JUDGMENT : Mr Justice Akenhead : TCC. 25th July 2008

Introduction

1. This claim is to seek to enforce an adjudicator's decision and it is challenged on the grounds that the adjudicator was improperly appointed and thus had no jurisdiction and that there is apparent bias on the part of the adjudicator arising out of a telephone contact made before his appointment and some contact made several months after his decision. It raises interesting issues as to how adjudicator appointing institutions should go about selecting the adjudicator to be appointed.

The facts

2. The Claimant ("Makers") is a building contractor and the Defendant ("Camden") is a local authority. By a contract in writing dated 21 June 2006 ("the Contract"), Makers agreed to carry out concrete repairs, window repairs and renewals, external repairs and decorations, repair and renewal of above and below ground drainage, and hard and soft landscaping ("the Works") at Whittington Estate, Highgate, New Town, London N19 ("the Site") for Camden. The Contract sum was £4,337,511.17 or such other sums as might be due under the Contract from time to time.

3. The Contract terms incorporated the conditions of the JCT Intermediate Form of Building Contract (1998 Edition) with certain bespoke amendments. Clause 9 of the Contract provided:

   "9A-1 Clause 9A applies where, pursuant to article 8 [Articles of Agreement], either Party refers any dispute or difference arising under this Contract to adjudication.

   9A-2 The Adjudicator to decide the dispute or difference shall be either an individual agreed by the Parties or, on the application of either Party, an individual to be nominated as the Adjudicator by the person named in the Appendix ("the nominator") …

   9A-6-1 The Adjudicator in his decision shall state how payment of his fee and reasonable expenses is to be apportioned as between the Parties. In default of such statement the Parties shall bear the cost of the Adjudicator's fee and reasonable expenses in equal proportions…

   9A-7-1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given.

   9A-7-2 The Parties shall, without prejudice to their other rights under this Contract, comply with the decision of the Adjudicator; and the Employer and the Contractor shall ensure that the decision of the Adjudicator is given effect.

   9A-7-3 If either Party does not comply with the decision of the Adjudicator the other Party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 9A-7-1."

   The President or a Vice-President of the Royal Institute of British Architects ("the RIBA") was agreed by the parties as the nominator under Clause 9A.2.

4. Makers commenced the Works on 17 October 2005. Issues arose between the parties over variations and delays. Camden apparently sought to resolve these issues by dismissing the independent Contract Administrator on 18 April 2007 and appointing itself as Contract Administrator. Whilst Camden did appoint another independent firm on 3 May 2007, relations between the parties became very strained.

5. By notice dated 3 July 2007 ("the Default Notice"), Camden alleged that Makers was in default of their contractual obligation to proceed regularly and diligently with the Works. By notice dated 27th July 2007 ("the Determination Notice"), Camden asserted that that Makers had "*continued the default for 14 days from receipt of the Default Notice*" and purported to determine Makers' employment under the Contract.

6. Makers disputed this determination and sought to argue that it was invalid. It asserted that Camden had itself repudiated the Contract.

7. Makers instructed Fenwick Elliott LLP ("Fenwick Elliot") to represent them in the dispute with Camden. Dr Critchlow of Fenwick Elliot was the solicitor entrusted with daily conduct of the matter. It was decided by Makers that the matter, specifically the dispute as to whether Camden had repudiated the contract, would be referred to adjudication.

8. The RIBA panel of Adjudicators, which is apparently not published, was believed to comprise largely architects, a few of whom had a dual qualification as a barrister or solicitor. Dr Critchlow took the view that it would be desirable to have an Adjudicator who was legally qualified to deal with the issues of repudiatory breach and failure to proceed regularly and diligently. He decided, doubtless on instructions, that there was to be no attempt to agree an adjudicator with Camden.

9. On or shortly before 8 January 2008, Dr Critchlow undertook an internet search for an RIBA panel member with legal qualifications. He ascertained that a Mr Philip Harris of a solicitors' firm in the Midlands, Wright Hassall, was a member of the RIBA panel of Adjudicators. On 8 January 2008, Dr Critchlow telephoned the office of Mr Harris and left a message asking Mr Harris to return his call.

10. On 8 January 2008, Mr Harris telephoned Dr Critchlow. Dr Critchlow's contemporaneous telephone attendance note of the conversation reads: *"Philip Harris returned my call. He confirmed that he was available to act if asked on an adjudication between Makers and the London Borough of Camden that had legal issues arising. I said that it would be inappropriate, obviously, for me to give him more details at this time."* The note also records "*Time Engaged: 12 mins*".

11. By letter dated 11 January 2008, Makers served a Notice of Adjudication on Camden. Makers sought, among other things, a declaration that their dismissal from the site constituted a repudiatory breach of contract by Camden.

12. On the same day, Makers applied to the RIBA to request the nomination of an adjudicator. The application was made on the RIBA's standard form. On the form, Dr Critchlow wrote:

"Makers claims that Camden repudiated their Contract. This is a legal issue and it is suggested that Mr Philip Harris of Wright Hassell be appointed if available."

In the covering letter, which, unlike the application, would be seen only by the RIBA, Dr Critchlow wrote:

"Since the claim concerns the essentially legal issue of repudiation of contract, we respectfully invite you to nominate Mr Philip Harris of Wright Hassell if available."

13. By letter dated 14 January 2008, the RIBA nominated Mr Harris as Adjudicator; such letter went to both parties and a copy of the application was sent to Camden, which was when it was first seen by Camden. By fax dated 15 January 2008, and addressed to both Makers and Camden, Mr Harris accepted the appointment. He did not refer to the earlier telephone contact with Dr Critchlow.

14. On 16 January 2008, Camden sent a fax to Fenwick Elliot, copying in Mr Harris:

"We are in receipt of a copy of your application to the RIBA dated 11th January 2008 seeking the nomination of a person to act as adjudicator.

By this application Fenwick Elliot suggest "that Mr Philip Harris of Wright Hassell be appointed if available." This strikes us as a highly unconventional way of going about the nomination process…

Please confirm without delay the reasons why you put forward Mr Harris as a preferred candidate and provide us with details of the extent of his previous involvement with your firm and precisely what that involvement comprises so that we may satisfy ourselves as to the propriety of the appointment."

15. On 17 January 2008, Mr Harris wrote to Camden and Fenwick Elliot, the material parts of which are:

"For the avoidance of doubt, I can confirm that I was asked by Dr Critchlow of Fenwick Elliot if I would be available to undertake an adjudication and I indicated that I would be, by telephone.

I was subsequently telephoned by [the RIBA] and confirmed that I would act as Adjudicator.

As a solicitor, I have acted against Fenwick Elliot in a number of disputes over the past 15-20 years. I believe that I met Dr Critchlow on a case once, a good many years ago. I have no regular contact with any of the solicitors in Fenwick Elliot.

Simon Tolson of Fenwick Elliot is acting as Arbitrator in a case in which I represent one party at present, but other than that I have had no contact with Mr Tolson to my knowledge."

16. On 18 January 2008, Makers served the Referral document. Also on that date, Camden sent a fax to Fenwick Elliot, copying in Mr Harris:

"We remain of the view that the nomination is not a valid nomination within the terms of the Contract…

Camden now has the Referral by fax…and will take the necessary action to prepare its Response. We would emphasise however, that all steps taken in connection with this adjudication are without prejudice to our principle contention that the Adjudicator has not been validly appointed and therefore has no jurisdiction to decide the dispute."

17. On 21 January 2008, Mr Harris wrote to Camden and Makers:

"An Adjudicator does not decide the question of his own jurisdiction unless expressly empowered to do so. Nevertheless, the Adjudicator will continue with the adjudication in the face of a jurisdictional challenge, if he considers that he has jurisdiction to proceed.

As far as I can see, although Fenwick Elliot proposed my name to the RIBA, the RIBA exercised its unfettered discretion to nominate me as Adjudicator. I therefore consider that my appointment is valid and will proceed with this adjudication."

18. On 13 March 2008, the Adjudicator delivered his Decision, the parties having agreed that the time for reaching a Decision should be extended to 14 March 2008. The Adjudicator decided, among other things, that:

(a) Makers were failing to proceed regularly and diligently with the Works at the time of service of the Default Notice.

(b) Makers did not continue the default for 14 days from receipt of the Default Notice.

(c) Camden incorrectly served its Determination Notice on 27th July 2007. In serving the Determination Notice and requiring Makers to vacate the Site, Camden had repudiated the Contract.

(d) Makers had not repudiated the Contract.

(e) Camden was, within 7 days of the Decision, to pay the Adjudicator's fees, expenses and VAT thereon.*

(f) If Camden failed to pay the Adjudicator's fees as directed, then the fees were to be paid by Makers within 14 days and Makers would be entitled to recover those fees as monies recoverable in the adjudication.

* There is no issue that this is in the sum of £20,065.51.

19. Camden refused to pay the Adjudicator's fees specified in the Decision, maintaining that the Adjudicator's decision is void because he was not appointed in accordance with the terms of the Contract and/or unenforceable on the grounds of apparent bias. Makers has paid the Adjudicator's fees in full.

These Proceedings

20. Makers issued proceedings in the TCC on 9 May 2008. It seeks a declaration that the decision is valid and enforceable and £20,065.51 representing the Adjudicator's fees as paid by it. On 19 May 2008, Makers issued an application for Summary Judgment. Directions were given which led to the service by Camden of its Defence and Counterclaim, the exchange of witness evidence (Theresa Mohammed and Dr Critchlow for Makers and Claire Miller for Camden) and the exchange of Skeleton arguments from Counsel on each side. Concern was expressed that a complaint of professional misconduct was being made about Dr Critchlow but that was expressly eschewed.

21. Mr Harris wrote to the Court by letter dated 1 July 2008 setting out his position, the relevant parts of it being:

"It has been suggested by Makers' solicitors that I should write to the learned judge and I am happy to do so…
…I confirm that the contents of this letter are true to the best of my knowledge and belief.
I am a construction lawyer based in Leamington Spa. As such, I am not regarded as a high profile character within construction law circles.
My practice is pure construction but is extremely widely based. I act for developers and institutions, registered social landlords and a variety of ad hoc employers such as a steam railway and various golf clubs.
I act for a raft of second tier main contractors operating below the PFI level.
I have also considerable experience of specialist sub-contractors and suppliers and have acted for them throughout my career.
I have also undertaken works for banks, funders and insurance companies, all in relation to construction.
I consider that there is no ascertainable bias in my perspective of the construction industry.
I am an adjudicator on various panels, including the CIC, RIBA, TeCSA, CIOB and other nominating bodies…
On or about 8 January 2008 I received a telephone call "out of the blue" from Dr Julian Critchlow of Fenwick Elliott which I returned. I do not have a perfect recollection of the telephone conversation. However, Dr Critchlow introduced himself as a solicitor with Fenwick Elliott. He reminded me of a case in which we had both been involved many years before. I do not recall the details but I do not believe we were on the same side.
Dr Critchlow then asked me if I would be available to act as an adjudicator. Again, I do not have perfect recall, but I believe that I would have asked for the names of the parties, since this is my usual practice, when I am contacted to act as adjudicator. In order to ascertain that there is no conflict. In any event, I was not conscious of any conflict and therefore responded that I was available to act as adjudicator. This may have involved checking a paper diary and an electronic diary, both of which would have been immediately available to me.
I can confirm that Dr Critchlow did not in any way question me about my views or my standpoint on any particular matters, either relating to the dispute between Makers and Camden, or otherwise.
I was subsequently contacted by Adam Williamson of the RIBA…
If it assists the Court, I can confirm that I have not had any prior contact before the adjudication with Makers or…Camden.
My contact with Fenwick Elliott has been extremely sparse over the 22 years of my career as a construction lawyer. To the best of my knowledge, I have only been involved in a handful of matters where Fenwick Elliott were on the other side…"

22. Essentially, Camden argue that there is an implied term of the Contract whereby "*neither party may seek to influence unilaterally the nominator's determination regarding the identity of an adjudicator, by making unilateral representations to the nominator concerning whom he should nominate or otherwise*" (from Camden' Counsel's skeleton); I will call this the *"Implied Term"*. That, it argues, was breached here so that any appointment is null and void leading to Mr Harris not having jurisdiction. Secondly, it argues in effect that there is an appearance of bias such that the decision should not be enforceable, such bias arising primarily out of the telephone contact between Dr Critchlow and Mr Harris prior to his appointment. Actual bias is not alleged. Makers reject all the arguments put forward by Camden.

The Implied Term

23. Clause 9A.2 is simply expressed: *"The Adjudicator to decide the dispute or difference shall be either an individual agreed by the Parties or, on the application of either Party, an individual to be nominated as the Adjudicator by the person named in the Appendix"*

It clearly complies with the Housing Grants Construction and Regeneration Act 1996 ("HGCRA") and reflects (not that it has to) broadly the nomination provisions of The Scheme for Construction Contracts (England and Wales) Regulations 1998 (S.I. 1998 No. 649) ("the Scheme").

24. The ordinary principles relating to the implication of terms will apply. Sir Kim Lewison says at Page 204 in his book, The Interpretation of Contracts, quoting ***BP Refinery (Westernpoint) Pty Ltd v Shire of Hastings*** (1979) ALJR 20,

"In order for a term to be implied the following conditions must be fulfilled:-
(1) it must be reasonable and equitable;
(2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
(3) it must be so obvious that it goes without saying;
(4) it must be capable of clear expression;
(5) it must not contradict any express term of the contract."

In broad terms, this is a proper reflection of the law.

25. Camden relies upon ***Mosvolds Rederi A/S v Food Corp of India*** [1986] 2 Lloyd's Rep. 68 in which Steyn J (as he then was) referred to implied terms:

*"Sometimes it is said that a term is implied into the contract when in truth a positive rule of law of contract is applied because of the category in which a particular contract falls. Another type of implied term is a term in order to give business efficacy to the contract. The basis of such an implication is that the contract is unworkable without it. There is, however, another form of implication. It is not permissible to imply a term simply because the court considers it to be reasonable. On the other hand, it is possible to imply a term, if the court or arbitrator, as the case may be, is satisfied that reasonable men, faced with the suggested term which ex hypothesi was not expressed in the contract, would without hesitation say: '**yes, of course that is so obvious that it goes without saying**.' "*

This adds nothing to the general statement referred to above.

26. Camden also relies upon some further elucidation provided on the topic of implied terms in the Court of Appeal decision of ***Crossley v Faithful & Gould Holdings Ltd*** [2004] 4 All ER 447, an employment case, Dyson L.J. drew some distinction between an implied term as a legal incident of a contractual relationship and a tailor-made implied term. Of the former, he said, in the context of that particular case and in reviewing the first instance judgment, in particular supporting that judge's rejection of a *"portmanteau"* implied term of care of care "*for the economic well-being of*" the employee" at Page 458 b:

"This would be a standardised term to be implied by law, that is to say a term which, in the absence of any contrary intention, is an incident of all contracts of employment. It is not a term implied to give business efficacy to the particular contract in question which is dependent on an intention imputed to the parties from the express terms of the contract and the surrounding circumstances."

27. Addressing the submission that the test was one of necessity, Dyson L.J. continued at page 459 b:

"It seems to me that, rather than focus on the elusive concept of necessity, it is better to recognise that, to some extent at least, the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations."

I do not consider that Lord Justice Dyson was rejecting the "*necessity*" element of the implication of terms; that is too well established in English law. He found it simpler to concentrate in that case on the other elements.

28. Camden argue that its implied term should be implied as a legal incident of the adjudication process, because it is not only applicable to the Contract in the present case and in the circumstances of the present case or only to Clause 9A.2 of the standard form of building contract used here, but rather is applicable to all adjudication agreements conforming to the requirements of sub-sections (1) to (4) of Section 108 of the HGCRA, unless a contrary intention is plainly expressed in any such agreement, and to the adjudication provisions of the Scheme. Makers argue that, however one looks at the suggested implied term it is not one that need or ought to be implied.

29. I have formed the view that the Implied Term can not or should not be implied. My reasons are as follows:

(1) Clause 9A.2 gives the parties or each of them the option of seeking to agree upon a particular adjudicator or to seek an appointment in this case from the RIBA.

(2) There is nothing in Clause 9A.2 which expressly bars the party seeking the appointment from the RIBA making representations to the RIBA as to the attributes or even the name of the person to be appointed.

(3) The RIBA is an independent, respectable and respected institution, which holds itself out as able to nominate adjudicators as well as having a very longstanding history of nominating arbitrators in building disputes. There has been no suggestion that the RIBA would be in breach of its own rules if it listened to and even acted upon representations as to the attributes or identity of the person to be nominated by it.

(4) There is no need to imply a term along the lines suggested by Camden. The system of nomination can work satisfactorily even if representations are made by the party seeking nomination. The RIBA can take or leave the representations.

(5) It is not necessarily wrong or unhelpful for a party to make representations. For instance, if the dispute is one which is very technical, say involving thermo-dynamics, it might be very sensible for the RIBA to be so informed. Similarly, if it was known that one or more of the people on the RIBA Panel of adjudicators were conflicted out, it would be sensible for the RIBA to be informed. It would be pointless for the RIBA to nominate someone who would either have to turn down the appointment or whose decision could be challenged on the grounds of bias.

(6) Thus, the main mischief said to arise against which the Implied Term would guard, namely to prevent <u>unilateral</u> representations by the party seeking a nomination, has no obvious support in commercial and practical terms.

(7) It might be possible to imply a term by which the party seeking a nomination should not suborn the system of nomination. Thus, (wholly irrelevant here) bribing the nominator would by one route or another invalidate the nomination or the nomination of someone one knew was actually biased in favour of the requesting party could be undermined. In the latter example, the adjudicator's decision would in any event be unenforceable on non-jurisdictional grounds. However, that term is not alleged in this case and the facts do not begin to support a breach of such a term.

(8) If someone who is unwittingly put forward by a party to the nominating body is biased, actually or ostensibly, one or other party can resist enforcement of the subsequent decision on that ground. The law already provides a remedy; this is at least a pointer away from the need to imply a term.

(9) I accept that it is at least not uncommon for parties seeking a nomination to suggest either a particular individual or that whoever is nominated should have particular attributes or experience. There was evidence about this and it is what happened in ***AMEC Capital Projects Ltd v Whitefriars City Estates Ltd*** [2004] EWCA Civ 1418.

I am unconvinced that, even if the Implied Term applied, a breach of it would, in the absence of impropriety, undermine or invalidate the appointment of the adjudicator. The appointment would still be valid having resulted from an application for nomination and the nominator, acting in good faith, would formally have nominated a person properly. The remedy would be damages for breach of the Implied Term, which could include the wasted costs of the adjudication.

Bias

30. The Court of Appeal has considered challenges on the grounds of bias in ***AMEC Capital Projects Ltd v Whitefriars City Estates Ltd.*** Lord Justice Dyson said at Paragraphs 22 and 37:

"It is easy enough to make challenges of breach of natural justice against an adjudicator. The purpose of the Scheme of the 1996 Act is now well known. It is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement. The intention of Parliament to achieve this purpose will be undermined if allegations of breach of natural justice are not examined critically when they are raised by parties who are seeking to avoid complying with adjudicators' decisions. It is only where the defendant has advanced a properly arguable objection based on apparent bias that he should be permitted to resist summary enforcement of the adjudicator's award on that ground…

The passage in the conversation which led the judge to hold that a fair-minded and informed observer might well have concluded that there was a real possibility of bias was the statement by [AMEC's solicitor] that the reason why the dispute was being referred to [the Adjudicator] was that his familiarity with the facts would save time and costs… I do not accept that this remark amounted to an invitation to [the Adjudicator] to reach the same decision as on the previous occasion, still less that it is to be inferred that there was a real possibility that [the Adjudicator] would reach the same decision by reason of that remark. I would accept that conversations between one party and the tribunal in the absence of the other party should be avoided. Communications should ordinarily be in writing with copies to all parties. But I see nothing in the circumstances of this conversation, which arose out of an innocuous telephone call to [the Adjudicator's] office, which would lead the fair-minded and informed observer to conclude that what was said would give rise to a real possibility of bias."

31. That case involved an adjudication by an adjudicator who had been successfully challenged on the ground that he did not have jurisdiction in an earlier adjudication. Upon the application of the successful party, such application suggesting that the same adjudicator be appointed, the RIBA duly appointed him. Lord Justice Dyson confirmed that the test propounded in ***Porter v Magill*** [2002] 2 AC 357 for apparent bias applied:

*"It is rightly not in dispute that the rule against bias applies to adjudicators appointed to determine disputes under the 1996 Act. It is not said on behalf of Whitefriars that Mr Biscoe was in fact biased in reaching his second decision. It is, however, submitted that his decision should be declared to be invalid on the grounds of apparent bias. The test for apparent bias is not in doubt. It is whether a fair-minded and informed observer, having considered all the circumstances which have a bearing on the suggestion that the decision-maker was biased, would conclude that there was a real possibility that he was biased: **Porter v Magill**…"* (Paragraph 16)

Camden only puts forward apparent bias as a ground for complaint.

32. Dyson LJ also endorsed as useful guidance given in ***Locabail (UK) Ltd v Bayfield Properties Ltd*** [2000] QB 451 at Paragraph 25 of the judgment in the Court of Appeal:

*"It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit local Law Society or chambers (see **K.F.T.C.I.C. v Icori Estero S.p.A.** (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6, 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of an individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see **Vakauta v Kelly** (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in*

the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

33. The facts relied upon as giving rise to apparent bias have been set out in Camden's Counsel's skeleton submissions. I summarise them:

(1) Dr Critchlow made a deliberate decision not to attempt to agree the identity of an adjudicator with Camden.

(2) Mr Harris was selected on behalf of the Makers as its preferred adjudicator for the forthcoming adjudication.

(3) Then, without any reference to Camden, on 8 January 2008 Dr Critchlow spoke on the telephone to Mr Harris apparently to discuss the latter's availability to act on a forthcoming adjudication between the Claimant and Camden.

(4) Dr Critchlow's telephone attendance note recording that he was engaged on that telephone call for 12 minutes; the short narrative on the note would not appear to explain a 12 minute telephone conversation.

(5) Dr Critchlow did not inform the RIBA of his conversation with Mr Harris. The covering letter and application form do not state that the invitation to nominate Mr Philip Harris is being made unilaterally on behalf of Makers and without the knowledge of Camden.

(6) Mr Harris did not disclose to Camden the fact that there had been any previous telephone contact with Dr Critchlow prior to his appointment as adjudicator by the RIBA, when Mr Harris wrote to Camden on 15 January 2008 announcing that he had been nominated as adjudicator by the RIBA.

(7) Fenwick Elliott's letter of 18 January 2008 still made no reference to Dr Critchlow's unilateral telephone approach to Mr Harris. This letter was. it is alleged, "*untrue*" in stating that Mr Harris was put forward solely because he was the only legally qualified adjudicator on the RIBA list whom Fenwick Elliott was able to identify. Dr Critchlow in his witness statement now accepted that he believed that he had, in fact, identified one other fully qualified RIBA List Member, but had not deemed him suitable for this case.

(8) There has been some "*ongoing communication between Fenwick Elliott and Mr Harris, to which Camden is not being made privy",* as referred to in Mr Harris's letter of 1 July 2008 to the Court and corroborated by Makers' Summary Costs Bill which suggests that a total of 2 hrs and 18 minutes of different individuals' time has been allocated to "*Attendances on Adjudicator*".

(9) It is said that the tenor of Mr Harris's letter to the Court gives rise to concern as arguing Makers' case before the Court. It is said that there is a discrepancy between his letter to the parties of 17 January 2008 ("*As a solicitor, I have acted against Fenwick Elliott in a number of disputes over the past 15-20 years*"), and his recent letter ("*My contact with Fenwick Elliott has been extremely sparse over the 22 years of my career as a construction lawyer*.").

34. One must judge apparent bias objectively, by the standards of the "*fair-minded and informed observer*" referred to in ***Porter v Magill***. The fact that individuals within Camden are subjectively concerned or distressed by what has happened is not in itself material. Parties to adjudications must avoid making mountains out of molehills even where something happens which is outside their immediate experience.

35. There is no apparent bias in this case. My reasons for forming this view are:

(1) There was no obligation on Makers to liaise with Camden before applying to the RIBA for the nomination of an adjudicator.

(2) It is wrong to describe Makers as "*selecting"* Mr Harris; ultimately, the RIBA selected him.

(3) Whilst there is no positive encouragement for a party to contact a potential adjudicator to check his availability, there is no discouragement in the contract. Such contact if limited to checking availability or checking if there is any conflict is in itself unexceptionable and can be a sensible and practical step to take.

(4) As to the telephone attendance note, there is nothing suspicious in the "*Time Engaged*" being 12 minutes. There were two telephone calls, the first being abortive. The second is not inconsistent with there being some time spent on the telephone discussing the limited matters as suggested in the attendance note itself, Dr Critchlow's witness statement in these proceedings and the Adjudicator's letter to the Court. One must bear in mind that solicitors have a charging "*unit"* which is often 6 minutes; that was confirmed here. Thus, the telephone calls could have been one and two minutes respectively and 12 minutes charged for. Of course "*Time Engaged"* does not exclusively refer to the telephone calls; for instance, the writing up of the Note would probably be included in the 12 minutes *"booked"*.

(5) There was nothing reprehensible in Dr Critchlow not mentioning to the RIBA or Camden that he had contacted for limited purposes the person whose name he was putting forward. Makers had no obligation to do so.

(6) No suspicion arises because in his first letter to the parties Mr Harris did not mention to Camden the previous telephone contact with Dr Critchlow. There was nothing untoward in there having been such contact. It might have been different if an adjudicator positively misled the parties about such contact but that is not the case here.

(7) For similar reasons, no suspicion arises because Fenwick Elliott did not mention this fact in its first letter post Mr Harris' appointment. The apparently incorrect statement in that letter that Dr Critchlow had found only one

legally qualified adjudicator on the RIBA panel of adjudicators is unfortunate but it was put right in his statement to the Court.

(8) The fact that Fenwick Elliott contacted Mr Harris apparently several months after the decision was issued clearly to ask him to put his version of events to the Court was not improper. It happens that the arbitrator is notified as a matter of course in arbitration where it is the invariable practice in the TCC and the Commercial Court that the arbitrator is served with the Court papers at least where serious irregularity is asserted. There is no such practice currently in the TCC for service of the papers on an adjudicator where similar complaints are made, but consideration may well have to be given to introducing it. Whilst it would have been better if Makers' solicitors had simply sent him a letter, copied to Camden, asking him, if he so wished, to comment to the Court about the challenge to his decision, I do not consider that a direct approach by one party some time after the decision is given gives rise to the appearance of bias. Both sets of participant in such contact as there was between Fenwick Elliott and Mr Harris are qualified solicitors of many years experience, who would know of the need to avoid any impropriety.

(9) I do not read Mr Harris' letter to the Court as arguing Makers' case. He describes the telephone call and such limited contact as he has had with Fenwick Elliott and individual partners over some 20 years; that is unexceptionable; and there is no reason to doubt the truth of what he says. He seeks to suggest that he is not one who has a particular affinity with claiming contractors in adjudication; again, that is helpful for the Court to know. The attempt to create a material discrepancy out of minor and immaterial verbal differences between statements of Dr Critchlow does not assist in determining this matter.

36. The Court is urged that, even if it is against Camden on each individual matter raised by it, taken overall, and given the possible importance of the issues raised in the case, summary judgment is inappropriate. I am mindful however of the numerous authorities that point inexorably to the prompt enforcement of valid adjudicators' decisions. I am mindful of the sentiments expressed by Lord Justice Chadwick In ***Carillion Construction Ltd v Devonport Royal Dockyard Ltd*** [2005] EWCA Civ 1358 :

"85.The objective which underlies the 1996 Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted…in the present case; which may, indeed, aptly be described as 'simply scrabbling around to find some argument, however tenuous, to resist payment'…

87.in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the Scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense…"

Whilst this case does raise several issues of practical importance for those involved with adjudication in this country, it is more important for the parties, at least for Makers, that promptness in addressing the issues in not subordinated to the Court's need to address the issues of principle and practice, which it can do in any event in this judgment, following extensive argument by experienced Leading Counsel. So far as the facts are concerned, I do not consider that the matters raised do give rise overall to any suspicion against Makers, its solicitors or Mr Harris.

37. **General observations**

This case has thrown up a number of points upon which it may be helpful if some guidance is given which might be of practical help to people and parties involved in the adjudication process under the HGCRA:

(1) It is better for all concerned if parties limit their unilateral contacts with adjudicators both before, during and after an adjudication; the same goes for adjudicators having unilateral contact with individual parties. It can be misconstrued by the losing party, even if entirely innocent.

(2) If any such contact, it is felt, has to be made, it is better if done in writing so that there is a full record of the communication.

(3) Nominating institutions might sensibly consider their rules as to nominations and as to whether they do or do not welcome or accept suggestions from one or more parties as to the attributes or even identities of the person to be nominated by the institutions. If it is to be permitted in any given circumstances, the institutions might wish to consider whether notice of the suggestions must be given to the other party.

Conclusion

38. There will be judgment for Makers against Camden.

Edwin Glasgow QC and Karim Ghaly (instructed by Fenwick Elliott LLP) for the Claimant
David Matthias QC (instructed by Camden Legal Services) for the Defendant