JUDGMENT : HIS HONOUR JUDGE DAVID WILCOX : TCC 18th December 2003

1. Waterman Partnership Limited (Waterman) are Structural and Civil Engineers. London and Amsterdam Properties Limited (LAP) had a construction project to develop Mid-Summer Place Shopping Centre in Milton Keynes. Waterman by a Deed of Professional Appointment of the 2nd November 1998 agreed to act as LAP's Structural and Civil Engineers and Traffic Consultants in relation to the project.

2. LAP contends that it suffered financial losses as a result of Waterman's failure to perform its contractual obligations under the Deed by failing to release substantial elements of steelwork design information by set dates therefore causing critical delays to the steelwork package contractor William Hare Limited (William Hare) and in turn causing critical delays to William Hare and the project as a whole.

3. LAP contended that Waterman were professionally negligent, in the performance of their duties.

4. As a result of such breaches and negligence LAP claim that it had to pay William Hare £1,324,969.

5. Waterman throughout denied liability.

6. The Deed of Professional Appointment is compliant with the Housing Grants Construction And Regeneration Act 1996. Clause 16 of the Deed provides that any dispute or difference arising under or in relation to the Deed is to be referred to adjudication in accordance with the scheme for Construction Contracts S.I. 1998 subject to some bespoke amendments I refer to later.

7. LAP served a notice of intention to seek adjudication on the 12th February LAP's referral notice is dated 19th February of 2003.

8. On the 6th May the Adjudicator Mr Juniper gave his decision.

   "10.1 Waterman shall pay LAP forthwith the sum of £659,346 together with interest of £49,450.95 totalling £708,796.95.

   10.2 Waterman shall be responsible for the payment of the Adjudicator's fees in the sum of £7,882.72 including VAT.

   10.3 If payment of the Adjudicator's fees is made by LAP, then Waterman shall reimburse them forthwith. Except for the amount of Value Added Tax recoverable by LAP from HM Customs & Excise".

9. On the 5th June 2003 Waterman made an application under CPR Part 8 for a declaration that the purported adjudication decision of Mr R Juniper is not binding upon Waterman, on the ground that he did not have jurisdiction or exceeded jurisdiction.

10. On 11th June LAP applied under CPR Part 24 for summary judgment in the amount of the adjudication award and the fee.

The Relevant History

11. During 1998-1999 the relevant contractual services were provided by Waterman.

12. On 10th August 2000 LAP wrote to Waterman putting them on notice that there might be a claim.

    "You will be aware that we have been far from satisfied with your company's performance on this project.

    In November 1998, you committed to certain information, release dates for structural engineering design information. It was in reliance on this commitment and the agreed release dates that the works package contractors were procured. However, your firm failed to meet these dates and indeed failed to meet further revised commitment dates, causing critical delay to the works package contractors and the project's programme as a whole.

    As a direct result of your firm's failings to provide adequate information on time, we have incurred extra costs associated with delay and disruption and was forced to enter acceleration agreements with a number of package contractors to significantly reduce the delay. As you are aware, this is necessary to avoid the dire financial implications of not completing on time Christmas trading.

    The purpose of this letter is to put you on formal notice that <u>we are currently carrying out a detailed review of the impact of your poor performance on the delays to the project and the consequential losses we have suffered.</u>

    If you have not already done so, you should put your professional indemnity insurers on notice and advise them of the circumstances of a claim. We should be grateful if you will confirm their details to us.

    We shall write to you once we have completed our review".

13. On the 4th September 2000 Waterman replied:- *"Waterman Partnership gave firm commitments to meet the programme on the condition that frozen information was provided prior to those dates. This fundamental condition was not met and the timely supply of clear instructions and lead design information has been historically poor throughout this project and adversely affected anything that followed.*
We were of course all concerned about the team's ability to "close down" design development issues at the end of 1998 and into 1999, but assumed that the fluidity of the scheme development and our continued pro-active support was well understood by your Project Managers and therefore also you and your colleagues".

14. On the 15th September 2000 there was a reply by LAP which did not take matters further save that Waterman's assertions were denied.

15. On the 4th April 2002 LAP wrote to Waterman seeking their help in relation to an adjudication referral by Byrne Brothers who were sub-contractors on the project. The dispute related to the valuation of the form work element of isolated beam encasement works carried out by Byrne Brothers who were arguing that the encasement works were not of a similar character to the work they priced for in the bills of quantities. The letter made reference to the referral document and to appendices submitted by Byrne Brothers, the appendices it is said contained a large amount of engineering detail, and was supported by a comparison between the tender drawings and construction drawings relating to the relevant work. Waterman's assistance was sought in relation to appendices A and B. Comments were required by the 9th April 2002. It was arranged that the drawings upon which Byrne Brothers sought to rely would be furnished to Waterman.

16. The full documentation in fact was not enclosed.

17. In May of 2002 Mr Juniper adjudicated the Byrne Brothers dispute.

16. On the 11th June 2002 Berwin Leighton Paisner on behalf of LAP wrote to Watermans:
We have now completed a detailed review of your performance on the Project.

Our review has concluded that your practice failed to perform its services on the project in accordance with the agreement for services and in particular with the express commitments made in regard to the provision of design information.

In breach of its obligations, Waterman failed to meet these commitments, issuing substantial elements of its design information late. Drawings were either issued late or were issued with substantial amounts of information missing. Our investigations conclude that such delays resulted from factors within Waterman's immediate control.

It is apparent that the underlying cause for Waterman's poor performance was a simple failure to apply sufficient resources to the design of the critical steelwork zones (particularly the Retail Area) of the preparation of the relevant drawings in time to enable the agreed dates for the release of information to be met.

These slippages caused critical delay to the steelwork package particularly the Retails Area of the project) which in turn directly delayed the substructure (ground floor slab) and superstructure works carried out by Byrne Brothers Limited (Byrne) and other following trades.

In order to maintain the opening date for the Project and avoid incurring substantial penalty costs to L&A's anchor tenant, Debenhams, and missing the Christmas shopping "window" of December 2000, and to mitigate the unfolding delay costs, our client was forced to enter a series of acceleration agreements with the works contractors in order to maintain the programme. Notwithstanding these measures, and the improvements they achieved, the continuing delays in Waterman's structural information caused delays to the steelwork, superstructure and substructure works, resulting in substantial delay claims from William Hare and other following trade contracts.

L&A have made payments to contractors in excess of £6.4 million as a result of such delays caused to the Project. The Byrne Bros account is yet to be finalised and our investigations with regard to ascertaining the losses caused to that contractor as a result of Waterman's defaults is ongoing. We put you on notice that Byrne Bros have tabled a loss and expense claim in excess of £3.5 million which is currently under review. You are also aware that Byrne bros have adjudicated a valuation dispute on the measured account, which you have been appraised

of. Our current analysis (excluding any liability resulting from Byrne Bros' loss and expense claim) is that Waterman's failings caused losses of at least £2.5 million to our client on the project as a whole.

We are not currently in a position to set out in full L&A's claim against your practice due to the ongoing analysis of the Byrne Bros loss/expense claims. However, we are now in a position to set out our client's claim with regard to the loss incurred on the steelwork package, which we set out in our second letter of today.

Our client is open to proposals from your practice and/or your insurers to settle Waterman's liabilities without incurring the heavy time and costs involved in formal proceedings and is prepared to meet to discuss your proposals. However, we put you on notice that in the event that a settlement cannot be reached, we believe the most cost effective means of resolving our client's claim is to seek resolution by way of adjudication proceedings.

19. The claim at this date was being presented in the broadest of terms without the particularity that would enable Waterman to engage and accept or reject the whole or parts of the allegations and thereby formulate a sensible legal or commercial response.

20. There was a second letter sent by LAP to Waterman in relation to the steelwork contract let to William Hare containing the following:
In October 1998, the Management Contractor for the Project, Bovis Construction Limited (now Bovis Land Lease Limited) ("Bovis"), identified critical dates for the release of construction information for the substructure and superstructure elements of the Project……

the prospective structural steel contractor, William Hare, confirmed that it was able to comply with Bovis's construction programme MK01A dated 4 September 1998 on the condition that the structural design construction information for the steelwork package was released in accordance with key information dates.

……Waterman unconditionally confirmed that it would issue its construction drawings to an agreed timetable……

Waterman should have been in a position to appreciate the status of the design teams' information and to predict with some degree of certainty the resources required for the outstanding work. Critically, Waterman offered no warnings to L&A that the information release dates were not going to be met when it must have been reasonably apparent at the time that the information that was available fell far short of William Hare's requirements.

In such circumstances, Waterman should have appreciated that they would be required to perform more effectively in order to reduce the effect of earlier slippages and in that meeting the issue dates was imperative if the reduced lead times in the revised programme were to be accommodated: the period from receipt of 100% of design information to start of erection was just 6 weeks for Zones 1 and 2 and 8 weeks for Zone 3; the basis of the steelwork price had generally been premised on a 13 week lead time.

These dates were accepted by William Hare and consequently a formal order was placed.

In breach of its undertakings, Waterman failed to meet its commitments to issue substantial elements of design information. By early January 1999, the project manager, Cygnus Project Management Limited ("Cygnus") was of the view that delays in release of steelwork information would result in 3 to 4 weeks delay to the steelwork installation programme.

……there were delays of the early site activities and in particular piling and drainage and their impact upon the substructure works, the critical activity to get underway was the steel, which had to be deferred in its start by some 8 weeks until 26 April 1999.

William Hare indicated it was unable to meet recovery programme MK02 and further acceleration measures were required over and above what was envisaged by the earlier recovery programme. By the end of June 1999, despite the acceleration measures, the delay to the steelwork had increased to 10 weeks against MK1A as a result of the delayed release of structural information……

……On 12 July 1999 Bovis assessed the extent of delay to the critical retail area at 12 weeks

Acceleration proposals were investigated and a cost/benefit analysis in July 1999 indicated that it would be preferable to accelerate rather than allow the inherent delays then in the project to unfold. Waterman were on notice of the matters leading up to the proposed acceleration agreement based on MK03 and the fact that the historical or committed costs were at that date (July 1999) in the order of £1,072,000 and that expected costs of

acceleration were of the order of 31,209,000. As a consequence, draft recovery programme MK03 was issued……...

Despite the adoption of this programme, delays continued throughout the rest of 1999m, driven by late structural design information. By the end of 1999, delay to MK03 was 10 weeks and it was apparent that the original planned completion date of 1 September 2000 could not be achieved.

In January 2000 another programme, MK04, was annexed to the formal acceleration agreement made at the end of that month. Negotiations with Byrne Bros were incorporated into this agreement and Bovis were required to negotiate separate acceleration agreements with other works contractors. The revised recovery programme MK04A was a completely redrawn "Target" programme which showed a target completion of 24 September 2000, 3 weeks later than the contract Date for Completion. The delays caused by late release of structural information were effectively addressed by MK04A and William Hare proceeded to complete their works on 8 Mach 2000, 15 weeks 5 days late.

Our investigations conclude that Waterman committed themselves to key information release dates at a stage in the Project when they should have been able to predict with some degree of certainty the resources required for the outstanding work. No warnings were issued that the information release dates were not going to be met when it must have been reasonably apparent at that time that the information that was available fell far short of Hare's requirements……...

£1,889,463.00 was paid to William Hare on advice from L&A's professional team upon which our client was entitled to rely. Further, the evidence of the professional team supports L&A's contention that these sums were paid as a direct consequence of Waterman's default.

Due to the level of detail involved in analysing the losses which resulted from the need to carry out on site fabrication modifications (item 7 above) due to your practice's default, our client intends to reserve its position on this claim, and deal with it by way of a separate adjudication, if necessary.

Adjudication

As mentioned in our first letter of today, our client is open to proposals from your practice and/or your insurers to settle Waterman's liabilities without incurring the heavy time and costs involved in formal proceedings. However, if a settlement cannot be reached, we believe that the most cost effective means of resolving our client's claim is for it to exercise its right to adjudicate."

21 On 21st June Berrymans acting for Waterman proposed the agreement of a timetable, so that the two extensive claims made in LAP's letters of the 11th June could be considered, and meetings between the party solicitors arranged.

22. On the 2nd July Berwins replied confirming the desirability of meetings between the parties solicitors and expressed the hope that the matters could be resolved informally.

23. On the 9th July Berrymans observed in a letter to Berwins that the letters of 11th June raised issues requiring substantial further investigation in order that their client could consider LAP's claims, and accept or reject them. They proposed providing a list of the further information required within a matter of days in order to investigate the claims and agreed to liaise as to the arrangement of meetings, and observed that following receipt of the claims and the provision of further information a reasonable opportunity for consideration of it by both the clients and experts would be necessary.

24. On the 12th July it seems that this approach was agreed by Berwins who noted that the list of further information would be provided by Berrymans by close of business on that day, and proposed a further meeting in mid August.

25. On the 12th July Berrymans sent a 12 page letter seeking particulars of the specific complaints and claims made in the two letters of the 11th June asking for documentation relating to them, such as the original programmes agreed, and subsequent variations and seeking sight of the original contracts with William Hare the sub-contractor. Where acceleration measures were put in hand, agreements relating to them were requested.

26. Paragraph 7 of the letter epitomises the detailed approach taken by Berrymans. "7. *In the first paragraph at the top of page …..of your first letter, your client alleges that, in breach of his obligations, our client failed to meet these commitments, issuing substantial elements of its design information late or with substantial amounts of information missing. Please identify precisely (a) what elements of design information were allegedly issued late (b) on what dates your client alleges that those elements were issued (c) when your client alleges they should have been issued (by reference to programmes requirements, etc.) (d) what information was missing (e) the source of our client's obligation to provide such design information/information.*

27. In relation to the second letter details of the allegations were sought relating to how and when unconditional confirmation was allegedly given as to the issue of drawings to the agreed timetable, periods of slippage relied upon vital information as to programming both original and recovery, and as to its acceleration.

28. From paragraph 45 onwards information as to quantum was sought, based upon the bare information contained in appendix 7 to the second letter. A detailed breakdown of figures earlier given was sought.

29. On the 17th July the claimants provided five volumes of information and records relating to Byrne Brothers loss and expense claim. This was without any narrative and was characterised by Waterman as *"just raw and unfiltered data"*. It related to both of the claims intimated in the two letters of 11th June.

30. On the 22nd August Berwins wrote:- *"We note that you confirm that your client has much of the documentation you originally requested in your letter of the 12th July 2002 and that the remainder of your request are in the form of detailed particulars of claim"*.

31. That assertion was controversial, no such confirmation was given. The reality was that much vital documentation was not served until the adjudication in relation to the steelwork claim delay was actually under way.

32. The letter continued *"we believe that our client's case against Waterman is more than adequately made out in our second letter of the 11th June 2002 which deals with our client's losses arising from the delays caused to the steelwork contractor. As your client would appreciate, our letter is confirmation of the claim which was set out by LAP to Waterman over two years ago in its letter dated 10th August 2002 (attached), in response to that letter, Waterman only provided the most superficial explanation of its failure to deliver information on time; blaming failure to "freeze information", a failure by others to supply Waterman with information on time and a general under resourcing of the project manager. These explanations were rejected by LAP (see LAP's letter to your client 15th September 2000 (attached)). Waterman either could not or chose not to provide any further explanation.*

    In the absence of any cogent explanation as to why your clients failed to meet its commitments to release structural steel information, in the light of the investigations our client has carried out we do not see that Waterman has any positive defence to LAP's claim.

    We therefore request that you provide us with your client's positive case as soon as possible. If you not already established this we do not imagine it would take more than a few days for you to consult with the engineers involved for their views."

33. 30th August 2002 Berrymans wrote:- *"Our client's difficulty considering the claim is that:1) many of the documents referred to by you have not been produced. 2) The advice and assessments upon which your client expressly relied to make payments to William Hare Limited have not been produced. 3) The documents supporting the quantum claim have not been produced. 4) Whilst your client is seeking to attribute the whole of the sums paid to William Hare Limited due to alleged delays caused by our client your client refuses to provide more precise particulars than the broad sweeping allegations made in your letter of the 11th June"*.

34. On 27th September Berwins replied:- *"It is disappointing that your client appears to want to hide behind a traditional request for "discovery" and detailed further and better particulars of claim rather than meet the allegation our client makes head on. Your client undoubtedly has sufficient project information to understand our client's case. Moreover, the key question we have put to you requires a review of Waterman's own papers in evidence from his own engineers rather than any papers our client may hold.*

Our clients case against Waterman has been more than adequately made out in our second letter of 11th June 2002 and Waterman had been on notice of the basis of our client's claim for a considerable period … for the avoidance of any doubt the nub of our client's case is your client failed to meet the commitments it made … to release its structural design information."

35. The letter went on to refer to explanations earlier given, such as a failure to freeze information, the failure by others to supply information on time, and the under resourcing of the project manager. They pressed for a positive case.

36. On the 3rd December 2002 Berrymans wrote to Berwins on behalf of Waterman, a detailed 44 page letter dealing with the steelwork claim. 43 pages relate to the liability aspect. The response was prefaced by:- *"In our view, Waterman cannot accept, modify or object LAP's claims until Waterman has given the opportunity to consider the information, opinions and documents that will form LAP's case. Otherwise what is a very substantial dispute will be subjected to adjudication over a short time period when Waterman will be finding out for the first time the full case that is being made against it. That is not what is intended by the adjudication process. If LAP takes this approach we will of course be making appropriate objections. Accordingly, the responses set out below are provided without prejudice to the matter set out above so that the parties can meet and agree a way forward to resolve the claims sensibly and proportionately in terms of cost."*

37. The response made it clear that Waterman did not accept the substance of LAP's claim that they were in breach of contract or professionally negligent.

38. They went on to identify the omissions in the provision of information by LAP which reasonably they could have expected to be provided with at this stage of the developing claim.

Waterman's Commitment To Release Design Information

"Waterman agrees that Bovis identified dates for the release of construction information for the subsctructure and superstructure elements of the project in October 1998. Waterman makes no admissions as to the actual criticality of the information requested and cannot accept or reject L&A's case s to criticality until L&A provides the analysis upon which it relies to claim that the information was actually critical.

L & A's claim that William Hare confirmed that it was able to comply with Bovis' construction programme MK01A dated 4th September 1998 on the condition that the structural design information was released in accordance with key information dates.

Waterman has no knowledge of this as Waterman was not part of the discussions with William Hare. Waterman has requested further information in this respect which has been refused by L&A Until that information is provided, Waterman cannot accept or reject this part of L&A's case.

Accordingly, until L&A particularise on what basis it is alleged that Waterman were responsible for the late provision of the structural information against the dates committed to by the design team on 19th November 1998, Waterman cannot accept or reject L&A's claim (although it appears on the evidence to be misconceived).

Previous delays affecting the progress of the substructure works

Waterman notes L & A's concession that there were delays in progress of the early site activities which impacted upon the substructure works.

As to recovery programme MK02, L&A claims that William Hare were unable to meet that programme. Waterman cannot comment on this.

L & A's claim that draft recovery programme MK03 was issued with Waterman being on notice that the historical or committed costs at that date (July 1999(were in the order of £1,072,000 and that the expected costs of acceleration were of the order of £1,209.000.

The costs of acceleration were quantified by Bovis, in conjunction with Deacon and Jones and then notified to the design team. Waterman were not party to the evaluation process and cannot accept or reject the accuracy of the figures referred to in terms of what they are claimed to represent.

L & A's allegation that, despite the MK03 measures, delays continued throughout the rest of 1999, were driven by late structural information.

L&A has been requested to identify what delays are being referred to and precisely which structural information it is alleged was late, and when it ought to have been provided. L&A has refused to provide this information. Until it does so, Waterman cannot accept, reject or modify this part of L&A's case. Nevertheless, Waterman notes that the causes of delay which affected the project up to this point (examples of which are evidence above) continued throughout 1999.

L & A's conclusion that "Waterman simply failed to apply sufficient resources to either the design of the steelwork or the preparation of the relevant drawings in time to enable the agreed dates for the release of this information to be met".

In our letter to you dated 15th July 2002, we requested details of L&A's case as to what resources L&A alleges would have been "sufficient resources". L&A has refused to provide those particulars. Until it does so, Waterman cannot accept or reject this part of L&A's case.

39. They indicated a claim to an entitlement to further fees of £310,000.

40. In the light of Waterman's refutation of LAP's liability claim, liability issues were clearly the subject of dispute despite the reservations above. However, how this sounds in damages in relation to amount and causation is quite another matter as Waterman made clear in their letter:-
"Alleged financial losses

In relation to the detail of claims from William Hare, Waterman have only ever received a copy of a letter from Bovis dated 21st March 2000 enclosing a letter from William Hare dated 17th March 2000 regarding practical completion, together with a draft final account summary totalling £11,280,690.11 and a document from Bovis containing a proposal for an extension of time in respect of the structural steel package. By letter dated 5th April 2000, Waterman passed queries to Deacon & Jones to assist them in analysing William Hare's draft final account. That has been the extent of Waterman's involvement in relation to the assessment of the financial aspects of William Hare's account.

We have provided you with a request for further information in our letters dated 12th July and 15th August in order that Waterman can consider the claim. As the requests have been refused, Waterman cannot accept or reject this part of L&A's claim until the information which has been requested is provided. (Waterman's appointed expert has confirmed that he cannot make an assessment based upon the information currently available to him. Furthermore, no information has been provided by you as to the basis of the deductions which were made to reduce William Hare's draft final account from £11,280,690.11 to £10,560,000. No supporting documents have been provided to evidence the payments referred to in the appendix to your letter, or their calculation.)

The sums claimed are premised upon Waterman being responsible for the whole of L&A's alleged losses. This cannot be correct in principle when L&A have expressly acknowledged in writing to Waterman (e.g. by letter dated 20th May 1999 in respect of GMW) that Waterman had been delayed by others. If L&A is to pursue a claim premised on Waterman being responsible for the whole of the claim, logically that claim must fail in full should Waterman identify instances where the premise is demonstrated to be wrong. Waterman has identified such instances in the course of this response. If L&A wishes to pursue a claim based upon delay, it must demonstrate cause and effect by reference to particular structural drawings or information which it contends were late and show, by analysis that (a) they were late because of a default by Waterman (rather than due, for instance, to information flow problems caused by other members of the design team) (b) their lateness was critical and (c), there were no other concurrent critical delays for which Waterman could not be held responsible".

41. Berwins answered this letter on the 20th December saying that it was wholly inadequate.
"If your client is not prepared to accept liability then LAP will proceed to adjudicate this dispute. LAP has received advice from Robin Blois-Brook of William J Marshall (Engineer) and Franco Mastrandrea of Northcrofts (time/money) in this matter, but no expert report disclosure has been prepared and given the lack of analysis in Waterman's response it is not intended to produce any such reports. LAP intend to rely on factual evidence alone.

42. On 20th December 2002 Watermans wrote:-

Our client's position remains as we have already informed you:

Our client cannot accept or reject the claims without further information. We have informed you what further information is required. (The fact that our client cannot accept, modify or reject the claims is amply demonstrated in respect of the quantum aspects, where no supporting information or documents have been served and an appointed expert cannot even start to make an assessment).

Should your client seek to adjudicate the claims in the form they have been presented to our client, they are bound to fail. If further evidence is relied upon by your client, we will object to the adjudicator's jurisdiction as our client must be given the opportunity to accept, reject or modify the claims having regard to the further evidence: ***Edmund Nuttal Ltd –v- R G Carter Ltd*** *[2002] EWHC 400 (TCC).*

We note that you have failed to respond to ***any*** *of the points raised by our client (including the fee claim). We note too that your client will rely upon factual evidence alone if the adjudication proceeds, without the support of any expert opinion or analysis.*

43. On the 12th February LAP served a notice of intention to seek adjudication and of an intention to apply to the PRICS for appointment of an Adjudicator in the dispute.

44. The material parts of that notice of intention are :-

"The Nature and a Brief Description of the Dispute

5. On 11 June 2002 Berwin Leighton Paisner ("BLP") on behalf of the Referring Party served a formal letter of claim on Waterman for £1,889,463 plus interest representing losses LAP alleges it has suffered as a result of Waterman's failure to perform its contractual obligations under the Contract. More particularly, LAP stated that in breach of its contractual obligations, Waterman failed to meet its unconditional commitment of 19 November 1998 to release substantial elements of its steelwork information by set dates thereby causing critical delays to the Steelwork Package Contractor, William Hare Limited and the Project as a whole. LAP further alleged that Waterman had failed to meet the dates which had been set at a time when Waterman should have been able to predict with some degree of certainty the resources required for the outstanding work. Moreover, no warnings were issued that the information release dates were not going to be met when it must have been reasonably apparent at that time that the information that was available fell far short of William Hare's requirements.

6. LAP contended that as a result of such breaches, substantial monies had to be paid by LAP to William Hare in the form of delayed start on site costs (£225,553), accelerated working costs (£129,718), extension of time costs (£398,403), main office additional drawing office costs (£106,629), site additional drawing office costs (£142,652), offsite fabrication costs (£201,364), on site fabrication modification costs (£564,494), extra over for stockist materials costs (£52,650) and cancelled materials costs (£38,000).

Where and When the Dispute Has Arisen

9. The dispute arose in England when the Responding Party rejected the Referring Party's claim by way of its solicitor's letter of 3 December 2002".

45. On 12th February 2003 Berwins wrote to the RICS Dispute Resolution Service applying for an appointment of an Adjudicator pointing out that Mr Bob Juniper was appointed in March 2002 to act as an Adjudicator under the Scheme for Construction Contracts on this project, and that he gave his decision on the 15th May 2002. *"Given the understanding Mr Juniper has of the Project we request that he be again appointed to deal with this further dispute. Although this dispute is different in nature, we believe that Mr Juniper has the necessary professional experience to deal with the contractual claim made against Waterman. Moreover, his previous experience to the Project will undoubtedly assist in the Adjudicator's role in understanding the construction process on this development, saving time and costs for both parties".*

LAP clearly considered Mr Juniper's knowledge to be material in this referred dispute.

On the 13th February Waterman's solicitor wrote to the RICS objecting to Mr Juniper pointing out that he was a chartered surveyor and that the dispute was a professional negligence claim against a structural engineer arising out of delays alleged to have been incurred as a result of their client's failure to comply with their duties under the Deed of Appointment. They asked for an Adjudicator with a structural engineering background to determine the dispute. *"We do not consider the fact that Mr*

Juniper adjudicated a previous dispute relating to the project will be of any assistance in relation to this adjudication for the reason that the only previous adjudication of which we are aware was in respect of the valuation of a measured account between the claimant and the contractor which involved entirely different issues and facts from the matters which the claimant now seeks to adjudicate. (Emphasis added)

46. Mr Juniper was appointed to be the Adjudicator on the 14th February 2003. He wrote to the parties on the 14th February. The material part of that letter as to submissions provides:
"I understand that the Adjudication is to be undertaken in accordance with the scheme for Construction Contracts (England and Wales) Regulations 1998
In accordance with clause 7 of the Scheme the referring party is required to refer the dispute in writing to the Adjudicator not later than seven days from the date of the notice of the Adjudication. I now await that submission from London and Amsterdam properties Limited.
To give a similar time for Waterman Partnership Limited to respond I direct that any such response they wish to make should be submitted not later than seven days from their receipt of a copy of the referral through London and Amsterdam Properties Limited.
It may be helpful if I remind both parties that their submissions should be (a) accompanied by copies of or relevant extracts from the construction contract and such other documents as they intend to rely upon.
(b) copied to the other party at the same time they are sent to me."

47. He then set out his proposals as to remuneration and expenses:
"I take this opportunity of proposing my terms:-
My fee will be at the rate of £85 per hour for each hour during which I engage myself upon this Adjudication.
My minimum fee in the event of an early settlement and/or the revoking of my appointment will be £200.
In addition I shall require to recover any reasonable expenses I incur in the execution of my duties.
My fees and expenses will also be subject to the addition of Value Added Tax.
I would be pleased to receive both parties agreement to those terms."

48. LAP served its referral notice on the 19th February 2003. In his letter of the 20th February sent to the parties Mr Juniper noted that he was awaiting a response from Waterman, that was due on or before 26th February 2003.

49. On 21st February 2003 Waterman reiterated that it did not accept his jurisdiction. Firstly, because he might have previous knowledge gained in a previous adjudication which was confidential; secondly, as a chartered surveyor he was not suitably qualified to make a judgment on the professional negligence of Engineers; thirdly, because he purported to direct a response when no referral had been made, and thus he had no jurisdiction, and in any event it was unreasonable to make such direction without having seen the referral.

50. The fourth objection was because the referral notice exceeded 20 single sided A4 pages as provided for by Clause 16.3 of the Deed of Appointment and the total reference itself exceeded 1000 pages.

51. The fifth objection was on the basis that within the time restraints of the adjudication process Waterman did not have any reasonable opportunity of meeting its case. The sixth objection arose because the terms proposed as to remuneration were not agreed and were inconsistent with paragraph 25 of the Scheme.

52. Waterman went on to comment that it had not been able to study the referral notice and accompanying documents in sufficient depth to be able to appreciate whether the claim put forward was the subject of the existing dispute, or whether a dispute existed.

53. It observed *"If LAP were following a fair process they would have finalised and served on us the witness statements and supporting volumes several months before serving the adjudication notice so that they could be properly considered." "We do not consider that you have been validly appointed or can validly proceed, and respectfully suggest that you ought to resign or to decline to proceed."*

54. The Adjudicator replied on the 24th February 2003 stating that he did not recall any knowledge that might be relevant to the dispute, that he proposed to continue unless LAP disagreed and that both he and the RICS felt that he was qualified to deal with the alleged professional negligence of an engineer.

55. As to fees, he withdrew the second sentence of Item 1 as to a minimum fee. He ruled that by the time that he made his direction as to Waterman's response he had jurisdiction.

56. As to the fourth objection he upheld it, and directed that Appendix A and all the documents accompanying the referral notice should be disregarded in the adjudication. He reserved his position as to the balance of the other documentation referred to and limited Waterman's response to 20 pages.

57. In relation to the fifth objection he noted a "*difference of opinion between the parties as to whether Waterman had been 'ambushed"* (and observed that LAP were legally advised). He went on to note *"The limitation on the referral notice may not embrace some of the information objected to by Waterman".*

58. He did not deal with the sixth objection.

59. The parties subsequently agreed a revised timetable whereby Waterman was to serve its response on the 7th March LAP its reply on the 11th April and the Adjudicator to give his decision 14 days later.

60. The Adjudicator directed a one day hearing on the 29th April limited to questions put by him or through him if he felt it to be helpful.

61. On 31st March 2003 the Adjudicator acknowledged receipt of Waterman's response and, enquired whether LAP would serve a reply. He reminded both parties that any subsequent submissions would be confined to issues and matters previously raised and directed the 29th April to be set aside for the meeting.

62. On 2nd April Berwins confirmed that they were going to serve a reply in two parts on the 11th April 2003. They said in their letter at paragraph 2.1 *"In light of Berrymans' objections you should regard Appendix A to LAP's referral notice dated 19th February 2003 and other supporting documents served on the 19th February 2003 as the first part of LAP's reply. This should enable you to consider these papers now without any further objections from Berrymans.*

63. Berrymans not unsurprisingly objected to this course in their letter of the 3rd April.
"A. Appendix A in the accompanying document the Referral are clearly part of LAP's claim in this Adjudication. They were served as part of the Referral Notice in support of the claim. They provide the evidence upon which LAP relies. Appendix A sets out the basis upon which the quantum of the claim was calculated. To suggest they are now somehow to be used as a "reply" to our clients' case, when they were served in advance of the receipt of the same, is in our respectful submission a nonsense.
As you are aware our client contends that the contents of the Referral Notice in the accompanying documents exceeds the 20 page limit imposed and agreed upon by the Deed of Appointment and that LAP are thereby in breach of contract in serving the same. The breach (and lack of jurisdiction consequent thereon) cannot be remedied retrospectively. You are already in receipt of our submissions on this point".

64. Waterman reserved its right to object to the submission by LAP of further material by way of reply, which properly ought to have been submitted with the referral.

65. The reply contained a witness statement of Kenneth Baker exhibiting a considerable body of further evidence in support of LAP's quantum claim. It was evidence which was available at the time of the referral notice and not served. It was not made available to Waterman before service of a reply.

66. Mr Baker LAP's quantum expert in this supplemental statement referred to the report of Waterman's quantum expert: *"It is not surprising that Mr Kabuzi states that he is unable to provide an opinion as to the accuracy of costs because it appears they have not requested the necessary backup information in the adjudication".*

67. Mr Kabuzi in his witness statement says that he did request that back up information.

68. It can hardly be said in this case that Berrymans were slow to request any backup information. The Adjudicator would not rule upon the acceptance of that additional evidence without LAP being heard. He said in his letter of 15th April *"… I will continue to bear in mind the complaint made in order to avoid any unfairness when considering and weighing the evidence".*

69. Waterman was put into difficulty. The Adjudicator was clearly minded to accept the body of additional evidence as probative to some degree, and because of the constraints of the timetable

Waterman felt itself at a disadvantage in dealing with the additional quantum evidence served with the reply without the assistance of its professional advisor who was not available until the 6th May.

70. In the letter of the 16th April 2003 it sought an extension of time to deal with these matters, and asked that the adjudication decision should be put back until the 23rd May.

71. On the 16th April Berwins insisted on a strict adherence to the existing timetable, and referring to the additional quantum evidence filed said: *"In any event we note that under paragraph 17 of the Scheme – The Adjudicator shall consider any relevant evidence submitted to him by any of the parties to the dispute …".*

72. On the 17th April the Adjudicator wrote to the parties stating that he did not have authority to further extend the process of the adjudication between the date already agreed, and commented that: *"Following a brief examination at this stage I am minded at present to agree with London & Amsterdam Properties Limited's contention that the supplemental witness statement of Kenneth Baker merely provides additional information in reply to MrKabuzi's statement and does not contain a new case or new issues but I will continue to bear in mind and consider Waterman Partnership Limited's complaint.*

73. On the 6th May 2003 the adjudication decision was issued.

Objections to jurisdiction

74. Waterman submit that the adjudication decision is not valid. LAP contend "that Waterman are relying upon a shifting number of jurisdictional arguments and are prepared to argue any point in order to delay and procrastinate in order to avoid judgment."

75. Waterman's first submission as to jurisdiction is that the Adjudicator's appointment was not authorised by the contract, because LAP were only entitled to appoint an Adjudicator on the terms provided for in the Deed of Appointment. Since Mr Juniper insisted on different payment terms which LAP accepted and Waterman did not, Mr Juniper was not appointed pursuant either to Clause 16(1) of the contract or ad hoc.

76. Clause 15.1 of the contract provides: *"Any dispute or differences arising under or in relation to this Deed shall be referred to adjudication under the Construction Act in accordance with the Scheme for Construction Contracts SI 1998 number 649 save that the following amendment shall be made to the Scheme:*

77. The Scheme provides at paragraph 25 *"The Adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment should be apportioned."*

78. The Adjudicator is entitled to payment of reasonable fees and expenses reasonably incurred.

79. At the outset after appointment on the 14th February 2003 the Adjudicator indicated what he proposed to charge (see paragraph above). The amount is clearly modest and reasonable by any token. The words "*for each hour during which I engage myself upon this adjudication"* do not appear in the Scheme.

80. As a yardstick to ascertain the final entitlement of the Adjudicator an hourly rate for time actually spent is sensible and reasonable.

81. It accords with the charging regime followed by each of the parties solicitors save that the hourly rate is considerably less. Mr Bartlett contends that it is open ended. Notionally an inexperienced Adjudicator could use his time uneconomically and not as productively as an experienced Adjudicator, his assessment of hours spent therefore could be extravagant and objectively unwarranted.

82. The reality however is that this was an experienced professional nominated by the RICS, a body chosen by the parties who prudently indicated the basis upon which he proposed to arrive at an assessment of his reasonable fees and expenses at the end of the adjudication process. Furthermore he indicated upon receiving submissions from the parties that he was willing to forego a minimum fee in the event of revocation of appointment.

83. I reject this submission that the Adjudicator's fee proposals made after his appointment is at variance is with the Scheme.

84. The entitlement is set out in the Scheme. There is no argument as to the rate or hours charged or suggestion that either were unreasonable.

Prior knowledge

85. Waterman submits that Mr Juniper's appointment was in breach of natural justice because he was represented as having relevant prior knowledge of the Scheme.

86. Mr Bartlett submits that LAP procured the appointment of Mr Juniper by representing to the RICS that he had relevant knowledge of the project, and that Mr Juniper having secured the desired appointment sought to keep the appointment by denying that he had any relevant knowledge at all.

87. The contract envisages that there are occasions when it is desirable that the Adjudicator in fact has some knowledge of the matters to be adjudicated, indeed Clause 16.2 expressly provides: *"That, if any dispute or differences arising out of this Appointment raises the same or parallel issues as a related dispute or difference between the Employer and any third party which has already been referred to adjudication, the parties shall (wherever practical) refer the dispute or difference under this Appointment to the same Adjudicator for decision and such Adjudicator shall be "the Adjudicator" for the purposes of this Appointment in respect of such dispute or difference"*. (emphasis provided)

88. The words emphasised are important. It may not be practicable because the same Adjudicator is not available to act or because of the confidentiality requirement is not waived by the parties to the original earlier adjudication, and any relevant knowledge common to both disputes cannot therefore be made known to the party to the subsequent adjudication.

89. It is a fundamental requirement that any reliance upon previously acquired relevant knowledge by an Adjudicator is made known to the parties to the adjudication, so that both have an opportunity to deal with it, should it be likely or does in fact affect his decision materially. A professionally qualified person who is an Adjudicator appointed by a body such as RICS must be presumed to be aware of such a basic ingredient of any fair hearing which accords with the requirements of natural justice.

90. In this case Mr Bartlett argues that the Adjudicator should have recused himself from hearing the case. Either he could have had operative relevant knowledge from the earlier adjudication which he conducted between LAP and Byrne Brothers, or more difficult to deal with, there might have been matters affecting his mind that he may not have been conscious of.

91. Shortly after the referral, the Adjudicator stated that he did not recall any knowledge that may be relevant to particular issues he had so far understood to have been the subject of the dispute. Later he observed *"Even if this was so, knowledge of the facts would not seem to present a problem. I am required to investigate facts in any event"*.

92. The previous dispute, as was acknowledged by Waterman in their letter of the 13th February 2003 was in respect of the valuation of a measured account between the claimant and the contractor which involved different issues and facts from that which the claimant sought to adjudicate with Waterman. Waterman made relevant comments on certain aspects of their claim.

93. LAP asserted that he had relevant knowledge. The Adjudicator stated that he did not. There is no basis on which it can be said that his assurance was not true. Had he been in possession of relevant information which affected his decision, he was under a duty to tell the parties. If he was bound by confidentiality and unable to do so he should have recused himself.

94. A defendant seeking to impugn an adjudication cannot merely raise the spectre of bias without founding the allegation upon some credible evidence and demonstrating that the knowledge or information was central to the decision. In this case the Adjudicator addressed his mind to the risk, and stated that he knew of no matters giving rise to risk. His duty to guard against bias on this basis would have been a continuing one. There is no basis upon which it can be said that he was in breach of that obligation.

95. I reject this submission.

The referral notice

96. The third basis upon which Waterman seek to impugn the Adjudicator's decision is that because the Referral Notice was not in the form prescribed by the contract, no jurisdiction lies. Mr Bartlett submitted that the Adjudicator only had jurisdiction to proceed if he was in receipt of a Referral Notice within the terms contractually agreed between the parties.

97. Part 7 of the Scheme provides:- *Where an Adjudicator has been selected …. the referring party shall, not later than seven days from the date of the notice of adjudication refer the dispute in writing (the "Referral Notice") to the Adjudicator.*

98. Clause 16.3 of the Deed of Appointment seeks to tailor the Scheme to the requirements of the parties:- *"Paragraph 7(2) of the Scheme shall be amended by the addition of the following: "Providing that the Referral Notice together with the accompanying document shall not exceed 20 single sided A4 pages"."*

99. The statutory adjudication procedure was introduced primarily in order to obtain quick answers to disputes arising during the course of the project. The need for summary process is reduced once the project is complete. The time limited procedure is ill suited to large and complex disputes involving an in-depth post-mortem of the project, such as was contemplated in this case. The short time limits cannot be extended without the agreement of the referring party and the responding party may be put under severe and unfair pressure. Mr Bartlett submits that Clause 16.3 was a bona fide attempt by LAP (who had to consider at the time of the appointment that they might be the responding party) to alleviate this potential unfairness.

100. LAP ignored Clause 16.3 and served a Referral Notice together with documents altogether in excess of 1000 pages.

101. It did not comply with the contract requirements as to the form and extent of the Referral Notice agreed.

102. Mr Akenhead was driven to submit that Clause 16.3 should not be given effect because it conflicted with paragraph 17 of the Scheme. *"17. The Adjudicator shall consider any relevant information submitted to him by any of the parties of the dispute and shall make available to them any information to be taken into account in reaching his decision".*

103. He supported the approach of the Adjudicator who in his letter of the 27th February 2003 agreed that the reference did not comply with Clause 16.3 but decided to receive the first 20 pages as "*the Referral"* founding his jurisdiction.

Then 'even-handedly' he proceeded to limit Waterman's response to a limit of 20 pages.

104. He thereafter received in evidence the balance of LAP's non compliant referral material, namely Appendix A and the accompanying documents. Provided he had jurisdiction, he had the requisite power under the Scheme to receive these documents and to give wide directions as to the conduct of the hearing. He could request that any party to the contract supply him with such documents as he may reasonably require, including if he so directed any written statement from a party to the contract supporting or supplementing the Referral Notice and any other documents given under paragraphs 7(2).

105. He could issue any other directions relating to the conduct of the adjudication, such as to oral representations, timetabling and documentation.

106. The Adjudicator's powers when dealing with complex matters include the power to limit the amount of documentation placed before him. A fortiori the parties can agree in advance to limit the extent of documentation constituting a referral. There is nothing in Clause 16.3 which is contrary to Section 108 of the Housing Grants Regeneration Construction Act 1996.

107. Neither is there anything in Clause 16.3 which conflicts with paragraphs 17 of the Scheme which obliges the Adjudicator to consider evidence put before him by the parties, following a properly constituted reference in accordance with the contract and the Scheme. Clause 16.3 is prescriptive as to

the form of the Referral Notice the parties have agreed to, which founds the Adjudicator's jurisdiction. Until there is receipt by him of a referral in proper form he has no jurisdiction.

108. In ***RG Carter Limited v. Edmund Nuttall Limited*** [2002] BLR page 359 HHJ Bowsher QC stated (at paragraph 27): *"As to the duty of the Adjudicator, one looks at the contract Clause 38A.5.3 requires him to reach his decision "within 28 days of his receipt of the referral and its accompanying documentation under Clause 38A.4.1 …" The Adjudicator has not received the "referral" nor any accompanying documentation and so the time for the giving of his decision has not begun to run and he has no further duty of jurisdiction."*

109. Mr Bartlett submits that similarly in the present case paragraph 19(1) of the Scheme required him to reach his decision not later than 28 days after the date of the Referral Notice provided for in the rules amended and adopted by the parties. Since he received no such notice he did not have jurisdiction to embark on the adjudication or to give any directions. In particular, he did not have jurisdiction to order as he purported to do that "Appendix A and other documents accompanying the Referral Notice shall be disregarded in this Adjudication at the present time. Nor, since he was without jurisdiction could he receive the excess under paragraph 13(A) of the Scheme.

110. Mr Bartlett submits the Adjudicator should have directed that the claimant present a short synoptic case compliant with Clause 16.3 of the Deed of Appointment not exceeding 20 pages.

111. I accept that the approach submitted by Mr Bartlett is the appropriate one. It seems to me however, that his analysis is incomplete.

112. The duly appointed Adjudicator must indeed consider the reference in the context of the contractual requirements and the Scheme. In this case the reference consisted of a Referral Notice giving an overview of the dispute setting out the parties the contract and clauses relied upon, the breaches and Waterman's responses and setting out the loss and damages under eight heads totalling £1,324,969 and the decision sought. Appendix A gave a summary breakdown of the money claims, the loss and damage being shown in eight A4 pages. The balance of the supporting documentation approximately 975 pages was supporting documentation comprising schedules, bar charts, correspondence, reports and the like.

113. The Adjudicator in my judgment clearly accepted that the body of material put to him as the reference was excessive and did not comply with Clause 16.3.

114. The reality however was that the 17 page Referral Notice on its face was the kind of synoptic summary of the dispute that was envisaged by the contract.

115. Provided that it sufficiently identified the dispute that existed, the adjudicator was entitled to regard that as a reference compliant with both the contract and the Scheme.

116. The Adjudicator therefore in my judgment had jurisdiction and was entitled to make the directions that he did and to receive the other documentation under paragraph 13(A) of the Scheme.

Was there a dispute

117. Mr Bartlett on behalf of Waterman contends that there was no dispute in existence at the time of the reference. Alternatively, he submits that the matters decided by the Adjudicator were not the same dispute as that in existence at the time of the reference, and that in any event there was procedural unfairness amounting to a breach of natural justice, because the respondent was not given any reasonable opportunity to deal with vital matters affecting the Adjudicator's decision.

118. Mr Akenhead contends that the letters of the 11th June 2002 from LAP clearly notified Waterman that they were claiming they had suffered loss by reason of Waterman's late release of design information in breach of the requirements in the Deed of Appointment, and subsequent agreements, and that their failure to perform their engineering duties fell short of the standard of care required of a reasonable engineer practicing in this field.

119. The claim as set out implied that LAP had thoroughly investigated the basis of their claim, and that there was programming evidence supporting their claim which causally demonstrated by analysis the responsibility of Waterman. Particulars of that aspect of claim was sought but were never forthcoming.

120. Waterman in its letter of 3rd December 2002 gave a detailed part refutation of the claim as to liability. Its response and denial clearly indicated that there was a dispute in existence as to the liability aspect of the claim. Quantum was another matter. Until detailed information as to the payments made to William Hare and others was made available and information as to causal links and the necessity of any payments being the responsibility of Waterman was provided, it was significantly handicapped in assessing its position and in participating in any meaningful commercial discussions to resolve the differences between the parties.

121. Mr Akenhead contended that the basis of LAP's claim both as to liability and quantum was plain from the outset, if there was any deficit as to the supporting evidence disclosed this could not affect the reality that by the 20th December when LAP replied to Waterman's response of the 3rd December there was a dispute in existence to be adjudicated. "*If your client is not prepared to accept liability then LAP will proceed to adjudicate this case. LAP has received advice from Robin Blois-Brooke of William J Marshall (Engineers) and Francis Masterden of Northcrofts in this matter but no expert report of disclosure has been prepared and given the lack of analysis in Waterman's response it is not intended to produce such reports. LAP in tend to rely on factual evidence alone.* (Emphasis supplied).

122. Mr Akenhead submits that LAP had presented a claim for payment by Waterman on the 11th June and Waterman having failed to pay that claim a dispute has arisen.

123. Mr Bartlett contends on the facts of this case that no dispute has arisen because Waterman were never given a proper opportunity for any consideration or negotiation of the claim because vital information as to causation and quantum was not provided prior to the adjudication.

124. The additional referral notice and accompanied documents contained substantial information and evidence which were provided to Waterman for the first time.

125. Mr Bartlett submits that given the nature and complexity of this claim, much of this information ought to and could readily have been provided to Waterman prior to the adjudication in order for Waterman to be able to adequately consider LAP's claims.

126. This information included the graphic analysis entitled "Information and Progress Analysis" which was an analysis by a person not identified, undertaken on behalf of LAP which identified periods relating to original work and modifications, periods of acceleration, intermittent delay, planned period on site, periods when modifications were carried out, final completions, periods of delay, extensions of time, the period of the Hare contract, planned issue dates and actual issue dates. An amended version of this analysis was served by LAP during the course of the adjudication on the 21st March 2003.

127. It also included the Bovis Management contract which Waterman had not seen prior to the adjudication, although it was requested in Berryman's letter of the 12th July 2002 and the request was reiterated later on the 15th August 2002.

128. Much of the correspondence between LAP and other members of the professional team notably GMW and Deacon and Jones was not furnished to Waterman prior to the adjudication.

129. Neither was the substance of the detailed witness statements from Mr Pearce of LAP, Mr Jackson of GMW, Mr Dudley of Cygnus and Mr Ken Baker of Deacon and Jones. It is of significance that Mr Baker's supplemental statement contained information relating to the basis upon which he had recommended LAP's payments to William Hare. This information had been requested in Berryman's letter of the 12th July 2002.

130. It was centrally relevant to the amount and justification of any payments made by LAP to William Hare.

131. It is surprising that LAP failed to provide this information, and gives rise to the inference that they never intended to afford any real opportunity for a proper consideration of their case in what was a complex dispute.

132. Mr Akenhead's contention that there was a dispute in existence by the 20th December 2002 is supported by the line of cases decided, based upon *Halki Shipping Corporation v. Sopex Oils Limited 1* WLR726, where the Court of Appeal affirmed the judgment of Clarke J who held that *"dispute in respect of a matter which under an arbitration agreement had to be referred to arbitration was to be given its ordinary meaning and included any claim which the other party refused to admit or did not pay whether or not there was an answer to the claim in fact or in law".*

133. He also found support in ***Monmouthshire County Council v. Costelloe & Kemple Limited*** [1965] 5BLR which concerned ICE conditions where Lord Denning said: *"Was there any dispute or difference arising between the contractors and the engineer? It is accepted that, in order that a dispute or difference can arise on this contract, there must in the first place be a claim by the contractor. Until that claim is rejected, you cannot say there is a dispute or difference. There must be both a claim and the rejection of it in order to constitute a dispute or difference.*

134. In neither case did the court conceive it necessary to import any additional ingredient into the definition of "dispute".

135. The Housing Grants Regeneration Construction Act 1996 Section 108 provides:
"(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.
For this purpose "dispute" includes any difference".

136. Arbitration and adjudication are dispute resolution procedures which have many similarities, they are privately conducted and confidentiality may attach to information received in relation to both. Arbitration gives rise to a final determination which is capable of registration for enforcement. Adjudication gives rise to a provisional determination which is only binding until the dispute is arbitrated, litigated or agreed. Adjudication further is subject to very restrictive time limits, and no matter how complex the dispute "one size fits all". Arbitration has no such limits imposed by Parliament.

137. As Forbes J observed in ***Beck Peppiatt Limited v. Norwest Holst Construction Limited*** [2003] BLR page 316 *"Halki is binding upon Courts of first instance in relation to what amounts to a dispute in arbitration cases".*

138. He went on to give approval to the adoption of the **Halki** approach to what constitutes a "dispute" in arbitration cases in relation to what is a "dispute" in adjudication. At paragraph 318 he said: *"It has to be borne in mind that as observed in **Halki,** "dispute" is an ordinary English word which should be given its ordinary English meaning. This means that there will be many types of situation which can be said to amount to a dispute. Each case will have to be determined on its own facts and attempts to provide an exhaustive definition of "dispute" by a reference to a number of specified criteria are in my view best avoided. I therefore reject the suggestion the word "dispute" should be given some form of specialised meaning for the purposes of adjudication".*

The approval of the Halki approach follows a passage at paragraph 317 where he expressed agreement with the approach of HHJ Lloyd QC in the unreported decision of **Sindall v. Solland** 30th June 2001", who at page 15 of his judgment said:- *"This and other decisions concerning what may constitute a dispute for the purposes of statutory adjudication show that the absence of a reply (for example by a person in the position of a contract administrator) may give rise to the inference that there was a dispute e.g. where there was prevarication. But I am unable to reach that conclusion on the present facts for there to be a dispute for the purposes of exercising the statutory right to adjudication it must be clear that a point has emerged from the process of discussion or negotiation that has ended and that there is something which needs to be decided".*

139. Mr Bartlett in his contention that 'dispute' has the wider meaning relied upon the passages in Judgments of HHJ Thornton QC and HHJ Seymour QC.

140. In ***Fast Track Contractors Limited v. Morrison Construction Limited*** [2000] BLR page 168 HHJ Thornton QC after considering ***Halki*** and the ***Monmouthshire*** cases concluded: *"A dispute can only arise once the subject matter of the claim, issue or other matters has been brought to the attention of the opposing*

party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion."

141. In ***Edmund Nuttall v. RG Carter*** [2002] BLR at page 312 HHJ Seymour QC said at page 321 paragraph 35: *"For there to be a "dispute" there must have been an opportunity for the protagonist each to consider the position adopted by the other and to formulate arguments of a reasoned kind. It may be that it can be said that there is a "dispute" in a case in which a party which has been afforded an opportunity to evaluate rationally the position an opposite party has either chosen not to avail himself of that opportunity or has refused to communicate the results of his evaluation … the construction of the word "dispute" for the purposes of the 1996 Act and equivalent contractual provisions, in my judgment is not simply a matter of semantics but a question of practical policy. It seems to me that considerations of practical policy favour giving to the word "dispute" the meaning which I identified".*

142. In ***Hitec Power Protection BV v. MCI World Com Limited*** [2002] EWHC page 1953 HHJ SeymourQC reiterated the wider concept of "dispute": *"Whatever may be the correct approach to the determination of the question what amounts to a dispute fit to be referred to arbitration under an arbitration clause, it seems to me that in the context of adjudication, a dispute is something more than simply a rejection broadly of the claim, or a failure to respond to a claim. What a dispute, in the context of adjudication, amounts to, in my judgment, is a situation which a claim has been made, there has been an opportunity for the protagonist each to consider the position adopted by the other and to formulate arguments of a recent kind.*

143. In ***Cruden Construction Limited v. Commission for the New Towns*** [1995] 2 Lloyds Reports 387, HHJ Gilliland QC after referring to Lord Denning's remarks **in** ***Monmouthshire County Council v. Costelloe*** said at page 393 of the Report: *"The words "dispute" or "difference" are ordinary English words unless some binding rule of construction has been established in relation to the construction of those words in Clause 35 of JCT contract I was of the opinion that the words should be given their ordinary every day meaning".*

144. In ***Cowlin Construction v. CFW Architects (a firm)*** [2002] EWHC (TCC) HHJ Francis Kirkham contrasted the approach as to what constituted a "dispute" in ***Sindall v. Solland*** and ***Edmund Nuttall v. Carter*** with that in ***Halki.*** She said: "*In my judgment the approach in* ***Halki*** *is to be preferred. I am guided by the straightforward analysis in that case. In Halki (in the context of the Arbitration Act 1996) the Court of Appeal reminded us the courts have generally construed widely at the word "dispute" and they declined, in that case to construed the word more narrowly in the context of arbitration. Whilst I accept that the adjudication process involves short time scales, and that there is a risk that the responding party may be ambushed, those are not in my judgment reasons to construe the word dispute more narrowly in the context of adjudication than in other context. I bear in mind the practical difficulties faced by an Adjudicator whose jurisdiction is challenged on the ground there is no dispute. The court should not add unnecessarily to those difficulties by giving a narrow meaning to the word dispute which would in turn permit a responding party to introduce uncertainties which might be difficult for an Adjudicator to deal with. Otherwise there is the risk that the purpose of the HGCRA may be defeated".*

145. The rationale for the wider view is expressed in ***Edmund Nuttall v. RG Carter*** at paragraph 36: *"The whole concept underlying adjudication is that parties to an adjudication should first themselves have attempted to resolve their differences by an open exchange of views and if they are unable to, they should submit to an independent third party for decision the facts and arguments which they have previously rehearsed among themselves. If adjudication does not work in that way they are at the risk of premature and unnecessary adjudications in cases in which, if only one party had a proper opportunity to consider the arguments of the other, accommodation might have been possible. There is also the risk that a party to an adjudication might be ambushed by new arguments and assessments which have not featured in the "dispute" up to that point but which might have persuaded the party facing them, if only he had the opportunity to consider them. Although no doubt cheaper than litigation, as Mr Richards' fees in the present case indicate, adjudication is not necessarily cheap".*

146. The risks referred to there are very real. But the position of a respondent in such an adjudication which may well be procedurally unfair is safeguarded because the Court would be slow to dilute the

requirements of natural justice where the referring party seeks to enforce the award under Part 24. A referring party who is permitted to ambush a respondent by deploying fresh arguments and using documentation held on to until the eve of the reference may have an expensive and hollow victory in the event. It must also be recognised that there may be some disputes particularly arising at the end of a project which are too complex to permit a fair adjudication process within the time limits of the scheme.

147. In my judgment the reasoning in ***Halki*** as to what constitutes a dispute in arbitration proceedings applies with equal effect in adjudication proceedings.

148. In this case as to the liability aspect of the dispute I hold that even if the wider view represents the test of what a dispute is, then that test is met. As to the quantum aspect of the dispute the wider test in my view could not be met. Nonetheless I hold that there was a dispute, embracing both the liability and quantum aspects of this large and complex claim. I accept the arguments of Mr Akenhead as to the ambit and meaning of "dispute" in Section 108 of the Housing Grants Regeneration and Construction Act 1996.

149. That dispute was sufficiently set out in a 17 page notice of referral of dispute which as to form I have already found was compliant with the requirements of the contract and the Scheme.

Natural Justice: Procedural fairness

150. Mr Bartlett contends that LAP through their solicitors conducted a determined and skilful ambush making allegations as to the liability and quantum aspects of their complicated claim and then steadfastly declined to release the material to back them up. They then allowed considerable time to pass which enabled them to depict Waterman's inevitable failure to provide a fully reasoned response as giving rise to a dispute.

151. As to quantum issues I accept that Waterman could not provide a fully reasoned response, but as to liability they were able to make reasonably a detailed response on some of the liability matters. They made it clear that they did not accept any obligation to pay any money to LAP.

152. Berwins' initial response to Berryman's request of the 12th July 2002 for information and documents relating to quantum was to decline to supply them on the basis that Waterman was alleged to have had much of the information they requested. Nevertheless Berwins in their letter of the 6th August 2002 did invite Mr Lane of Berrymans to take instruction from Waterman as to which documents they did not have. He took up that invitation, and on the 15th August 2002 set out the information and documents that was required.

153. On 22nd August Berwin's misinterpreted that letter and asserted that "notwithstanding these requests we believe our client's case is more than adequately made out in our second letter of the 11th June 2002". They provided no further documentation or information. In the subsequent correspondence Mr Lane of Berrymans reiterated his request for the information and the documents that he had been invited to indicate were not in the possession of his client, but none were forthcoming.

154. In their letter 20th December 2002 Berwin's position was that no quantum information would be given unless Watermans first admitted liability.

155. In the event LAP had to reply upon some of the quantum material that they neglected to provide to Watermans, when the adjudication was commenced. On the 26th February 2003 Berrymans drew the Adjudicator's attention to the fact that the Referral Notice with the accompanying documents whilst maintaining the broad allegations which were made in the claim letter of the 11th June contained significant and substantial information and evidence which ought to have been put to their client before hand if the adjudication process was to be fair and workable, and to reflect the dispute the subject of adjudication. The Adjudicator on the 27th February 2003 in relation to that wrote:
"There is a difference of opinion between the parties as to whether Waterman Partnership Limited has been "ambushed" London & Amsterdam Properties Limited are legally advised and able to consider the objections and reservations. The limitation of the Referral Notice may not embrace some of the information objected to by Waterman Partnership.

I am prepared to continue if that is the wish of London & Amsterdam Properties Limited and if they will agree to indemnify me against any claims that my fees and expenses are not payable for the reason that this adjudication is outside my jurisdiction".
(emphasis provided)

156. LAP did agree to indemnify him, he then ordered a response within 14 days of his appointment which was then extended to the 27th March with the agreement of LAP. Mr Simon Kabuzi in that response identified deficiencies in LAP's case, that it was reasonable for Mr Baker to recommend payments to William Hare. He detailed these in his report:
    - *No back up information has been submitted by the Referring party to support their claim for the delayed start on site and how it is attributable to WP.*
    - *No substantiation has been provided to show how the acceleration costs have been derived or how these costs are attributable to WP.*
    - *No evidence of notices of delay issued by W Hare, extensions of time granted by the Architect or delay analysis related to the extensions of time granted have been provided or how this period of delay is attributable to WP.*
    - *No information has been provided to show how the main office additional drawing costs has been evaluated or how this cost is attributable to WP.*
    - *No information has been provided to show how the additional site drawing costs has been evaluated or how this cost is attributable to WP.*
    - *No substantiation has been provided to show how the offsite fabrication facility costs have been derived or how this cost is attributable to WP.*
    - *No substantiation has been provided to show how the on site fabrication/modification costs has been derived or how this costs is attributable to WP.*
    - *No information has been provided to show how the extra over cost for stockist materials has been derived or how this cost is attributable to WP.*
    - *No information has been provided to confirm what or quantity of materials were cancelled, how the cost has been derived or how this cost is attributable to WP.*
    - *The claim submitted by the Referring Party is based on exceptionally poor material. I have not seen any evidence of recommendations upon which L&A submit that it is entitled to rely.*

    He concluded:
    "On the basis that no substantiation has been provided by the Referring Party to show how its claim has been derived. I have been unable to provide an independent opinion on the quantum matters referred in this dispute.
    In my opinion, the Quantity surveyor on behalf of the Referring Party has failed to exercise proper quantity surveying practice and procedures whilst valuing W Hare's works, which one would expect of a Chartered Quantity Surveying practice.
    In my opinion this undermines the recommendations upon which L&A submit that it is entitled to rely".

157. Mr Baker LAP's quantity surveyor on the 11th April served a supplemental statement with a great deal of new evidence and documentation seeking to make good the deficiencies identified in Mr Kabuzi's statement. That material clearly comprised much of the information that was asked for by Waterman as early as the 12th July 2002 and the 15th August 2002 which LAP for no good reason failed to supply. LAP's late reliance upon it emphasises its materiality. Mr Baker in his additional statement was clearly in error when he asserted that Waterman had failed to request this information.

158. At the time of Mr Baker's supplemental statement Waterman was obliged by the timetable to serve its further response dealing with this substantial body of additional information by the 17th April. LAP refused to extend the timetable.

159. Waterman took objection to the reception of the additional material on the basis that it had been available to LAP at the time of the referral and that they chose not to rely upon it. It had been requested long ago and there was no adequate time to deal with it by way of expert analysis.

160. The Adjudicator replied by letter 15th April 2003 saying somewhat lamely: *"Without have heard from LAP on the issue and before having more thoroughly considered documents myself I am unwilling to issue a*

direction that any evidence be excluded. However, I will continue to bear in mind the complaint made in order to avoid any unfairness when considering and weighing evidence in due course. (emphasis provided)

161. The underlined words can hardly have afforded reassurance to the disadvantaged party.

162. The further quantum information was provided towards the very end of the adjudication only because it was apparent that the success of LAP's case was jeopardised without it. It formed no part of the exchange of views between the parties prior to the commencement of the adjudication. None of the supporting documents and information relating to quantum were provided to Waterman prior to the service of the Referral Notice and the accompanying documents. It is difficult to understand what the emphasised words in the letter above mean if the respondent is handicapped by having to meet a substantially refined case without time to investigate and properly consider it. The Adjudicator did not seem to appreciate that he ought to have considered whether there were any grounds on which LAP should properly be granted the indulgence of such late evidence being received.

163. Mr Akenhead submits there is no question of there being an ambush in this case. Had LAP stood on its strict rights in the adjudication the process would have been far shorter. He points to the fact that time was in fact extended once by LAP for Waterman to make its initial response.

164. That contention fails to recognise that LAP chose not to reveal its case as to causation and quantum until the adjudication commenced and even then the evidence although approaching 1000 A4 pages was incomplete thus giving rise to the necessity to support its case by seeking to adduce the additional evidence introduced very late in the adjudication process. It could not therefore have been taken account of in Waterman's response. It was not made available until after Waterman's response when their quantum expert drew attention to the lack of substantiation of the payments to William Hare. There clearly was an evidential ambush. The decision to withhold the quantum evidence requested in July and August was clearly deliberate. The decision to serve the considerable body of detailed evidence at the time of the referral was deliberate. The omission to serve the necessary additional evidence may have been merely oversight or neglect.

165. Mr Akenhead submits *"that even if Waterman was ambushed that is of no relevance: the Adjudicator made his decision and both the HGCRA, the contract and case law make it clear that it must be complied with*". Mr Bartlett contends that this was no 'mere' ambush. The reception of the additional evidence and the failure to give Waterman the opportunity to deal with it amounted to a breach of natural justice, because the Adjudicator as to vital issues based his decision on matters that Waterman could not properly deal with. He was not therefore impartial.

166 Both parties cited *Macob Civil Engineering Limited v. Morrison Construction Limited* [1999] BLR page 156 where Dyson J examined the scope of the HGRCA Scheme and gave guidelines as to the enforcement of adjudication decisions. He also considered two challenges as to the validity of the Adjudicator's decision based on alleged breaches of the rules of natural justice at page 96:

"The defendant challenges this decision on the merits. Additionally, it contends that the decision was invalid. The validity challenge is based on alleged breaches of the rules of natural justice in two respects. First, it is argued that the adjudicator should have given the parties the opportunity to make representations on the question whether a mechanism for payment and final payment which was ambiguous *was inadequate within the meaning of s 110(1) of the Act. Secondly, it is said that the adjudicator acted in breach of the rules of natural justice because he decided to invoke s 42 of the Arbitration act 1996 without giving the parties the opportunity to make representations on this point either.*

Is there a binding and enforceable decision?

Miss Dumaresq submits that, even if, there is a challenge to the validity of an adjudicator's decision, the decision is binding and enforceable until the challenge is finally determined. For reasons that I will attempt to explain, I accept this argument.

Mr Furst submits that the word "decision", where it appears in clause 27, and where it appears in paragraph 23 of part 1 of the Scheme, means a lawful and valid decision. Accordingly, where there is a decision whose validity is challenged, that is not a decision which is binding or enforceable as a contractual obligation until it has been determined or agreed that the decision is valid.

It will be seen at once that, if this argument is correct, it substantially undermines the effectiveness of the scheme for 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 the final determination of disputes by arbitration, litigation or agreement: see s 108(3) of the Act and paragraph 23(2) of Part 1 of the scheme. The timetable for adjudications is very tight (see s 108 of the Act).

For all these reasons, I ought to view with considerable care the suggestion that the word "decision" where it appears in s 108(3) of the Act paragraph 23(2) of Part 1 of the scheme and clause 27 of the contract, means only a decision whose validity is not under challenge. The present case shows how easy it is to mount a challenge on an alleged breach of natural justice. I formed the strong provisional view that the challenge is hopeless. But the fact is that the challenge has been made, and a dispute therefore exists between the parties in relation to it. Thus on Mr Furst's argument, the party who is unsuccessful before the adjudicator has to do more than assert a breach of the rules of natural justice, or allege that the adjudicator acted partially, and he will be able to say that there has been no "decision".

At first sight, it is difficult to see why a decision purportedly made by an adjudicator on the dispute that has been referred to him should not be a binding decision within the meaning of s 108(3) of the Act, paragraph 23(1) of the Scheme and clause 27 of the contract. If it had been intended to qualify the word "decision" in some way, then this could have been done. Why not give the word its plain and ordinary meaning? I confess that I can think of no good reason for not so doing, and none was suggested to me in argument. If his decision on the issue referred to him is wrong. Whether because he erred on the facts or the law, or because in reaching his decision he made a procedural error which invalidates the decision, it is still a decision on the issue. Different considerations may well apply if he purports to decide a dispute which was not referred to him at all".

"In the present case, the question of the meaning of the word "decision" is one of construction, both statutory and contractual. Neither party suggested that there was any difference between the meaning of the word as it appears in the Act and the Scheme on the one hand, and clause 27 of the contract on the other. As I have already indicated, I do not find any difficulty in giving the word "decision" that I conceive to be its plain and ordinary meaning. It may, however be possible to argue that it is ambiguous in the same way as Lord Hoffman thought that "enforcement notice" was ambiguous. I emphasise that no such argument was addressed to me. In that event, it would be necessary to ascertain the correct meaning from the scheme of the Act and the Scheme, and the background against which it was passed. Adopting that purposive approach to the construction of the word "decision", I am in no doubt that it should not be qualified in the way suggested by Mr Furst. The plain purpose of the statutory scheme is as I have earlier described. Mr Furst would not accept that his construction would drive a coach and horses through the Scheme. On my view, it would substantially undermine it, and enable a party who was dissatisfied with the decision of an adjudicator to keep the successful party out of his money for longer than envisaged by the scheme.

I would hold, therefore, that a decision whose validity is challenged is nevertheless a decision within the meaning of the Act, the Scheme and clause 27 of the contract". (emphasis provided)

167. The words emphasised throw some light upon the basis of the holding. I do not understand it to relate to the enforceability of a decision where there is a challenge to the jurisdiction based on a breach of natural justice, which is well founded as opposed to fanciful. Neither does it include a decision where the challenge is made out, for such a decision would clearly be a nullity.

168. S108 of the Housing Grants Construction Regeneration Act provides
A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with the scheme. For this purpose "dispute" includes any difference.
The contract shall
(e) impose a duty on the Adjudicator to act impartially.

169. The contract in this case is subject to the Scheme.

170 The primary legislation expressly makes provision for the requirement of 'impartiality' to be included in every construction contract within the Act.

171. In ***Glencot Development and Design Company Limited v. Ben Barrett & Son Contractors Limited*** *[2001] 80 Con LR* at page 31 HHJ Lloyd QC said: *"It is accepted that the Adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as limitations imposed by Parliament permit."*

172. In ***Try Constructions Limited v. Eton Town House Group Limited*** *[2003] BLR* page 286 at paragraph 29 I agreed with that passage:
" The process of adjudication under the Housing Grants, Construction and Regeneration Act 1996 is not a finely tuned instrument. Whilst the time constraints may by agreement be slightly relaxed as was the case here nonetheless the overall requirements as to timing make adjudication a summary and at times blunt instrument for the resolution of disputes.
Nonetheless, as HHJ Humphrey Lloyd QC succinctly expressed the matter in ***Glencot Development & Design Co Ltd v. Ben Barrett & Son (Contractors) Ltd*** *[2001] BLR 207, at page 218:*
"It is accepted that the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit".
Miss Dumaresq submits, and I accept, that the principles of procedural fairness (or the need to observe the rules of natural justice) are not to be regarded as diluted for the purpose of the adjudication process. In an individual case, however, they must be judged in the light of such material matters as time restraints, the provisional nature of the decision and any concessions or agreements made by the parties as to the nature of the process in a particular case.

173. In ***Discain Projects Services Limited*** **No.2** 2001 BLR at page 285 HHJ Bowsher QC agreed with the statement of Judge Lloyd QC in ***Glencot*** and at paragraph 33 he said that it was not sufficient in a Part 24 Application for a defendant *"To raise the banner of breach of rules of natural justice"* to defeat an application to enforce the decision of an Adjudicator. In a reference to Dyson J's comments in ***Macob*** as to challenge to the jurisdiction based on alleged breaches of natural justice, he commented that if a court on a Part 24 application forms a strong provisional view that a challenge based on alleged breach of natural justice is hopeless, the resisting defendant will not be able to show that there is a live triable issue between the parties to defeat the claim, which has a realistic as opposed to a fanciful prospect of success. I agree with that statement.

174. In ***Balfour Beatty v. The London Borough of Lambeth*** *[2002] BLR* page 288 at page 301 HHJ Lloyd QC said:

"That Scheme makes regard for the rules of natural justice more rather than less important. Because there is no appeal on fact or law from the Adjudicator's decision, it is all the more important that the manner in which he reaches his decision should be beyond reproach. At the same time, one has to recognise that the Adjudicator is working under pressure of time and circumstance which makes it extremely difficult to comply with the rules of natural justice in the manner of a Court or an arbitrator. Repugnant as it may be to one's approach to judicial decision-making, I think that the system created by the [HGCRA] can only be made to work in practice if some breaches of the rules of natural justice which have no demonstrable consequence are disregarded.

The last sentence shows that the question that I posed cannot be given an unqualified answer as the facts have to be taken into account.

Nevertheless, in my judgment, that which is applicable in arbitration is basically applicable to adjudication but, in determining whether a party has been treated fairly or in determining whether an Adjudicator has acted impartially, it is very necessary to bear in mind that the point or issue which is to be brought to the attention of the parties must be one of which is either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant. It is now clear that the construction industry regards adjudication not simply as a staging post towards the final resolution of the dispute in arbitration or litigation but as having in itself considerable weight and impact that in practice goes beyond the legal requirement that the decision had for the time being to be observed. Lack of impartiality or fairness in adjudication must be considered in that light. It has become all the more necessary that, within the rough nature of the process, decisions are still made in a basically fair manner so that the system itself continues to enjoy the confidence it now has apparently earned. The

provisional nature of the decision also justifies ignoring non-material breaches. Such errors, if apparent (as they usually are), will be rectified in any negotiation and settlement based upon the decision".

175. In **RSL(SW) Limited v. Stansell** Limited [2003] EWHC 1390 at paragraph 33 HHJ Seymour QC observed: *"The introduction of systems of adjudication has undoubtedly brought many benefits to the construction industry in this country, but at a price. The price, which Parliament and to a large extent the industry has considered justified, is that the procedure adopted in the interests of speed is inevitably somewhat rough and ready and carries with it the risk of significant injustice. The risk can be minimised by Adjudicators maintaining a firm grasp on the principles of natural justice and applying them without fear or favour. The risk is increased if attempts are made to explore the boundaries of the proper scope and function of adjudication with a view to commercial advantage".*

176. In ***Balfour Beatty v. London Borough of Lambeth*** *[2002] BLR* at page 288 at paragraph 301 HHJ Lloyd QC said: *"Lack of impartiality carries with it overtones of actual or apparent bias when in reality the complaint may be better characterised as a lack of fairness."*

177. Judge Bowsher QC put it very well in **Discain Projects Services Limited (No.1)** when he said at page 405: *"I do understand that Adjudicators have great difficulty in operating this statutory scheme and I am not in any way detracting from the decision in Macob. It would be quite wrong for parties to search around for breaches of rules of natural justice. It is a question of fact and degree in each case and in this case the Adjudicator overstretched the rules."*

178. The question that must be answered in relation to the Part 24 application is this is there a live triable issue that there was a breach of the requirements of natural justice which if established relates to a material and central issue in the decision made by the Adjudicator.

179. I agree with the submission of Mr Akenhead, that mere ambush however unattractive does not necessarily amount to procedural unfairness. It depends upon the case. It may be an important part of the context in which the Adjudicator is required to operate and in which his conduct may fall to be judged in the light of the fundamental common law requirements statutorily underpinned in Section 108 (2)(e) of the Act.

180. The Adjudicator recorded in paragraph 1.23 of his decision that Mr Kabuzi had submitted some comments and raised concerns. He nowhere dealt with the question as to whether Waterman had sufficient time to answer and rebut Mr Baker's evidence, nor did he find that Waterman did not need an extension; he merely pointed out his letter of the 17th April 2003 that he did not have power to grant the extension that was sought. At paragraph 1.23 he referred to the further evidence as additional information. In my judgment that was new evidence supporting LAP's existing case on quantum which could and should have been adduced much earlier. At paragraph 3.17.7.5 of the decision the Adjudcator expressly found that there was an absence of evidence that Mr Baker's settlement recommendations and advice were unreasonable. The additional material belatedly produced in the final stages of the adjudication was part of that advice. The Adjudicator found that the settlement was reasonable on the basis of the very evidence about which Waterman complained and in the absence of the expert quantum evidence which Waterman did not have a fair opportunity to adduce.

181. Mr Juniper did not appear to appreciate that in accordance with the rules of natural justice, he should either have excluded Mr Baker's supplemental statement, or should have given Waterman a reasonable opportunity of dealing with it. Under the applicable rules he was precluded from taking the latter course because LAP declined to agree to the necessary extension of time. He should therefore have excluded the evidence. He ought to have complied with the requirement of natural justice but did not do so. In fact he avoided a decision as to whether or not the evidence should be admitted and then based his decision upon Mr Baker's evidence without giving Waterman a proper opportunity to deal with it. That was a substantial and relevant breach of natural justice.

182. Had the claimant supplied the quantum information when it was first requested in July both parties would have been able to consider their differences in a sensible commercial way reflecting the legal strength and weaknesses of their respective positions before adjudication commenced. The claimant

chose not to. Where, as in this case the dispute is complex, involving the evaluation of the activities of a number of parties over a long period of time and issues of professional negligence and where the project is substantially complete the post mortem is best suited to arbitration or litigation.

183. Even where an adjudicator is prepared to firmly and impartially exercise the powers given to him under the Scheme to investigate control and manage the hearing of a dispute there may well be cases which because of their complexity and/or the conduct of a Claimant are not susceptible of being adjudicated under the Scheme fairly and thus impartially.

184. The scheme does not envisage that there should be a provisional resolution of a dispute by an adjudicator at all costs.

185. That would be far greater an injustice and mischief than that which the H.G.C.R. Act was enacted to remedy.

186. In my judgment for the purposes of Part 24 the defendant has demonstrated a substantial live and triable issue as to the Adjudicator's jurisdiction to make the decision, the claimant seeks to enforce based upon the Adjudicator's failure to act impartially.

Want of jurisdiction: error of law

187. The standard for Waterman's duties is contractually set by Clause 2.2 of the Deed of Appointment in terms no different from the common law duty in tort. *"The Consultant warrants the Client that his exercise will continue to exercise, in the performance of the services, or such professional skill, care and diligence as may reasonably be expected of properly qualified and competent instructural/civil engineer and traffic consultant experienced in the provision of such services in respect of work to the similar size, scope, nature and complexity to the Project".*

188. The Adjudicator at paragraph 3.16.2 stated that : *LAP contends that Waterman's conduct did constitute breaches of contract on the part of Waterman in that it constituted:*

1. *A failure to perform the Services set out in the Deed of Appointments "fully and faithfully upon and subject to the provisions of [that] deed";*
2. *A breach of the warranty under clause 2.2 thereof that Waterman "has exercised and will continue to exercise, in the performance of the Services, all such professional skill, care and diligence as may reasonably be expected of a properly qualified and competent structural/civil engineer and traffic consultant experienced in the provision of such services in respect of works of a similar size, scope, nature and complexity to the Project2.*
3. *A breach of the obligation under clause 2.7 to "keep the Client fully and properly informed on all aspects of the progress and performance of the Services and shall provide the Client with all such other information in connection with the Project as the client may reasonably require".*
4. *A breach of the obligation under Clause 2.8 to "fully co-operate with [the Architect] and liaise directly as necessary with the Several Consultants, the contractor and sub-Contractors to the extent that the project shall be completed with all reasonable speed and economy in accordance with the Programme and within the Construction Period".*
5. *A breach of the obligation under clause 1.6.1 to co-ordinate the Services properly and timeously – in particular the services set out under clauses 1.1.1, 1.2.6, 1.3.1, 1.3.2, 1.3.8, 1.4.3, 1.4.4, 1.4.6, 1.5.3, 1.5.18, 1.6.1, 1.6.10 & 1.6.12.*

For the reasons that I have found Waterman made a dates commitment, which it failed to meet for reasons which were not caused by the alleged failures of other members of the design team or LAP to meet the conditions upon which that agreement was premised, and that I have found Waterman had an obligation to advise of delays which it failed to meet up to the expiry of the dates commitment, I decide that Waterman was in breach of the conditions its deed of Appointment set out in my paragraph 3.16.2 above and numbered 3 and 4 in particular and as a consequence was also in breach of the other conditions set out therein.

189. Paragraph 66 of the Referral Notice alleges that Waterman failed to exercise proper professional skill care and diligence in performing their duties under the appointment, thus in regard to professional

negligence the central issue was whether a competent and careful structural engineer acting with due diligence could have missed the information issue dates.

190. The only expert evidence before the Adjudicator as to the standard of the Waterman Partnership's performance was that of Mr Michael Pepper a well known and experienced civil engineer. He concluded that Waterman did exercise all such professional skill, care and diligence, and in his opinion were not in breach of their obligations under the Deed of Professional Appointment. It is clear from his report which was before the Adjudicator that this opinion was expressed on the basis of a set of facts that he had investigated and concluded was right. It was not an expert opinion expressed upon the basis of the factual situation in fact found by the Adjudicator and wholly within his province. It is strongly arguable that the Adjudicator failed to properly address the issue of professional negligence. He did not do so directly in his reasons. The matter was wholly within the remit of the Adjudicator in the terms of the dispute entrusted to him. It may be said that he dealt with it in an unsatisfactory way. The resolution of questions of professional negligence within the limited timescale by an Adjudicator is not best suited to deciding such matters, particularly when the Adjudicator's professional qualifications are not of the same or a similar discipline as that of the professional he seeks to judge. Neither is the provisional impugning of a professional's standards something to be desired. However, that clearly is a matter ultimately for Parliament.

191. Mr Bartlett submitted that the Adjudicator made a clear error of law in relation to his finding of professional negligence although the decided cases since the introduction of the HGCRA 1996 hold that an error of law by an Adjudicator does not necessarily take him outside his jurisdiction or nullify his decision.

192. He submitted that these cases are inconsistent with higher binding authority namely **Anisminic v Foreign Compensation Commission (**1969) 2 AC 147 and **O'Reilly v Mackman** 1983 2 AC 287. He submitted that S108 should be read against the background of the ordinary law applying to public or private decisions as set out in those cases. (He contended that the Scheme of the Act is that the Adjudicator should find the facts and apply English law to the facts as found. There would be no purpose in the Adjudicator ascertaining the relevant law if he were empowered to decide according to his own ideas and not obliged to apply English law. If there is an error of law it means that the Adjudicator asked the wrong question.

193. In ***Anisminic v. Foreign Compensation Commission*** *[1969] 2 AC 147* the House of Lords considered a determination of the Foreign Compensation Commission as to the appellant's claim to be entitled to participate in an Egyptian compensation fund. Section 4(4) of the Foreign Compensation Act 1950 provided:- *"The determination by the Commission of any application made by them under the Act shall not be called into question in any court of law".*

194. The respondents contended that the court had no jurisdiction to entertain the proceedings. Lord Wilberforce at page 208 said: *"Just as it is the duty of the court to attribute autonomy of decision to the Tribunal within the designated area so the counterpart of this autonomy is that the courts must ensure that the limits of the area laid down are observed".*

195. Lord Reid at page 171 said
"I have come without hesitation to the conclusion that in this case we are not prevented from inquiring whether the order of the commission was a nullity.

It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take

into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly". (emphasis provided)

196. The words emphasised are particularly apposite in relation to the approach consistently followed by the Courts who have considered S 108 from **Macob** onwards.

197. **O'Reilly** was also concerned with the question as to whether the decision of an inferior tribunal or body was susceptible of challenge, in that case by way of a private law action. The decision in question was the determination by prison visitors making a disciplinary award. The issue was whether it was within the protection afforded to statutory tribunals from private suit given the availability of judicial review. It was held that the decision was not challengable in a private law action.

198. Mr Bartlett relied on the passage at p.287 in the speech of Lord Diplock. *The breakthrough that the **Anisminic** case made was the recognition by the majority of this house that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported "determination", not being "determination" within the meaning of the empowering legislation, was accordingly a nullity.*
(emphasis provided)

199. This case emphasises the requirement that a court must scrutinise with care the extent of the empowerment conferred on a particular tribunal or body by statute or otherwise and to consider where appropriate whether or not a mechanism for challenge exists as to its determinations by way of appeal judicial review or by any other prescribed route.

200. It is evident from **Anisminic** and **O'Reilly** that if the Court concludes that the adjudicator was properly seized of the real dispute between the partiies and comes to a decision relating to that dispute that involves an error as to law or fact that decision is a decision "within the meaning of the empowering legislation" because S 108 (3) H G C R A provides that "*the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration or……by agreement.*" Parliament has given provisional finality to the adjudicator's decision and laid down the mechanism whereby it may be challenged if in error.

201. Similar analyses were followed in those public and private law cases cited by Mr Bartlett.

202. Thus in **Anisminic** the question was whether the order of the Foreign Compensation Commission was within its powers under the Foreign Compensation Act and could it be the subject of challenge in court. It was held that the order in that case was susceptible of challenge. In **R v Lord President of the Privy Council Ex Parte Page** (1993) 682 the issue was whether the Visitor's decision within the power conferred by the relevant University requesting documents. In the absence of bad faith or of compliance with the requirements of natural justice it was held not to be susceptible of challenge. In **Racal Communications Ltd**. 1981 AC 374 the issue was whether a judge's decision could be challenged where S441 Companies Act 1948 provided that the decision was final. The Court of Appeal held that the empowering provision was sufficiently clear to oust the jurisdiction of the Court of Appeal to entertain an appeal. In **Boddington v B.T.Police** 1999 AC 143 the issue was whether the statutory regime whereby an anti-smoking bye law was made under the Transport Act as amended was capable of challenge in criminal proceedings. It was held that it was but in **R v Wicks** 1998 A.C it was held that an administrative act triggering consequences for the purposes of the criminal law could not be challenged in the criminal court because there already existed a prescribed mechanism to challenge the planning enforcement notice in question:

203. The regime whereby an Adjudicator's decision may be effectively challenged is now well settled. The construction placed on Section 108 of the HGCR Act 1996 and the statutory scheme by courts both in England and Wales and in Scotland; starting with the analysis in ***Macob*** and ***Outwing*** and has been consistently followed at first instance.

204. In ***Bouygues (UK) Limited v. Dahl-Jensen (UK) Limited*** *[2000] BLR 522* the Court of Appeal confirmed that errors of procedure fact or law are not sufficient to prevent enforcement of an Adjudicator's decision by summary judgment. That case was a striking example of where an Adjudicator had made an obvious and fundamental error, accepted by both sides to be such, which resulted in a balance being owed to the contractor where as in truth it had been overpaid. The Court of Appeal held that the Adjudicator had not exceeded his jurisdiction, he had merely given a wrong answer to the question which was referred to him. And, were it not for the special circumstances that the claimant in that case was in liquidation, so there could be no fair assessment on the final determination between the parties, summary judgment without a stay of execution would have been ordered.

205. In the course of his judgment at page 525 Buxton LJ approved the test formulated by Knox J in ***Nikko Hotels (UK) Limited v. MEPC Plc*** *[1991] 2 EGLR 103* at page 108B: *"If he answered the right question in the wrong way, his decision would be binding. If he has answered the wrong question, his decision would be a nullity".*

206. In ***CNB Scene Concept Design Limited v. Isobars Limited*** *[2002] BLR p93* ….Sir Murray Stewart-Smith giving the judgment of the Court cited **Bouygues** and at page 98 paragraph 24 went on to say:

*In **Northern Developments (Cumbria) Ltd v. J & J Nichols**, His Honour Judge Bowsher QC cited with approval the following formulation of principles stated by His Honour Judge Thornton QC **in Sherwood v. Casson**:*

24. a decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced;

a decision that is erroneous, even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced;

a decision may be challenged on the ground that the adjudicator was not empowered by the Act to make the decision, because there was no underlying construction contract between the parties or because he had gone outside his terms of reference;

the adjudication is intended to be a speedy process in which mistakes will inevitably occur. Thus, the Court should guard against characterising a mistaken answer to an issue, which is within an adjudicator's jurisdiction, as being an excess of jurisdiction;

an issue as to whether a construction contract ever came into existence, which is one challenging the jurisdiction of the adjudicator, so long as it is reasonably and clearly raised, must be determined by the Court on the balance of probabilities with, if necessary, oral and documentary evidence.

25. I respectfully agree with this formulation. I would also add, as I have already pointed out, the provisional nature of the adjudication, which, though enforceable at the time can be reopened on the final determination.

207. Mr Bartlett seeks to argue that this court is not bound by the two Court of Appeal decisions because they were per incuriam and in conflict with ***Anisminic*** *and* ***O'Reilly***. I reject that submission. The Court of Appeal decisions clearly endorse the approach followed by the Courts at first instance both in England and Scotland starting with the analysis by Dyson J of the Act and the Scheme in ***Macob*** which clearly follows the approach of the House of Lords in **Anisminic**.

208. In my view the position is well settled. I agree with the statement by his Honour Judge Thornton QC in ***Sherwood v. Casson***. And since it has been endorsed by the Court of Appeal, I am clearly bound by it.

209. If there was an error of law as to the finding of professional negligence against Waterman in a dispute properly within the remit of the Adjudicator, it is not within the power of this court to interfere with that finding, when considering whether or not to grant summary judgment under Part 24. In so far as I am siesed of the matter under Part 8, without hearing further evidence, I am not prepared to come to a final view on this matter.

210. These disputes arose at the very end of the contract. A party seeking "a provisionally final decision" in a complex case such as this and involving professional negligence clearly perceives an advantage in

doing so. It is a practice within the letter of the law and within the Act in Lord Ackner's contribution to the debate at the Report Stage in the House of Lords (Hansard, HL vol. 571 cols 989 to 990). *"What I have always understood to be required by the adjudication process was a quick, enforceable interim decision which lasted until practical completion when, if not acceptable it would be the subject of arbitrational litigation. That was a highly satisfactory process. It came under the Rubric of "pay now argue later", which was a sensible way of dealing expeditiously and relatively inexpensively with disputes that might hold up the completion of important contracts".*

211. A review as to the working of the Act in practice is perhaps now timely.

212. **Conclusion**

1. The application under Part 24 is refused.

2. In the light of my decision as to the Part 24 claim and in the absence other evidence it is not necessarily for me to deal with the Part 8 claim.

Mr Robert Akenhead QC and Mr Sean Brannigan (instructed by Berwin Leighton Paisner) for the Claimant

Mr Andrew Bartlett QC and Ms Kim Franklin (instructed by Berrymans Lace Mawer) for the Defendant