

JUDGMENT : HIS HONOUR JUDGE GILLILAND Q.C. TCC. Salford District Registry. 27th January 2006.

1. There are 2 actions before the court. The first is an action by the adjudicator, Dr. Rankilor, to recover one half of his fee from the unsuccessful referring party, M. Igoe Limited ("Igoe") in an adjudication between Igoe and Perco Engineering Services Limited ("Perco") conducted by Dr. Rankilor in February and March 2005. The second is an action by Perco to enforce Dr. Rankilor's decision that Igoe should within 7 days of his decision pay Perco £18,344.08 plus VAT, totalling £21,544.29 together with interest and that his fee should be paid by Igoe and Perco in equal parts. Perco has paid Dr. Rankilor its half of Dr. Rankilor's fee. Igoe has refused to pay either Dr. Rankilor or Perco. The amount claimed by Dr. Rankilor against Igoe is £2,100 plus VAT of £367.50 and interest.
2. Igoe has refused to comply with Dr. Rankilor's decision on the ground that Dr. Rankilor reached his decision in breach of the rules of natural justice and that accordingly his decision is not binding upon them. There has been no suggestion that Dr. Rankilor in any way acted in bad faith. Neither has it been said that Dr. Rankilor did not consider the evidence and submissions which were made to him. The complaint made by Igoe is that Dr. Rankilor made findings of fact and/or reached conclusions based upon his own expert assessment of a laboratory analysis which had been produced by Igoe when such findings and /or conclusions had not been contended for by either Igoe or Perco and when Igoe had had no opportunity to comment upon those findings or conclusions.
3. It has not been suggested by Igoe that Dr. Rankilor was not entitled to use his own expert knowledge when assessing the evidence or submissions. The adjudication was conducted pursuant to the Institution of Civil Engineers' Adjudication Procedure (1997) which was incorporated into the contract between Igoe and Perco and under paragraph 1.4 of the Procedure it is expressly provided that the adjudicator could rely upon his own expert knowledge and experience. The way in which Igoe puts its case is that because neither Perco nor Igoe had contended for the conclusion drawn by the adjudicator, Igoe had not had any inkling that it needed to address the point and that it had not done so. Igoe's contention is that basic fairness demands that Igoe should have had the opportunity of producing evidence and/or of making submissions in response. It has been submitted that Dr. Rankilor having formed a preliminary view as a result of his consideration of the laboratory results should have notified the parties of his preliminary view and invited submissions from the parties on the point.
4. The dispute which was referred to adjudication was the question what was the amount to which Perco was entitled for auger boring work which it had carried out as Igoe's sub-contractor at a building site at Middlewich in Cheshire. The sub-contract was a fixed price contract and the agreed time for completing the work was alleged by Igoe to be 10 days. There is no dispute that Perco encountered difficulties in carrying out the work. When Perco in October 2004 attempted to bore the first section of the work, it found that it was unable to direct the auger properly and the piloting operation failed. Igoe then instructed Perco to proceed to bore the second section of the work which Perco proceeded to do. Perco again found difficulty in carrying out the work, but it was able to complete the second section although it took longer than 10 days. By this time Igoe had decided that first section of the work should be completed using traditional excavating procedures and Igoe asked Perco to leave the site with the first section uncompleted. Perco left the site.
5. A dispute then arose as to the amount to which Perco was entitled to be paid. Perco's position was that unforeseen ground conditions had been encountered and that under the contract with Igoe it was entitled to extra payment for dealing with the unforeseen ground conditions and was not in breach of contract in taking more than 10 days on the work. Perco, as appears from its response in the adjudication, claimed to be entitled to a total payment of £46,421.92 plus VAT. Igoe considered that the amount properly to Perco was £20,130.92 plus VAT and it paid that amount to Perco. Igoe's position was that the difficulties which Perco had encountered were matters which Perco should have taken into account when quoting for the work and were not due to unforeseen ground conditions. Igoe's contention was that Perco had been told before the contract that the ground was clay and that the ground encountered was clay.

6. Igoe referred the dispute over the amount payable to Perco to adjudication and sought a declaration that the proper amount was the £20,130.92 already paid to Perco. There was also a claim that Igoe was entitled to contra charge Perco £9,392.63 as a result of delays by Perco and repayment was sought.
7. The adjudicator made his Decision on 15 March 2005. In his Decision Dr. Rankilor found that Igoe was not entitled to make any contra charge and he reduced the amount of Perco's claim from £46,451.92 to £38,478 because Perco had withdrawn part of the claim and also because he considered that the man hours working on site claimed by Perco should be reduced "*based upon my experience of site working practices*". Otherwise he rejected Igoe's claims and he found for Perco. Under the heading "**Summary of Findings**" the adjudicator stated as follows:
 1. *Igoe was correct in describing the soil as clay during the site meeting of the 8th July 2004.*
 2. *Igoe did not provide Perco with a site investigation report and thus Perco was unaware of the highly compact nature of the clay soil, which was subsequently demonstrated by a post contract site investigation conducted by Igoe.*
 3. *The laboratory tests results issued by Igoe showed that the clay soil was exceptionally compact and dense - sufficiently so as to give a high level of support to the assertions of Perco that the ground caused the technical and progress problems experienced.*
 4. *Assertions by Igoe that the boring equipment was in poor condition were not persuasive and were rebutted by evidence provided by Perco with regard to the recent date of purchase of the boring machine.*
 5. *The contract contained a number of protective clauses in favour of Perco. These clauses are relevant under the circumstances outlined above. They entitle Perco to compensation for delays and consequences of delays owing to the unforeseen nature of the ground conditions and the incompressibility of the soil.*

In its Standard Terms and Conditions, the Respondent had :

Item 3.7 "...Perco will be able to charge the Employer all reasonable additional cost incurred by Perco where ...the ground is not compressible..." "

Additionally, in consideration of claims, the Respondent had certain terms in its Quotation (and thus in The Contract) that catered for unexpected ground conditions. In its Standard Terms and Conditions, the Respondent had:

Item 3.12 "Perco cannot accept responsibility for delay or additional-costs caused by ...unexpected ground conditions."

Item 3.14 "Where the works are undertaken using directional drilling Perco's quotation is based on the ground conditions being conducive to the use of conventional directional drilling techniques in soft displaceable formations."

Item 3.15 "Perco reserve the right to charge the Employer for all additional costs incurred by Perco in overcoming unforeseen ground conditions."

- 6 [deals with quantum and already summarised above].
- 8 Under the heading of "**Items Decided**", the adjudicator then set out the amount of the final account before contra charge, rejected the claim to contracharge Perco and directed payment of the sums he found to be payable to Perco, costs and the ICE appointment fee and his own fees. In addition to providing his formal Decision, Dr. Rankilor also provided the parties with another document, also dated 15 March 2005. This document is headed "**Matters taken into consideration by the Adjudicator in making his Decision**". In his formal Decision Dr. Rankilor referred to this document and observed that while under the ICE Adjudication Procedure reasons may not be requested nevertheless "*to assist the parties in understanding the Decision, at the discretion of the Adjudicator, some matters taken into consideration have been attached to this Decision as an Appendix.*". It was submitted by counsel for Perco and Dr. Rankilor that this document was not part of the actual decision of the adjudicator and that it had been provided for information purposes only and that Igoe thus did not have a reasoned decision. Nevertheless I am satisfied and hold that it may be taken into account by the court as a document evidencing some of the matters in fact considered by the adjudicator and insofar as it does state any

reasons for his decision regard may be had to them. It should be noted however that Dr. Rankilor expressly said in the Decision that these are "*some matters*" which he took into account and the document does not necessarily give rise to a fully reasoned decision. In fact Dr. Rankilor has without any objection from Igoe given evidence both in a witness statement and in cross-examination of how he arrived at his decision and of the factors influencing him in reaching his decision in favour of Perco.

- 9 The matters to which Igoe takes exception as having been arrived at in breach of the principles of natural justice appear both in the Decision itself and in the Appendix. They relate to the density of the soil which had been encountered. In the Decision findings appear in paragraphs 2 and 3 of the summary of findings that the clay soil was "*highly compact*" (para.2) and that the laboratory test results showed that the clay soil was "*exceptionally highly compact and dense*" (para.3). In the Appendix, Dr. Rankilor explains that his reading of the laboratory test results which had been provided by Igoe showed that the soil was "*exceptionally dense at 93% [maximum density] and denser than should be expected for a natural soil. It would not surprise me if the soil were in fact a constructed engineering soil or had been subject to heavy glacial surcharging*". Dr. Rankilor's conclusion as expressed in the Appendix was that the "*soil was in fact, according to the laboratory test information provided to me, virtually incapable of being displaced by the machine. It was classified as LBM 3, but its in-situ density was so great as to make it unsuitable for the use of the machine. Had a site investigation and laboratory testing been undertaken beforehand, this information would have been available to an experienced geotechnical engineer who could have deduced it in advance*".
- 10 It is important when assessing the impact on the adjudication of Dr. Rankilor's findings and conclusions in relation the density of the clay soil to place them in context within the adjudication. Igoe's Referral does not clearly set out its case as to why difficulties had been encountered by Perco. The rival contentions are however to be found in the correspondence attached to Igoe's referral, and in Perco's response. Perco first raised the issue of ground conditions in its letter wrongly dated 8 July 2004 but actually sent on 8 October 2004 soon after the difficulties with the piloting rods had been first encountered. In this letter Perco referred to "*skin friction*". In a later letter dated 18 October Perco referred to "*unforeseen ground*". Igoe's response was set out in a letter dated 26 October 2004 stating that the ground was clay as Perco had been told before the contract and suggested that the reason for Perco's difficulties might be due to "*the quality of your equipment, which by its frequent problems and breakdowns was plainly long past its renewal date*". In a letter dated 2 November 2004 Perco referred to its method statement where in Para.2.6 it had been stated that "*extremely cohesive soils and some sands can cause excessive skin friction which may reduce progress and achievable installation lengths*" and that their quotation had had to be based on the limited information given and that was why they had qualified their quotation.
- 11 Igoe, after the dispute had arisen, commissioned laboratory tests from GeoAssist Limited on 2 samples of soil said to have been taken from the line of the first bore. The results were provided to Igoe under cover of a letter dated 10 December 2004. 4 pages from the test results were included in Igoe's referral. They included 2 particle distribution graphs for samples D1 and D2 and a Summary sheet classifying the 2 samples as being brown sandy, or very sandy, silty clays with occasional gravel and as having moisture contents of respectively 14% and 19% and shear cohesion of 56 kN/m² and 57 kN/m² respectively. The graphs stated that the Particle Density had an assumed value of 2.65. This is a conventional figure often used by engineers and was not an actual measurement of the density of the particles in the 2 samples.
- 12 In its referral Igoe referred to these results as confirming that the soil was "*clay*" (p.18 of the bundle). Perco responded to the ground investigation results in a letter dated 14 December (p.113 of the bundle and part of the documents submitted with the referral) observing that the ground investigations showed that the ground was far from being a clay in the classic sense of a London or Oxford clay and had a high proportion of silts and sands. The letter then went on to assert: "*These elements detract from the structural properties of clay, ie "standup" time which is exactly the problem suffered by Perco on this contract. The ground collapsed back on to the casings resulting in extremely high skin friction and consequently*

a process of casing recycling with larger over cut bands". At this time inquiries were also being made by Igoe as to the age of the machine used by Perco in support of its suggestion that the machine had been an old machine and past its renewal date. The outcome of inquiries from the manufacturer and the supplier showed that the machine was about 18 months old. There was no dispute between the parties that, the soil at Middlewich was classed as a LBM 3 cohesive soil or that the manufacturer's specification for the machine used by Perco indicated that it was suitable for use with displaceable soils of LBM 1 to 3.

- 13- In its response in paragraph 4 Perco referred to skin friction as the cause of the difficulties and although querying where precisely the 2 samples examined by GeoAssist had been taken from and how they had been treated before being tested again referred to the results as supporting their claim of high skin friction and referred to the letter dated 14 December as the reason for the difficulties encountered. In paragraph 4.15 the method statement was referred to with its warning in relation to extremely cohesive soils and some sands producing high skin friction. Perco also included an extract from BS 5930 ;1981. This was a page showing 2 tables. The first was a table of strength scale guide for cohesive material relating terms such as soft, firm, and stiff clays to their undrained shear strength. On the basis of GeoAssist's analysis, the 2 samples would be classed as firm clays. The other table was an assessment of Relative Density for Granular soils relating terms such as loose, dense and very dense to S.P.T.N values which were described as blows for 300mm penetrations. There was no specific commentary in Perco's response about these tables. There was a reference in paragraph 4.3 to the document but it seems to have been in relation to the table of shear strengths and in support of the proposition that clays had a wide range of properties with strengths ranging from very soft to hard. There was no specific reference to the density of the clay in para.4.3. It is clear however from Perco's response and attached documents that Perco was asserting 3 things. First that they had encountered unforeseen ground conditions the risk of which under the contract was on Igoe. Secondly that what had caused the problems they had encountered was high skin friction which had prevented the auger from performing as it should and could properly have been expected to perform. Thirdly that the cause of the high skin friction was the fact that the clay did not "stand up" but rather "collapsed back" onto the drill. Igoe did not in terms deal either with the suggestion that skin friction was the reason for any difficulty which had been encountered or what had been the cause of any skin friction. Igoe's position was that the ground was clay and that that had been known to Perco from the outset.
- 14 Igoe then submitted a reply to Perco's response. Under the heading of ground conditions and economical working, Igoe agreed that the ground had been described as clay. No specific comment was made about the extract from BS 5930 beyond agreeing that clay was a broad term. Included with the reply was a short report dated 4 March 2005 from Mr. Joyce, a consultant engineer and geologist whom Igoe had engaged. The substance of his report was that there could be little doubt that the boring machine chosen by Perco should have been adequate for the job in that the machine had a capability of boring in stiff clays of up to 150 kN/m² shear strength whereas the 2 samples were well within that capability. The conclusion which he drew was that Perco's estimate of time had been wrong, that the machine had been faulty, that the machine had not been operated properly, or that something different from the clay described in the samples had been encountered. He then indicated that the geological map for the area showed the area was underlain by a glacial boulder clay, but that no boulders had been encountered. There was also a short witness statement from Mr. Igoe stating that no boulders or rocks had been encountered during the excavation of the first section which had been excavated with an excavating machine. It is clear that Igoe was maintaining its position that Perco had know[n] *sic* of the presence of clay from the outset and in so far as any reason for the problems which had been encountered was being put forward by Igoe, the reason was the machine used by Perco had been faulty. Perco then made a brief response denying that it had refused any ground information when offered as Igoe had claimed in its reply. Perco then emphasised that the issue was that of skin friction. Perco took up a point which Mr. Joyce had made at the top of page 2 of his report that the clay was a somewhat weaker than either London Clay or Oxford clay. Perco (4.10) said that this was precisely its point. *"The fact that the clay is weaker due to the amount of secondary constituent, ie sands and silt has results (sic) in the overcut collapsing back on to the casing and pilot rod*

causing excessive skin friction. The sand and silt turn the geology into a free water strata that allows the water to run washing sands and silt again weakening the ground. The "classic clays" would not act in this way as they "stand up" over a greater time span and as such do not cause problems with skin friction".

- 15 Dr. Rankilor has given evidence that when he received Igoe's referral, he read it and reached a provisional conclusion in favour of Perco based on the view that Perco had encountered unforeseen ground conditions the risk of which under the contract was on Igoe and not Perco. In reaching this view he relied in particular upon Perco's terms and conditions. It was his view that Perco did not have to explain how the ground conditions had caused the difficulties and that it was sufficient that Perco should in fact have encountered unforeseen ground conditions. He did not consider that Igoe had established its case that the difficulties were due to deficiencies in the boring machine used by Perco. There was in his view no evidence to support the suggestion that the machine had been unsuitable. In fact, when all the documents became available, they confirmed the view that the machine which Perco had chosen to use was suitable for the job. Indeed there was no issue between the parties that the type or model of machine chosen was suitable. The only issue related to the age or condition of the particular machine used and on this issue he found for Perco because Igoe had not established its case. His preliminary view was based on the view that Perco were a reputable company and that it was unlikely that they would have used an old machine or have operated it improperly. Those may or may not have been sufficient or satisfactory reasons but his decision cannot be challenged on the basis of insufficiency of reasons or lack of evidence. Accordingly he formed the provisional view that since the machine had been suitable, and there was nothing to indicate that it had not been operated properly, the inference was that Perco had encountered unexpected ground conditions. Again that reasoning cannot be challenged. His evidence was that he found nothing in the subsequent documents to cause him to alter his initial view. That again was a view which he was entitled to reach.
- 16 Although Dr. Rankilor said that he had studied the technical documents supplied in relation to the soil, he also said (and I accept) that *[he] sic* did not pay what he described as undue attention to them. It was clear from his evidence that his view was that Perco did not under the contract have to explain how the unexpected ground conditions had affected the work and that it was sufficient that Perco had reported the fact of having encountered unexpected ground conditions. However he said that he had noted that Perco had claimed that the cause of the difficulties had been high skin friction on the auger and pilots. High skin friction in Dr. Rankilor's view was derived from 2 basic properties of soil: (1) the short term cohesive strength of the soil; (2) the grip asserted by the density/ compaction of the soil. The explanation of high skin friction would be consistent with the difficulties encountered. The references in the fax dated 18 October to the pushing pressure being far too high to attempt to install the product pipe also indicated in his view that the friction encountered had been too high and that this was a case where Perco had encountered unexpected ground conditions.
17. In relation to the GeoAssist report, Dr. Rankilor said that when he had first read it he had noted that it was only an extract from a larger report and that there was no evidence of from where the samples had been taken or how they had been treated before being examined in the laboratory. However he did accept them at face value. He said that he had noted that the shear cohesion values were not exceptional. Shear strength or cohesion is the resistance of the soil to shearing, shearing occurring when rotated. Dr. Rankilor did not at this time make any calculations of the density of the samples. That he only did at a later time after he had received Igoe's second response. By this time he also had Mr. Joyce's report. Dr. Rankilor then calculated, using the figures given by GeoAssist, the dry density of the samples and he noted the result and the formula he had used *[used] sic* on the summary sheet. Dr. Rankilor's evidence was that the formula to calculate, dry density from the bulk density of a soil sample and its moisture content is an elementary calculation familiar to any geotechnical engineer. This was not disputed by Mr. Joyce who also gave evidence and I accept that the calculation of the dry density is an elementary calculation given bulk density and moisture content. In this sense it is not new information or a new fact. It is rather something which is implicit in the figures for moisture content and bulk density. Dr. Rankilor then used the dry density figure which he had ascertained in this way to calculate the density of the samples. That calculation requires the particle density. The 2

graphs show the conventional figure used by engineers and the conclusion drawn by Dr. Rankilor was that the soil samples showed a compact and dense soil.

- 18 Dr. Rankilor was not impressed by Perco's explanation that the cause of the high skin friction had been the claim that because of the high proportion of silts and sands in the clay, it had not "*stood up*" but had collapsed back onto the bore. In his view there would be no collapsing back if a solid is being pushed and he rejected virtually at the outset of his consideration that theory of the cause of any skin friction. He did not regard Perco as experts in geotechnical matters. I am satisfied that he rejected this suggested mechanism as an explanation for high skin friction. That in my view was something which he was entitled to do without going back to the parties.
- 19 Igoe's position in the adjudication was that the ground conditions were "*clay*" and that Perco had known this, from the outset. Dr. Rankilor however did not accept that ground conditions for the purposes of the contract could simply be equated with a description such as clay. Dr. Rankilor has explained his position in his Appendix document (P.316) by saying that while the soil was an LBM 3 class soil, that did not address the condition of the soil in the ground. As a result of his calculations he expressed the view that the density which he calculated was denser than should be expected for a natural soil and that he would not be surprised if the soil at Middlewich were a "*constructed engineering soil or had been subject to heavy glacial surcharging*" (p.316). In this connection it is interesting to note that it was Mr. Joyce's view that the soil was a glacial boulder clay and in evidence that he accepted that in the Ice Age there had been heavy glaciation in Cheshire which could cause compaction of the soil. Dr. Rankilor's conclusion was that although the soil was classed as a LBM3 soil, according to the laboratory information which had been supplied to him, in situ it was virtually incapable of being displaced by the machine and its density was so great as to make it unsuitable for the machine used. (p.316). In this connection it should also be noted that the manufacturer's specification had also referred to "*displaceable*" LBM soils of classes 1 to 3.
- 20 In my judgment there can be no doubt that the conclusion reached by Dr. Rankilor as a result of his consideration of the laboratory test samples provided by Igoe did play a material part in Dr. Rankilor's reasoning in reaching his final decision. It was not however in my view the predominant or main reason why he reached the conclusion which he did. However anyone reading his Decision cannot but see that he considered it relevant to refer in his findings to the highly compact nature of the soil and to say that it was exceptionally highly compact and dense. The Appendix also shows that he regarded the density of the soil as a relevant consideration.
- 21 It is also in my judgment perfectly clear that although Perco had in its letter dated 2 November 2005 raised the issue of cohesion of the soil, neither Perco nor Igoe had put forward in their respective submissions that the reason for the difficulties which had been encountered had been due to the density or compact nature of the soil. This was a conclusion which Dr. Rankilor reached as a result of his own consideration of GeoAssist's test results which Igoe had submitted as part of its case in support of its contentions that the ground had been clay and that any difficulty was due to the poor condition of the machine which Perco had used. The nature of the soil was clearly an issue before the adjudicator. Perco had expressly raised the issue of skin friction. Igoe on the other hand did not deal with that issue at all beyond its contentions that the soil was clay and within, the capabilities of the type of machine used, with the consequence that unexpected ground conditions had not been encountered.
- 22 Igoe has now produced evidence from Mr. Joyce to the effect that if Dr. Rankilor had given Igoe the opportunity to comment upon his conclusions as to the density or compaction of the clay, Mr. Joyce would have challenged those conclusions. Mr. Joyce's view was that the density of the soil was largely irrelevant and that what mattered was the strength of the soil. He illustrated his point by observing that whereas mercury had a high density yet it offered little resistance to penetration while conversely lightweight concrete had a low density but a high shear strength. It was the shear strength of the material which in his view was of primary importance in relation to the question of penetration. The shear strength of a clay such as that at Middlewich, he said, depended primarily upon its water

content. A very dry clay would have a high shear strength and be in the nature of a brick whereas a very wet clay would be a fluid and have negligible shear strength.

- 23 Igoe's submission is that it ought to have been afforded the opportunity of questioning Dr. Rankilor's conclusions on the significance of the density of the clay and that because it was not given that opportunity, there has been a serious breach of the rules of natural justice and that it has been prejudiced as a result. It has not been suggested by counsel for the parties that the court on this application should seek to determine whether Dr. Rankilor or Mr. Joyce is correct in the views which they have each expressed. Indeed counsel are agreed that the question of which view is correct is a matter for another day and is not an issue in the present applications. It is clear that Mr. Joyce considers Dr. Rankilor was wrong to attach significance to the density of the soil. It is equally clear from the evidence of Dr. Rankilor that he does not agree with Mr. Joyce on this point. There is in fact a disagreement between 2 reputable geotechnically qualified experts on the point.
- 24 The approach to be followed by the court when it is suggested that a decision of an adjudicator should not be enforced because it is said that the adjudicator has acted in breach of the rules of natural justice has been considered recently by Jackson J. at first instance and by the Court of Appeal in **Carillion Construction Limited v Devonport Royal Dockyard Limited** [2005] EWCA Civ. 1358. The facts of that case were very different from the present case. In that case the decision of the adjudicator over the amount to which the claimant contractor was entitled to be paid under a substantial and complicated construction contract was challenged on both jurisdictional and natural justice grounds. The nature of primary challenge on natural justice grounds was that the adjudicator had disregarded or failed to take account of various arguments which had been put forward in the adjudication by the paying party. That, of course, is not the objection which is made in the present case. Jackson J. considered these objections in detail and rejected them either on the basis that the arguments did not fall to be considered in light of the findings of fact or law which the adjudicator had made or that the adjudicator had in fact considered but rejected the arguments. However in relation to one element, it was also claimed that the adjudicator had acted in breach of the rules of natural justice in deciding an issue concerning "*target cost*" on a different basis from that advanced by the parties and without giving the paying party an opportunity to make representations. This objection is essentially the objection which Igoe has put forward in the present case. Jackson J. dealt with this objection at paragraph 105 his judgment where he said: "*DML had proper opportunity to make representations concerning the assessment of target costs on the basis adopted by the adjudicator. Indeed DML did make such representations in the form of Mr. Ennis's reports*". Thus it is apparent that Carillion was a case where the trial judge in fact rejected the allegations of breach of natural justice and the Court of Appeal upheld his conclusions on these issues. However as I have indicated, both Jackson J and the Court of Appeal considered the approach which should be followed when a challenge to an adjudicator's decision is mounted on the grounds of a breach of natural justice.
- 25 Jackson J at paragraph 80 of his judgment set out 4 legal principles as relevant to be applied. They are:
1. *The adjudication procedure does not involve the final determination of anybody's rights (unless all parties so wish).*
 2. *The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact, or law; see **Bouygues, C& B Scene and Levolux**;*
 3. *Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision: see **Discaint, Balfour' Beatty and Pegram Shopfitters**.*
 4. *Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice: see **Pegram Shopfitters and Amec**.*
- 26 At paragraph 52 of its judgment, the Court of Appeal stated: "*We do not understand there to be any challenge to those general principles. They are fully supported by the authorities as the judge demonstrated in his judgment*". Accordingly those general principles are applicable in the present case. Jackson J. then

went on to state 5 further propositions which he considered were relevant to the issues which he had to decide. One of those propositions is also of direct relevance to the present case since it deals with the requirement for an adjudicator to put his provisional conclusions to the parties for comment. Jackson J said:

" 3. It is often not practicable for an adjudicator to put to, the parties his provisional conclusions for comment. Very often those provisional conclusions will represent some intermediate position for which neither party was contending. It will only be in an exceptional case such as **Balfour Beatty v London Borough of Lambeth** that an adjudicator's failure to put his provisional conclusions to the parties will constitute such a serious breach of the rules of natural justice that the Court will decline to enforce his decision".

27 That proposition (and the other 4 propositions which Jackson J. had, enunciated) met with the "**broad agreement**" of the Court of Appeal and was in substance reiterated in Paragraph 85 of the judgment of the Court of Appeal where it is stated:

"The objective which underlies the 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 only be in rare circumstances that the courts will interfere, with the decision of an adjudicator...."

This approach was emphasised again in Paragraph 87 of the judgment where it was said that in the overwhelming majority of cases that the proper course for an unsuccessful paying party in an adjudication to follow was to pay the amount directed to be paid and that if he does not accept the adjudicator's decision as correct, then to take arbitration or legal proceedings as appropriate 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 - as, we suspect, the costs incurred in the present case will demonstrate only too clearly"*.

28 If Dr.Rankilor's decision is to be challenged, it is clear in my judgment that it must be shown by Igoe both that a breach of the rules of natural justice has occurred and that the breach is a serious breach. Putting it another way, it must be shown that the adjudicator has gone about his task in a way which is "**obviously unfair**". It is also now clear that it will only be in rare or exceptional circumstances that this test will be found to have been satisfied. In my judgment Igoe has not established that a serious breach of the rules of natural justice occurred in the present case or that Dr. Rankilor acted in a way which was obviously unfair.

29 Although Dr. Rankilor made a finding of fact that the clay soil was exceptionally highly compact and dense for which neither Perco nor Igoe had contended, nevertheless the nature of the soil was a matter which had been raised. Dr. Rankilor having rejected Perco's explanation of the cause of skin friction then looked at the other evidence before him about the characteristics of the soil. He concluded from the evaluation of the laboratory results which Igoe had supplied that the soil was in fact dense. It may be that Dr. Rankilor was wrong in his view that the density of the clay was a significant factor in causing the problems which had been encountered while drilling the bore but the fact that the clay was dense was it seems to me a conclusion which was implicit in the laboratory analysis which had been provided by Igoe. Indeed Mr. Joyce, as I understood his evidence, accepted that the clay had been subject to glacial compaction as Dr. Rankilor had suggested. Dr. Rankilor was in my judgment entitled to use his expert knowledge as an engineer to calculate from the information supplied by Igoe the dry density of the clay applying a well known and elementary formula and then to use the conventional figure for specific gravity which also appeared on the test results in order to ascertain the density of the clay. In reality all that Dr. Rankilor was doing was to elucidate what was already implicit in the test results. Dr. Rankilor was not in my judgment engaged in a process of finding facts independently of the evidence which had been placed before him for his consideration.

30 While it is correct that neither Perco nor Igoe had submitted that the density of the clay might be a cause of the problems which had been encountered in drilling the bore, the issue of density or compaction was not a new topic introduced by Dr. Rankilor. Perco had referred to compaction in its letter 2 November 2004. It is important to note that it was not any part of Igoe's case that the

difficulties which had been encountered were due to the particular ground conditions on site. Igoe's case was that there were no unforeseen ground conditions and that the cause of the difficulties lay with the condition of the actual machine used by Perco. The laboratory test results were submitted in support of Igoe's contention that the clay was an ordinary clay and well within the capabilities of the type of machine used by Perco and the adjudicator was being invited to draw the inference that the problems encountered were due to the condition or age of the actual machine. It is clear that Igoe did not produce any direct evidence of the actual condition of the machine and any suggestion that the machine had been an old machine was negated by the documentation which was produced. Dr. Rankilor was in my view fully entitled to conclude as he did that Igoe had not established its case that the problems were due to the condition or age of the machine. What Dr. Rankilor in substance did was to reject Igoe's evidence that the test results supported Igoe's case. He then went on from that to say that on the contrary they in fact provided a "*high level of support*" for Perco's claims that the difficulties had been due to high skin friction. The issue of skin friction although clearly raised by Perco was not an issue or point with which Igoe had ever sought to deal either on a technical level or otherwise. Igoe simply did not address the question of what might have been the technical cause of the difficulties encountered beyond alleging the use of a defective or old machine.

- 31 In my judgment Dr. Rankilor did deal with the claims respectively put forward by the parties. It was clear from his evidence which I accept that his approach was first to consider Igoe's referral when he received it and that he formed a preliminary view that Igoe's claims that the machine or its operation had been defective were not supported by the evidence provided by Igoe with its referral and that the likelihood was that Perco had in fact encountered unforeseen ground conditions. Dr. Rankilor's evidence was that he found nothing in the subsequent evidence and submissions to cause him to alter his preliminary view. It is clear from the Decision itself that Dr. Rankilor was not persuaded that the machine used by Perco had been in poor condition because the documentation showed that the machine was not an old machine. Having rejected Igoe's submission that the problems were due to the condition or age of the machine, in substance there was nothing left of Igoe's case and it is thus not at all surprising that he concluded that Perco must as it had claimed have encountered unforeseen ground conditions. He clearly did not accept that the fact that the ground was clay to the knowledge of Perco meant that unexpected ground conditions had not or could not have been encountered. The contract on Dr. Rankilor's analysis did expressly contemplate the possibility of unexpected ground conditions being encountered. It is clear from the Decision itself that Dr. Rankilor regarded the test results as supportive to a "*high level*" of Perco's claims but on a fair reading of the Decision that was not a determining or decisive factor. The determining factor was it seems to me what has been stated in paragraphs 4 and 5 of his summary of Findings. So long as those paragraphs stand, the conclusion that Perco had indeed encountered unexpected ground conditions appears to me to be inevitable. Having rejected Igoe's case, there was in reality nothing left to put against Perco's claim of unexpected ground conditions. At its highest, the density of the soil was a supporting factor for the conclusion that Perco had been correct in referring to skin friction as the technical cause of the difficulties encountered.
- 32 On the point that Dr. Rankilor should have notified the parties of his preliminary view that the density of the soil had been the cause of the difficulties encountered during the boring, I take the view that this falls within the principle of the third proposition stated by Jackson J. in the **Carillion Case**. It is not the case that an adjudicator should be expected to refer back to the parties every time he reaches a conclusion of fact which may not have been contended for by the parties. The adjudicator is under strict time constraints and it is simply not practicable to refer back each time he may reach a provisional conclusion which neither party has actually contended for. A common example of this type of situation is where an adjudicator reduces the amount of a claim, as for example Dr. Rankilor did, because he considered the amount claimed by Perco for the number of man hours was in his experience of site practices excessive. The present case is in my judgment very far removed from a case such as **Balfour Beatty v London Borough of Lambeth** [2002] EWHC 597 where an adjudicator had in fact accepted that the claimant's case on delay had been deficient as the defendant had claimed but had then in effect remedied the defects by constructing his own critical path analysis and using it

to reach a conclusion in favour of the claimant without giving the defendant an opportunity to comment either on the critical path analysis or on the inferences as to the causes and effects of delay when applying that analysis. In **Balfour Beatty** the adjudicator in substance made a case for the claimant which had not been pleaded or raised. In the present case Igoe did not put forward any technical argument or submissions in response to Perco's case that skin friction had been the cause of the difficulties. Although Dr. Rankilor rejected the mechanism which Perco had suggested, nevertheless he found that Igoe's own evidence supported the contention that skin friction had been the cause of the difficulties. That is in my view very different from making a case for a party who has not pleaded its case properly. If it is the case that Igoe was taken by surprise and now wishes to revisit the matter, the real cause of any difficulty is that Igoe did not in its submissions attempt to deal with Perco's contention that skin friction had been the problem. It may be that it was under no obligation to do so, but not having done so, it was always at risk that the adjudicator might accept that explanation especially as the contract did refer to unexpected ground conditions. This is not a case where in my judgment any serious injustice or breach of the rules of natural justice has occurred as a result of the procedure followed by Dr. Rankilor and his decision cannot be characterised as obviously unfair.

33 Perco is in my judgment entitled to enforce Dr. Rankilor's decision and it must also follow that Dr. Rankilor is entitled to recover the half share of his fee from Igoe. In the circumstances, I do not need to consider Dr. Rankilor's claim that even if his decision had been vitiated by a breach of the rules of natural justice, he would still have been entitled to recover his fee under the terms of the adjudication contract which had been entered into. It is, I must say, a surprising submission that if an adjudicator's decision has been reached in serious breach of the rules of natural justice and thus would not be enforced by the court, that the adjudicator should nevertheless be entitled to claim payment for producing what was in fact a worthless decision without even any temporary binding legal effect. I prefer however to leave that question for determination in a case where it is necessary to do so. The present is not such a case.

34 The result is that there will be judgment for Dr. Rankilor in the Action TCC 54/05 for £2,467.50 (inclusive of VAT) with interest and subject to any submissions which may be made also for costs. In the action TCC/53/05 there will be judgment for Perco for £21,554.29 (inclusive of VAT) with interest and subject to any submissions, also for costs. If agreement cannot be reached on the amounts of interest or costs, I shall deal with those matters when this judgment is formally handed down on a date to be arranged by my clerk. In the meantime I direct that this judgment be issued in draft subject to editorial correction and that it may be released to the parties forthwith.

Counsel for Claimants (1) and (2) : Paul Newman instructed by Hugh James (Cardiff).
Counsel for Defendant : Stephen Davies instructed by Halliwells (Manchester).