispute the subject of the referral notice given on behalf of B&L, was very short. It was whether, upon proper construction of the letter dated 12 June 2001, the contract brought into existence by the acceptance by B&L of the offer contained in the letter by acting upon it incorporated the JCT Form or not.

21. Mr. Bowsher submitted that the agreement in the terms of the letter dated 12 June 2001 was in the nature of a preliminary agreement of a simple nature which looked forward to, and in that sense anticipated, an agreement in the JCT Form, but which did not itself incorporate that form. He drew attention to a number of points. The first was that the letter declared an intention to enter into a contract in the JCT Form, rather than purported to be that contract. He contended that the effect of the future tense in the expression *"The Contract will be executed"* was to make plain that what was contemplated was a separate future event, the execution of the contract in the JCT Form. That that was so was emphasised, according to Mr. Bowsher, by the later reference in the letter, *"The Contract Documents will be drawn up shortly"*. He submitted that the possibility that the project might not proceed specifically envisaged by the letter could not be a live one if the effect of the letter was to incorporate the JCT Form, for if that form were incorporated the consequences would be that B&L was bound and entitled to carry out the works to which the JCT Form was supposed to relate and Mr. Boston was bound and entitled to let B&L carry out those works and to pay for them. He further submitted that it was plain from considering the letter that at least one matter of importance to Mr. Boston, a bonus scheme, remained to be agreed, and that when one considered the JCT Form in the as printed version there were blanks to be completed and options to be exercised without which there could not be a valid, workable agreement.

22. Mr. Sampson's submission was simplicity itself: the Bill clearly contemplated that a JCT Form of contract would be entered into, B&L's tender was made on that basis, and the letter dated 12 June 2001 specifically referred to the JCT Form, all of which was sufficient to incorporate the JCT Form into the contract in the terms of the letter.

23. I unhesitatingly prefer the submissions of Mr. Bowsher to those of Mr. Sampson as to the proper construction of the letter dated 12 June 2001. It is plain, in my judgment, that the letter was, as Mr. Bowsher submitted, looking forward to the making of another contract, which it was anticipated would be in the JCT Form, and not itself seeking to incorporate that form.

24. It follows that, as it seems to me, Mr. Boston did not make any agreement with B&L which incorporated the provisions as to adjudication in the JCT Form, and thus that Mr. Orme had no jurisdiction to entertain the reference to him on behalf of B&L. That conclusion is sufficient to dispose of the application for summary judgment, and, indeed, of the whole action. The claim to enforce the decision of Mr. Orme fails because that decision was made without jurisdiction.

The alleged waiver

25. Had I come to the conclusion that Mr. Orme had had jurisdiction to entertain the reference to him on behalf of B&L, I should have rejected the submission of Mr. Bowsher that Mr. Orme's decision should not be enforced because to do so would have been a breach of an alleged agreement made on or about 8 August 2002 that B&L would accept a sum of £50,000 and not seek any further payment. That matter was raised as a defence to the substantive claim before Mr. Orme and he rejected it. Had he had jurisdiction to entertain the dispute referred to him, he would obviously have had jurisdiction to entertain alleged defences to the claim made on behalf of B&L. He did consider this alleged defence. On what are now well-established principles, his conclusion concerning that defence, had he had jurisdiction over the matter referred, would have been unassailable, even if wrong in fact or in law.

26. I am far from persuaded that Mr. Orme's conclusion concerning the alleged waiver was wrong, or arguably so. There seems always to have been uncertainty as to whether Mr. Boston's case as to the alleged agreement was that the relevant agreement was made orally, as the words in the post scriptum to the letter of 8 August 2002 *"We have today agreed"*, would seem to suggest, or came into

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existence as a result of the alleged acceptance by conduct by cashing the cheque for £50,000 of an offer which the post scriptum itself contained. That there may not actually have been any oral agreement antecedent to the post scriptum was indicated by Mr. Boston's expressed desire for confirmation as to the terms on which the cheque was handed over. As against this, there is, of course, the brief account given by Mr. Boston in his witness statement. Then again, there is also the robust denial of any agreement in Mr. Pearson's facsimile transmission of 19 August 2002. I do not actually have to reach any conclusions as to the agreement alleged, and I do not do so.

Unfair Terms in Consumer Contracts Regulations 1999

27. In the light of the conclusions already expressed it is not necessary for me to consider Mr. Bowsher's submissions based on *Unfair Terms in Consumer Contracts Regulations 1999* (*"the 1999 Regulations"*). However, the application of the 1999 Regulations in the context of adjudication is a matter which has attracted the attention of the court in a number of recent cases and it may be helpful if I add a contribution of my own.

28. By Regulation 4(1) of the 1999 Regulations the 1999 Regulations apply *"in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer"*. Building contractors are not, as a matter of the ordinary use of language, usually described as *"sellers"* or *"suppliers"*, nor are those who employ them ordinarily described as *"consumers"*. While various of the expressions used in Regulation 4(1) are the subject of definition for the purpose of the Regulations, to which definitions I refer in the next paragraph of this judgment, the use of the terms *"seller or supplier"* and *"consumer"* in the 1999 Regulations at least suggest that the intended primary area of operation of the 1999 Regulations is not the construction context.

29. The definitions set out in Regulation 3(1) of the 1999 Regulations include:-

" *"consumer" means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession; …*
"seller or supplier" means any natural or legal person who, in contracts covered by these Regulations, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned;
"unfair terms" means the contractual terms referred to in regulation 5."

30. The heart of the 1999 Regulations for present purposes is Regulation 5. The material part of Regulation 5 is:-

"*(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*
(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.
(3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.
(4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.
(5) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair."

The only terms in Schedule 2 which I need specifically note are those set out in paragraph 1(b) and (q), terms which have the object or effect of:-

"*(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him; …*

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract."

31. The assessment of the fairness of a term is elaborated upon in Regulation 6(1):-
"*Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all other terms of the contract or of another contract on which it is dependent.*"

32. Where a term in a contract concluded with a *"consumer"* by a *"seller or supplier"* is unfair, the effect of Regulation 8(1) is that it is not binding on the *"consumer"*, although, by Regulation 8(2) the contract in which such term is contained continues to bind the parties if it is capable of continuing in existence without the unfair term.

33. The 1999 Regulations and their predecessor regulations have been considered in a number of cases. Those to which I need refer are ***Director General of Fair Trading v. First National Bank plc*** [2002] 1 AC 481, ***Picardi v. Cuniberti*** [2003] 1 BLR 487, ***Lovell Projects Ltd. v. Legg and Carver*** [2003] 1 BLR 452, and ***Westminster Building Co. Ltd. v. Beckingham*** [2004] 1 BLR 265.

34. The issue in ***Director General of Fair Trading v. First National Bank plc*** concerned a term in the standard form of loan agreement of a bank that interest at the contractual rate for which the agreement provided should continue to accrue after as well as before any judgment. Such a provision deprived a defaulting borrower of the benefit of *County Courts (Interest on Judgment Debts) Order 1991 arts. 2(3)(a) and 3*. On that account the Director General of Fair Trading considered that it contravened Regulation 4 of *Unfair Terms in Consumer Contracts Regulations 1994* (*"the 1994 Regulations"*), the predecessor of the 1999 Regulations. Regulation 4 of the 1994 Regulations covered the ground dealt with in the 1999 Regulations in part by Regulation 5 and in part by Regulation 6. The origin of each set of regulations was *Council Directive 93/13/EEC*, which was referred to in the speeches in *Director General of Fair Trading v. First National Bank plc* as, and is called in this judgment, *"the Directive"*. On the question of the test of unfairness, Lord Bingham of Cornhill, who gave the leading speech, said this:-

"*17. The test laid down by regulation 4(1), deriving as it does from article 3(1) of the Directive, has understandably attracted much discussion in academic and professional circles and helpful submissions were made to the House on it. It is plain from the recitals to the Directive that one of its objectives was partially to harmonise the law in this important field among all member states of the European Union. The member states have no common concept of fairness or good faith, and the Directive does not purport to state the law of any single member state. It lays down a test to be applied, whatever their pre-existing law, by all member states. If the meaning of the test were doubtful, or vulnerable to the possibility of differing interpretations in differing member states, it might be desirable or necessary to seek a ruling from the European Court of Justice on its interpretation. But the language used in expressing the test, so far as applicable in this case, is in my opinion clear and not reasonably capable of differing interpretations. A term falling within the scope of the Regulations is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith. The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. The illustrative terms set out in Schedule 3 to the Regulations provide very good examples of terms which may be regarded as unfair; whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties' rights and obligations under the contract. This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer; a significant imbalance to the detriment of the supplier, assumed to be the stronger party, is not a mischief which the Regulations seek to address. The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the Regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good*

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standards of commercial morality and practice. Regulation 4(1) lays down a composite test, covering both the making and the substance of the contract, and must be applied bearing clearly in mind the objective which the Regulations are designed to promote."

At paragraph 24 of his speech Lord Bingham made the point that:-
"*Regulation 4 is directed to the unfairness of a contract term, not the use which a supplier may make of a term which is in itself fair.*"

35. As a footnote to the decision in ***Director General of Fair Trading v. First National Bank plc,*** Mr. Bowsher drew to my attention a recent, as yet unreported, decision of the European Court of Justice, ***Freiburger Kommunalbauten GmbH Baugesellschaft v. Hofstetter.*** In that case the Supreme Court of the Republic of Germany referred to the Court the question of the proper interpretation of *article 3(1)* of the Directive. Mr. Bowsher relied on the facts of the case as illustrative of the approach which he urged should be adopted in the present case. The basic facts were that under a contract for the construction and provision of a parking space the whole of the purchase price was payable upon delivery of a bank guarantee by the vendor as to the due performance by the vendor of its obligations under the contract, and interest was payable if payment was made late. The purchasers only paid the price after satisfactory completion of the parking space. The vendor thereupon claimed interest for late payment. The purchasers contended that the terms of the contract providing for payment of interest even if payment of the purchase price was delayed on account of defects contravened the German law by which the Directive was implemented in Germany. The Bundesgerichtshof inclined to the view that the terms of the contract did not contravene the relevant law, but referred the question to the European Court of Justice. In a ruling handed down on 1 April 2004 the European Court said:-

"*21. As to the question whether a particular term in a contract is, or is not, unfair, Article 4 of the Directive provides that the answer should be reached taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract. It should be pointed out in that respect that the consequences of the term under the law applicable to the contract must also be taken into account. This requires that consideration be given to the national law.*

22. It follows, as the Advocate General has observed at point 25 of his Opinion, that in the context of its jurisdiction under Article 234 EC to interpret Community law, the Court may interpret general criteria used by the Community legislature in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question. …

25. The answer to the question referred for a preliminary ruling is therefore that it is for the national court to decide whether a contractual term such as that at issue in the main proceedings satisfies the requirements for it to be regarded as unfair under Article 3(1) of the Directive."

The upshot is, therefore, that it is for the English court to consider the issue of fairness or unfairness according to the language used in the Regulations and the guidelines provided by the House of Lords.

36. In ***Picardi v. Cuniberti*** H.H. Judge John Toulmin C.M.G., Q.C. had to consider upon what terms the claimant architect had been engaged by the defendants, and in particular whether, as the claimant contended, he had been engaged on the RIBA Conditions of Engagement. Judge Toulmin found that the claimant had not been engaged on those terms. Had he found that the claimant had been engaged on the RIBA Conditions of Engagement issues would have arisen as to whether the provisions in those terms for adjudication and against the withholding of payment of fees were unfair for the purposes of the 1999 Regulations. Because the point as to unfairness had been argued Judge Toulmin dealt with it in his judgment, but, understandably, somewhat briefly. He set out the legal background to the issue, referring to the decision of the House of Lords in ***Director General of Fair Trading v. First National Bank plc,*** at paragraphs 100 to 111 inclusive. He returned to the question at paragraphs 128 to 134 in the conclusions section at the very end of the judgment. The core of his consideration of the matter is at paragraphs 129 to 132:-

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"*129. Using Lord Bingham's test in* **Director General of Fair Trading v. First National Bank***, is the term* [as to adjudication] *weighted in favour of the supplier so as to tilt the parties' rights and obligations under the contract? I also bear in mind Lord Millett's practical approach, which looks at the question of whether, had the clause been drawn to the attention of the Cunibertis, they would have accepted it. This is a useful cross-check, in that, if a party would obviously not have accepted it, this would be significant evidence that would tend to support the conclusion that it was a clause which was weighted in favour of the supplier so as to tilt the party's rights and obligations under the contract.*

130. It is worth noting that, although there is a duty on the adjudicator to act impartially, the adjudication clause stipulates that, where no adjudicator is named in the agreement and the parties are unable to agree on a person to act as an adjudicator, the adjudicator shall be nominated, in this case by the architect's own professional body.

131. I conclude that a procedure which the consumer is required to follow, and which will cause irrecoverable expenditure in either prosecuting or defending it, is something which may hinder the consumer's right to take legal action. The fact that the consumer was deliberately excluded by Parliament from the statutory regime of the HGCRA reinforces this view. Costs in an adjudication can be very significant. Unless it is properly explained to the consumer, the fact that the adjudicator is to be neutral, even if nominated by the architect's own professional body, also may give the appearance of unfairness.

132. In addition, I accept the defendants' argument that this provision must be seen in the context of other provisions in the RIBA standard contract: clauses 5.10 and 5.11 (the inability of the client to withhold payment); clause 7.3 (limitation of architect's liability); clause 7.5 (third party agreements); clause 9.6 (costs). These clauses reinforce my opinion that where [sic – it seems that *"whether"* was meant] *clauses 9.2 and 9.4 are looked in isolation, or with the other clauses taken as a whole, they are unfair and cause a significant imbalance in the parties' rights and obligations.*"

37. An important feature of the facts in ***Picardi v. Cuniberti*** was that the form of contract which contained the provisions which Judge Toulmin considered to be unfair was put forward by the architect claimant, who was seeking to rely on them if he had established the contract for which he contended. That was not the case in ***Lovell Projects Ltd. v. Legg and Carver***. In that case, as in the present case, the form of contract to be entered into between the parties had been selected by the advisers of the employer under a building contract. The relevant form in *Lovell* was the JCT Agreement for Minor Building Works, 1998 Edition, incorporating amendments MW 1 –11. In that case a contract was actually concluded on the form chosen. After disputes had arisen between the employers and the contractor the contractor referred to adjudication in accordance with the relevant provisions of the contract a number of matters, including a question as to what sum was due to it. The adjudicator determined that a sum of £85,873.59 was due. The employers did not pay that sum and enforcement proceedings were commenced. Those proceedings came before H.H. Judge Moseley Q.C. The principal defence raised to enforcement of the decision of the adjudicator was that the employers were not bound by the adjudication provisions in their contract. Judge Moseley rejected that defence. He found that the employers were bound by the adjudication provisions in the contract. He distinguished the decision of Judge Toulmin in ***Picardi v. Cuniberti*** on the facts, specifically, as set out in paragraph 30 of his judgment these circumstances:- "*The client did not have the benefit of any advice concerning the adjudication terms in these provisions: his dispute was with the architect who should have provided that advice. The judge found as a fact that the architect had not, as he said he had, offered to go through the RIBA terms with the clients (paragraph 61). None of the relevant terms had been drawn to the client's attention let alone specifically negotiated (paragraph 40).*"

Judge Moseley also distinguished on its facts another decision to which he was referred, that of H.H. Judge Richard Havery Q.C. in an unreported case, ***Zealander v. Laing Homes***. That decision, apparently concerning the enforceability against a purchaser of a dwelling of an arbitration clause in an NHBC agreement, was not cited to me. Judge Moseley's consideration of the issue of alleged unfairness in *Lovell* was at paragraphs 28 and 29 of his judgment:-

"*28. In his very helpful argument on behalf of the employers Mr. Stansfield listed the factors which he argued made the adjudication provisions in the contract unfair. For the present I list them without comment. They were:*

(1) The adjudication terms do not provide for a final determination of the dispute: supplemental condition D 7.1.

(2) In a case such as the present the sum awarded by the adjudication is payable to the contractor who can hold it pending final determination of the dispute even if in due course it is decided or agreed that the sum was not due; in such a case the contractor gains a cash flow advantage over the employer.

(3) They transfer the risk of the contractor's insolvency to the employer.

(4) The costs of adjudication are not recoverable even if the employer is ultimately proved right: supplemental condition D 5.7.

(5) The costs of adjudication are considerable.

(6) The timescales under the adjudication provisions are very short and an employer is less likely to have the resources to deal with that timetable than the contractor.

(7) The adjudication provisions in the Minor Works contract do not exclude residential occupiers from their ambit as does the Act.

29. The propositions as propositions of fact are undoubtedly correct, but in my judgment they do not suffice to make the adjudication terms unfair under Regulation 5.1. To be unfair the terms must cause a significant imbalance in the parties rights and obligations under the contract to the detriment of the consumer. Any imbalance will not do: it must be a significant imbalance. Moreover that significant imbalance must be caused by the adjudication provisions contrary to the requirement of good faith. In my view neither requirement is satisfied in the present case. The adjudication terms apply equally both to the contractor and employers: both are bound by the terms. It is undoubtedly true that the dispute between the contractor and employers in the present case has resulted in an adjudication in favour of the contractor whereby a sum of money is payable forthwith by the employers to the contractor. However, that is only because that dispute or difference concerns the non payment of sums payable under interim certificates. If the dispute or difference had concerned the payment of liquidated damages for delay payments may well have been ordered in the reverse direction. There is no limit on the kind of difference or dispute which can be the subject matter of adjudication under the contract and in my judgment no imbalance arises in the parties rights and obligations under the contract let alone a significant imbalance. Equally important however are the requirements of good faith. There has been no breach of the requirement of openness: the adjudication terms are fully clearly and legibly set out in the contract and contain no concealed pitfalls or traps. As for the requirement of fair dealing the contractor did not either deliberately or unconsciously take advantage of the consumers necessity indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in schedule 2 to the regulations. On the contrary, the minor works form of contract was insisted upon by the architect on behalf of the employers; they were knowledgeable business people who had engaged successively an architect and a contract administrator and who apparently also had solicitors whom they had an opportunity to consult and whom they may have indeed consulted: see the emails referred to above. In my judgment there was no departure from "good standards of commercial morality and practice". "

38. Had Mr. Boston entered into a contract with B&L on the JCT Form, the facts and circumstances of the present case would have been, as it seems to me, indistinguishable from those of *Lovell*. In making that comment I remind myself that in this area of the law each case depends upon its own facts. Nonetheless, it is likely that in many cases in which an individual or a number of individuals enter into a contract under which building work is to be performed for him or them in a private, that is to say, non-business, capacity the facts and circumstances will be very similar. Unless the work is of small extent and value the individual or individuals will have professional advisers, such as an architect or a quantity surveyor or a contract administrator. Either in reliance upon his or their own judgment, or on advice from professional advisers, terms upon which it is considered appropriate to engage a contractor will be devised or selected and upon those terms tenders will be sought.

39. The significance of the involvement of professional advisers on the side of the "*consumer*" was a matter considered by H.H. Judge Anthony Thornton Q.C. in ***Westminster Building Co. Ltd. v.***

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Beckingham. In that case, on the judge's findings, an individual entered into a contract with a contractor in the JCT Intermediate Form of Contract after a document in that form had been prepared by surveyors acting on his behalf. Subsequently the individual did not pay sums certified as due to the contractor and the contractor referred to adjudication the issue what sums were due to it. The adjudicator found a sum to be due to the contractor. The individual did not comply with the decision of the adjudicator and enforcement proceedings were commenced. In the course of those proceedings the individual sought to resist enforcement on a number of grounds, one of which was that the adjudication provisions in the contract were not binding upon him. Judge Thornton dealt with that part of the case relatively shortly. The material part of his judgment was:-

"*31. I was referred to a number of authorities of which the most helpful* ***were*** **Director General of Fair Trading v. First National Bank plc** *[2002] 1 AC 481, HL, particularly the speech of Lord Bingham at page 494, and* Lovell Projects Ltd. v. Legg and Carver *[2003] BLR 452, Judge Moseley Q.C., particularly at paragraphs 24 – 31. From these authorities, I derive the following guidance as applicable to the facts of this case:*

1. The terms in this case were not individually negotiated but were couched in plain and intelligible language.

2. The terms of the contract were decided upon by Mr. Beckingham's agents, who are chartered surveyors, and Mr. Beckingham had, or had available to him, competent and objective advice as to the existence and effect of the adjudication clause before he proffered and entered into the contract. Westminster did no more than accept the contract terms offered and had no reasonable need to draw to Mr. Beckingham's attention the potential pitfalls to be found in the adjudication clause and in its operation during the course of the work. The clause did not, therefore, contravene the requirement of good faith (see especially the speech of Lord Bingham in the Director General of Fair Trading *case at page 494).*

3. The clause did not, if considered at the time of making the contract, constitute a significant imbalance as to Mr. Beckingham's rights (see especially the judgment of Judge Moseley at paragraphs 28 – 29).

4. The clause does not significantly exclude or hinder the consumer's right to take legal action or other legal remedy or restrict the evidence available to him (see especially the judgment of Judge Moseley at paragraph 27).

32. For all these reasons, I conclude that the adjudication clause, on the facts of this case, is not unfair and is binding on Mr. Beckingham."

40. In support of his submissions that the JCT Form contained unfair provisions which I should find were not binding upon Mr. Boston, Mr. Bowsher relied heavily upon what he characterised as the exclusion of rights of set-off by clause 30.1.1.5. Mr. Bowsher was exercised by that provision in the circumstances of the present case because what, in the opinion of Mr. Orme, defeated Mr. Boston's attempt to rely upon alleged cross-claims as a defence to the claims of B&L was his failure to give a withholding notice under clause 30.1.1.4. The need to give a withholding notice is undoubtedly a limitation on the exercise of a right of set-off, for the purposes of paragraph 1(b) of Schedule 2 to the Regulations, but it is a long way short of an exclusion of that right. As long as the appropriate notice is given the right of set-off is freely exercisable.

41. In his skeleton argument Mr. Bowsher made the following submissions as to why he said that the adjudication provisions of the JCT Form were unfair in the circumstances of the present case, if otherwise they were binding upon Mr. Boston:-

"*35. The requirement of good faith under the Regulations connotes fair and open dealing which require terms to be expressed fully and clearly without hidden pitfalls and with appropriate prominence being given to matters which might operate disadvantageously to the customer. The contractual adjudication provisions are just such terms and are not expressed clearly, without hidden pitfalls and with appropriate prominence.*

i. In a long and highly technical contract, it can hardly be expected that anyone unfamiliar with construction contracts will be able to appreciate the effect of clause 41A upon parties' rights under the contract and the means open [to] *them to enforce those rights.*

ii. The relationship between adjudication and other forms of dispute resolution can hardly be said to be clear to a consumer.

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iii. The relationship between adjudication and the assertion of rights of set off under different contract clauses is far from clear.

36. Even the very best informed consumer cannot be expected to be aware of the import of clause 30.1 and clause 41A of the JCT main form of contract.

i. Any consumer, even a very well informed consumer will not have full knowledge of the operation of the terms of the main JCT contract. This is not a form designed for use by or with consumers (by contrast to other JCT forms).

ii. Even a well informed consumer if he knows anything about the operation of construction adjudication is likely to have little knowledge of its operation, or for the intricacies of the withholding notice provisions under the Act.

iii. The very best informed consumer may even be aware of the part II of the Act, but is likely then to be aware also that the relevant provisions do not apply to contracts with residential occupiers.

iv. It would require a consumer (even a lawyer) of with [sic] *some specialist knowledge to be aware that incorporation of the entirety of the JCT main form brought with it provisions as to adjudication and exclusion of set-off that would not normally apply to a residential occupier.*

37. The imposition of adjudication causes significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

i. With the greatest respect to those judges that may have suggested that the adjudication procedures do not cause imbalance in the parties' rights and obligations, those decisions should not be followed. As the assessment of each term in its context is by its nature a factual assessment, this court is not bound by any such previous decisions.

ii. Plainly the adjudication procedures can have a dramatic effect on the balance of the contract where, for instance, a contractor may be about to become insolvent.

iii. The proceedings themselves place substantial and unexpected demands upon the consumer. These are demands not only of the cost of dealing with the proceedings, of having to retain persons to assist in those proceedings, but also the need to maintain documentary records throughout a job in permanent readiness to deal with an adjudication that may be launched with little or no prior notice when it will not be possible to rely upon disclosure procedures to ensure that a common documentary basis is established. A consumer that has failed to take steps to ensure that he has all the requisite records and so forth may be unable to defend him or herself when the adjudication is commenced.

iv. The imposition of adjudication provisions upon a consumer in a case such as this cuts across the clear statutory policy of ensuring that clauses that provide for methods of dispute resolution other than litigation must be the subject of clear written assent. It is well understood that this is the basis for the requirement that the provisions of sections 1 to 84 of the Arbitration Act 1996 apply only to arbitration agreements in writing pursuant to section 5 of the 1996 Act. The same limitation is applied to enforceable adjudication agreements. These limits are applied because such provisions do effect a significant imbalance in the parties' relationship by altering their modes of dispute resolution. It would be a strange and counter-intuitive effect if consumers could have their rights altered simply by inference from conduct without any written assent to the new procedure and its terms. The evidence in this case is that insofar as the consumer, Mr. Boston had any view about his preferred means of dispute resolution, he wished the matter to be resolved in court.

v. It is not an answer to state that where the consumer has access to professional advice, the Regulations ought not to be applied. The consumer does not cease to be a consumer because he or she is receiving professional advice. The involvement of such professionals does not absolve the commercial party of its responsibilities. The professionals may provide poor advice, or may be incapable of providing the necessary advice. The poor or non-existent advice may not lead to any immediately demonstrable loss, but the consumer may still have been prejudiced. The advice may very well have been poor, but not negligent. Even if it [is] *negligent, there may be a number of reasons why it is not possible to show that the poor advice was negligent and therefore the consumer would have no recourse in respect of the inappropriate terms on which it was led to contract. These regulations achieve the highly desirable goal of protecting the*

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consumer and avoiding the need for the consumer to pursue yet further claims against professionals for failure to protect them. The onus is clearly placed upon the seller or supplier that is familiar with the terms to take proper steps when dealing with a consumer to ensure that the normal balance of the deal is not imbalanced."

42. I think that the points made by Mr. Bowsher in the passage from his submissions which I have quoted in the preceding paragraph may be summarised as, first, a consumer cannot be expected to have a detailed knowledge of a lengthy and technical form of contract such as the JCT Form; second, in practice adjudication is disadvantageous to employers under building contracts; and, third, it is the duty of the other contracting party to protect the *"consumer"* from the risk of being inadequately advised by his professional advisers. In support of his submission that the process of adjudication is disadvantageous to employers under building contracts Mr. Bowsher drew to my attention a comment of May LJ in ***Pegram Shopfitters Ltd. v. Tally Weijl (UK) Ltd***. [2004] 1 BLR 65 at page 67 that:- "*Those who consider and make policy for the building industry, including the government, have taken a general view over the years that a temporary balance should in appropriate circumstances fall in favour of those who claim payment, at the temporary expense if necessary of those who pay.*"

    I think that Mr. Bowsher was seeking to suggest that that observation showed that it was a matter of public notoriety that all, or most, claims referred to adjudication were claims by contractors for payment, and that the outcome in all or most of such cases was that the employer was found liable to pay to the contractor on a temporary basis a sum as to which there was a dispute. With great respect to Mr. Bowsher it seems to me that that was reading far too much into what was plainly an introductory comment and disregarded the no doubt carefully chosen words *"in appropriate circumstances"*.

43. While emphasising that each case must depend upon its own facts and circumstances, it seems to me that a number of general comments may be made about the application of the 1999 Regulations to construction contracts. The first is that under Regulation 5 a term of a contract not individually negotiated is only to be regarded as unfair if it causes a significant imbalance in the parties' rights *"contrary to the requirement of good faith"*. As Lord Bingham made plain in paragraph 17 of his speech in ***Director General of Fair Trading v. First National Bank plc***, the requirement of good faith in this context is one of open and fair dealing. It is plain, in my judgment, that the party whose dealing is in question in considering the requirement of good faith is the *"seller or supplier"*. It is only his actions which Lord Bingham considered in stating that:- "*Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the Regulations.*"

    While it may be going too far to say that a building contractor who merely, without more, accepts a proposal from a *"consumer"* as to the terms of the contract to be made between them could never contravene the requirement of good faith, it is difficult to envisage circumstances in which the criticism could properly be made that the contractor had acted contrary to the requirement of good faith in such a case. Further, as by Regulation 5(2) a term of a contract is to be taken not to have been individually negotiated *"where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term"*, it seems to me that it is at least arguable that where the *"consumer"* has been able to influence the substance of the relevant term because he chose to use the standard form of contract in which it is contained, the term does not fall to be regarded as not having been individually negotiated. If that were the correct construction of the 1999 Regulations, it would follow that there can never be any question of the applicability of the regulations to a case in which the *"consumer"* has chosen the contract terms.

44. It is not normally, in English law, the function of a party negotiating a contract to protect the other party to the negotiation from the consequences of his own folly, or from the negligence of third parties, such as the professional advisers to the other party. Thus it would seem to be an unusual case, if such a case could be found at all, in which it would not be a complete answer to any suggestion that a building contractor had acted in bad faith in letting a *"consumer"* choose to use a particular standard

form of building contract, that the *"consumer"* made his own decision, with or without the advice of a third party.

45. It is likely to be material to any consideration of the applicability of the Regulations in any particular case of a building contract that the transaction is not of a normal *"consumer"* type, like buying a television set, but, for the individual or individuals concerned, a major project which, unless he or they are experienced in construction matters, will only be undertaken with the benefit of what was thought, at least, to be appropriate professional advice.

46. The concept that adjudication as a process causes a significant imbalance in the parties' rights and obligations is a difficult one. Adjudication is but a means of dispute resolution. It has been ordained and approved by Parliament in *Part II* of *Housing Grants, Construction and Regeneration Act 1996*. The provision made by Parliament includes, in *s. 108(2)(e)*, that the adjudicator should act impartially. It seems a bold thing to envisage that a procedure created and approved by Parliament for the resolution of disputes, albeit on an interim basis, by someone bound to act impartially and subject, at the enforcement stage, to a degree of supervision by the court, could properly be stigmatised as unfair or producing a significant imbalance in the rights of those potentially involved in the procedure.

47. The fact that there have been a number of cases which have come before this court in which the burden and cost of adjudication in particular circumstances have been so enormous as to border on the scandalous is immaterial to the question whether adjudication as a process for resolution of disputes incorporated into a contract creates as between the parties to that contract a significant imbalance in rights. As Lord Bingham pointed out at paragraph 24 of his speech in ***Director General of Fair Trading v. First National Bank plc*,** the use made of a contractual term is not the target of the 1999 Regulations. That target is the term itself considered in the context of all of the ways in which it might be employed. Regulation 6(1) makes plain that the assessment whether a term is unfair falls to be made prospectively at the time the relevant contract is made, not retrospectively once advantage has been sought to be taken of the term. In the case of the JCT Form, adjudication is not a compulsory method of dispute resolution. It is merely one option. As Judge Moseley pointed out, it may, in particular circumstances, be an attractive option for a *"consumer"*. For example, if there were to be a dispute about the quality of work, or the time taken to do it, adjudication might provide a quick and relatively cheap means for a *"consumer"* to obtain redress.

48. The fact that Parliament, in *Housing Grants, Construction and Regeneration Act 1996 s. 106(1)* did not see fit to include within the ambit of *Part II "a residential occupier"* would not seem to be material at all to the question whether, if a *"consumer"* agrees by his contract to adjudication, the term by which he does so is unfair. In ***Director General of Fair Trading v. First National Bank plc*** what was found not to be unfair was a term which in effect deprived a *"consumer"* of a statutory benefit without alerting him to the existence of such potential benefit.

49. It is difficult to see that a provision in a contract by which a *"consumer"* is bound to give a withholding notice by a given date if he wishes to exercise a right of set-off, at least if the specified date is fixed along the lines of that required by clause 30.1.1.4 of the JCT Form, creates a significant imbalance in the rights of the parties. As long as the *"consumer"* is aware of the requirement, and alert to the possible need to comply with it, it does not affect his rights at all. If the requirement is contained in a form of agreement which he has himself put forward, any ignorance on his part of the term is not likely to be as a result of the opposite party failing to act in good faith.

Conclusion

50. I find that the decision of Mr. Orme contained in Adjudicator's Decision No. 2 is not enforceable as against Mr. Boston because Mr. Orme had no jurisdiction in relation to the matters purportedly referred to him which were the subject of the decision. The application for summary judgment therefore fails. It would seem to follow that the action also fails and should be dismissed, but I will hear Counsel as to the appropriate orders to make.

Graeme Sampson (instructed by Martin Amey & Co. for the Claimant)

Michael Bowsher (instructed by C. J. Hough & Co. for the Defendant)