Fenwick Elliott

ADJUDICATION CASES – MAJOR DEVELOPMENTS

Dr Julian Critchlow

November 2005

THE IBC MASTERCLASS

Six years ago I was telling clients that Adjudication was the be all and end all of construction disputes. It was always the first point of call and often the mere threat of issuing a notice of adjudication would resolve matters. The last 18 months have seen no signs of reduction in the cases coming before the Courts relating to adjudication. Those cases largely develop familiar issues such as jurisdiction and natural justice.

Jurisdiction

Recent cases deal, in particular, with two issues: whether a construction contract within the meaning of the Housing Grants Construction and Regeneration Act 1996 ("the Act") came into existence; and whether a dispute in respect of it has crystallised.

The need for a construction contract is self-evident: without it, statutory adjudication is not compellable – it can only be instituted by agreement of the parties.

As to crystallisation of a dispute, as is clear from *Halki* v *Sopex* (which, although relating to arbitration, has been held to have application to adjudication), it is necessary that:

- a claim has been made by one party and either rejected by the other or not responded to after that party has had a reasonable opportunity to do so: and
- the Responding Party is properly notified of the nature of claim, and the claim contained in the Notice to Adjudicate is the same as first advanced by the Referring Party before the proceedings.

Crystallisation of a dispute is necessary as the very nature of adjudication is to decide disputes; as such, it can be distinguished from other processes such as valuation. Further, it is not for the adjudicator to try to establish the nature of the parties' dispute: it is for him to decide the dispute once its nature and scope have been established by the parties.

Two of the recent cases concern whether or not there was a construction contract within the meaning of the Act.

Allen Wilson Shopfitters v Buckingham (Anthony) (2005) CILL 2249, Allen Wilson were engaged by Buckingham under a Letter of Intent incorporating the JCT Private Without Quantities Form 1998 to carry out building work to Mr Buckingham's property. A second Letter of Intent was issued but never signed by Allen Wilson. The second Letter sought to address work not included within the first Letter but instructed as additional work.

By the beginning of February 2005 significant sums were outstanding pursuant to interim valuations. On 1 February 2005 Allen Wilson suspended work and adjudicated. Mr Buckingham claimed the adjudicator had no jurisdiction. The adjudicator found in favour of Allen Wilson for the full sum. On Allen Wilson's application to enforce, Buckingham claimed:

- there was no written contract in respect of the works; and
- the adjudicator was acting outside his jurisdiction because the works concerned the refurbishment of a dwelling house which was excluded from the Act; and
- the agreement to adjudicate offended the Unfair Terms in Consumer Contracts Regulations 1999.

Summary judgment was granted by the Court to Allen Wilson. The Judge decided that the parties were proceeding according to the first Letter of Intent and, although the parties intended a formal contract to be signed, despite the absence of such a contract, the wording of the Letter of Intent incorporated the terms of JCT 1998 and the adjudication provisions of that form of contract applied.

If the JCT Conditions had not applied, the Act could not have been invoked because the construction was a dwelling but since, in fact, the adjudicator's jurisdiction arose from the agreement to adjudicate in the JCT form, adjudication was available.

As to the Unfair Terms in Consumer Contracts Regulations, the adjudication agreement was not unfair because it was individually negotiated, and offered by Buckingham himself in putting forward the contract terms with the benefit of professional advice.

Similar considerations arose in *Bryen & Langley Limited v Boston (Martin)* (2005) CILL 2262. Bryen & Langley carried out fit-out works at Boston's property. Bryen & Langley were invited to tender on the basis of the JCT Form 1998, Private with Quantities. However, before a form of contract was executed Boston requested Bryen & Langley to commence work pursuant to a Letter of Intent. The Letter said that if the project did not proceed then reasonable ascertainable costs would be paid by Mr Boston but would not include any loss of profit or overheads.

Certificates were issued during the course of the contract in accordance with the JCT provisions. Disputes arose as to payment and Bryen & Langley adjudicated. Boston contended that there was no JCT contract in place and that, therefore, adjudication did not apply (because, as in *Allen Wilson*, the contract related to residential premises which are outside the scope of the Act). The adjudicator proceeded and, on Boston failing to honour the award, proceeded to enforcement.

The Judge at first instance decided that there was a contract but that it did not incorporate the JCT form. However, he did not accept Boston's argument relating to the Unfair Terms in Consumer Contracts Regulations.

Bryen & Langley appealed. The Court of Appeal held that the contract did incorporate the JCT form. The mere fact that the parties intended to execute formal contract documents did not prevent a contract being entered into in fact where all the major terms of the contract were agreed, and the evidence was that the parties intended legal relations.

Note that the position might have been different if, as in the *Tesco Stores Limited v Costain Construction Limited* [2003] EWHC 1487 case, the parties had intended that contracts should be under seal: if this were important to one of the parties, they would not be content with an agreement that was not by way of deed and, therefore, the Court would be less likely to infer that the parties intended to enter into legal relations informally.

As to the question of the Unfair Terms in Consumer Contracts Regulations again, the Court rejected the challenge by Boston because, acting on professional advice, Boston as consumer, had advanced the contract containing the adjudication provisions.

Turning to the question of the need for a crystallised dispute, a recent case is *Collins (Contractors) v Baltic Quay Management (1994) Limited* (2005) CILL 2213. Collins carried out work for Baltic Quay pursuant to a JCT Minor Works Form of Contract. Baltic failed to pay an interim certificate and also failed to serve notice to withhold. Collins determined the contract and issued Court proceedings. Baltic Quay sought, and was granted, a stay of proceedings pursuant to the Arbitration Act 1996 section 9. Collins contended that given the absence of a withholding notice pursuant to the Act, Baltic Quay had no arguable defence to the proceedings. Therefore, there could be no dispute and there should be no stay.

This argument was rejected. Applying the test for a dispute in *Halki Shipping Corporation v Sopex Oils Limited* [1998] 1WLR 726, it was held there is a dispute if a claim is made and rejected, or ignored for a sufficient period, even if there is no substantive defence available. The Court adopted the judgment of Jackson J in *Amec Civil Engineering Limited v The Secretary of State for Transport* [2004] EWHC 2339 where it was said:

1. The word "dispute" which occurs in many arbitration clauses and also in Section 108 of the Housing Grants Construction and Regeneration Act 1996 should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.

2. Despite the simple meaning of the word "dispute", there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.

3. The mere fact that one party (whom I shall call "the Claimant") notifies the other party (whom I shall call "the Respondent") of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a

matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.

4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties whether objectively it is to be inferred that the claim is not admitted. The Respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The Respondent may simply remain silent for a period of time thus giving rise to the same inference.

5. The period of time for which a Respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and is obviously controversial a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the Respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be referred that mere silence gives rise to a dispute.

   If the Claimant imposes upon the Respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what will otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the Court comes to consider what is a reasonable time for responding.

6. If the claim as represented by the Claimant is so nebulous and ill-defined that the Respondent cannot sensibly respond to it, neither silence by the Respondent or even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.

This is a good overview of the current law relating to an existence of a dispute. The issue of the crystallisation of dispute also arose in *William Verry (Glazing Systems) Limited v Furlong Homes Limited* (1995) CILL 2205. This dispute concerned a final account. The adjudicator had to determine Verry's entitlement to an extension of time. During the contract, Verry had been granted an extension to 2 February 2004. On 2 July 2004, Verry submitted a claim for an extension to 24 June 2004. Furlong responded on 13 August 2004 stating that Verry had provided nothing that would add to the extension of time of 2 February 2004.

Furlong adjudicated seeking a declaration that the extension of time granted by Furlong to 2 February 2004 was correct. Alternatively, the adjudicator was requested to decide an appropriate extension of time.

In the response to the Referral Notice, Verry claimed an entitlement to an extension to 27 July 2004. Furlong objected stating that Verry was putting forward a new extension of time claim which should not be considered. The adjudicator decided that Verry could seek the longer extension they were claiming. In his decision he said they were entitled to an extension until 27 July 2004.

In enforcement proceedings Furlong contended that the adjudicator did not have jurisdiction to consider Verry's "new claim" for an extension of time. It was held that, in fact, Verry were not submitting a new claim. It was held that the claim was simply a fuller explanation of the claim originally made. However, even if it had been a new claim, Verry would have been entitled to advance it in their defence. The scope of the adjudication is determined by the Referral and the Referring Party is entitled to defend on any basis they reasonably could and could not be artificially prevented from asserting the full extent of their arguments.

In any event, the adjudicator was entitled to consider Verry's claim given that he had been requested, in the alternative, to decide an appropriate extension of time. If Furlong had wished to circumscribe the scope of the adjudication they would have needed to have done so much more carefully.

Quoting Judge Toulmin in *AWG Construction Services Limited v Rockingham Motor Speedway Limited* [2004] EWCH 888, the Judge said that:

> It is important that a Court should approach the question of what is a dispute with robust common sense which takes into account the nature of the dispute and the manner in which it has been presented to the adjudicator.

The Judge also disapproved the restrictive approach for a dispute taken in *Edmund Nutall v R G Carter* [2002] EWHC 400 where it was held that a full recital of the parties' arguments is necessary before a dispute can come into existence.

Judge Thornton QC in *Fastrack Contractors v Morrison* [2000] BLR 168 was also quoted where he said:

> The Scheme [that is the Adjudication Scheme] gives the adjudicator two powers to take the initiative in ascertaining the facts and the law … and to resign if the dispute varies significantly from the dispute referred to him … these powers show that it is possible that a dispute that has been validly referred to adjudication can, in some circumstances, as details unfold during the adjudication become enlarged and change its nature and extent. If this happens it is conceivable that at least some of the matters and issues referred … which are not previously encompassed within a pre-existing dispute could legitimately become incorporated within the dispute that is being referred.

Furlong also claimed breach of natural justice because the adjudicator stated in his decision:

> In the timescale of adjudication, even with the extension of time granted to me by the parties it has simply not been possible for me to make the full analysis of this mass of evidence which would be appropriate in litigation or arbitration where the analysis would in any case probably have been carried out by experts for both sides. While I have carried out as much analysis as has been possible my decision is therefore based to a large extent on an objective overall view of events, causes and effects.

It was held that the adjudicator could not be expected, operating on a tight timetable and obliged to reach a decision on every possible dispute that could arise under a building contract that took a year to perform, to deal with each point with the same care and detail

as if the point were being decided in litigation or arbitration. This was an adjudication, which is an entirely different form of dispute resolution.

The Judge did accept that if the dispute were so complex that he could not produce a fair decision within the statutory time limit he should say so and not go on to reach an unfair decision. This is consonant with the views expressed by Judge Toulmin in *CIB v Birse* [2004] EWHC 2365. However, this was not such a case.

The above cases look at jurisdiction as at the time of Referral. A case consideration whether a validly appointed adjudicator departed from the scope of his jurisdiction is *Carillion Construction Limited v Devonport Royal Dockyard* (2005) CILL 2253. Devonport were engaged by the Ministry of Defence to carry out substantial refurbishment works to a number of docks. They entered into an alliancing agreement with Carillion which made provision for payment to Carillion of target costs, and a payment regime with a gain share provision.

Substantial delays occurred as a result of design matters for which Carillion were not responsible and substantial delays and costs increases arose generally. Disputes arose as to the operation of the target cost provisions and respecting alleged defects in Carillion's works.

Carillion adjudicated for approximately £12m plus interest. Devonport maintained that Carillion had been significantly overpaid and that remedial works of approximately £20m were necessary.

The adjudicator awarded £10,646,327 including interest. Devonport refused to comply, arguing that the decision was made in excess of jurisdiction and there were breaches of natural justice. They also said that the adjudicator had no jurisdiction to award interest.

It was held that the decision was not outside the adjudicator's jurisdiction, there had been no breaches of natural justice and the adjudicator did have jurisdiction to award interest. In particular, the adjudicator could not be criticised in disregarding some of the evidence placed before him.

The case reinforces the fact that mere errors of law do not amount to errors of jurisdiction. An adjudicator may wrongly decide that a piece of evidence is irrelevant and fail to take that evidence into account as required by the Scheme for Construction Contracts. Such non-compliance does not, however, deprive the adjudicator's decision of its bindingness. Adjudication must be as speedy and inexpensive as circumstances permit. The adjudicator is not necessarily expected to arrive at the solution that will ultimately be held to be correct. "That would be asking the impossible." The adjudicator is required to arrive at an interim resolution within strictly drawn constraints.

The Judge also remarked that the fact that the parties often accept the adjudicator's decision as final does not change its juridical nature.

The Judge also re-stated certain basic principles as follows:

1. The adjudication procedure does not involve the final determination of anybody's rights (unless the parties so wish).

2. The Court of Appeal has repeatedly emphasized that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law …

3. Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the Court will not enforce his decision…

4. Judges must be astute to examine technical defences with a degree of scepticism consonant with 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 …

Turning to the law specifically relevant to this case the Judge abstracted five propositions being:

1. If an adjudicator declines to consider evidence which, on his analysis of the facts or the law, is irrelevant, this is not a breach of the rules of natural justice or a failure to consider relevant material. The possibility of such errors is inherent in the adjudication system and is not a ground for refusing to enforce the adjudicator's decision.

2. If his views were inconsistent with those expressed in *Buxton Building Contractors Limited v Grosvenors of Durand Primary School* [2004] 1BLR 474 then Buxton was wrongly decided.

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 is contending. It will only be in an exceptional case such as *Balfour Beatty v The London Borough of Lambeth* that the 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.

4. Analogies from the planning context are of limited assistance.

5. If an adjudicator is requested to give reasons, a brief statement of those reasons will suffice. It should be sufficient to show that the adjudicator has dealt with the issues and to show his conclusions.

Similar jurisdictional issues arose in *William Verry Limited v North West London Communal Mikvah* (2005) CILL 2185. In this case, the adjudicator had made a previous decision concerning the value of works contained in interim valuations. Verry commenced an adjudication in respect of a further interim certificate. Northwest tendered that there were defects in the work that had previously been valued (and adjudicated). The adjudicator refused to consider the defects on the grounds that he was not entitled to do so having decided the value of the interim certificates previously in his earlier adjudication.

It was held that since a new valuation takes place on each interim certificate, the adjudicator's decision as to his jurisdiction was wrong. Judge Thornton said that "The errors of the adjudicator would appear to be ones made as part of his answering the right question wrongly rather than in answering the wrong question." He also said that "My present inclination, based on necessarily curtailed argument, is that the errors were just, but only just, ones within jurisdiction but that the exclusion of any consideration of the defects on the manifestly erroneous ground that this issue had not been referred to the adjudicator potentially vitiated the adjudicator's decision and prevented NWLCM's entitlement to a fair hearing because NWLCM's contentions on a core issue were not considered at all by the adjudicator."

There is an uncertainty in this decision in that it might be argued that where an adjudicator has erred as to his jurisdiction, as opposed to erring as to substantive issues relating to the merits, the adjudicator has necessarily answered the "wrong question" and the decision should not be enforced. However, the Judge found an innovative way of avoiding injustice. He directed that the judgment was not to be drawn up for six weeks from the date he handed it down so as to give NWLCM opportunity to adjudicate on the defects question. They would then have a valid adjudicator's decision to set off against the earlier decision.

Turning to a different aspect of jurisdiction, the recent case of *Richie Brothers (PWC) Limited v David Philip Commercials Limited* (2005) BLR 384 decided that the statutory time limit of 28 days (or 42 if extended by the Referring Party) is mandatory and not directory. The case should be treated with caution as it is Scottish, albeit at a high level, so was referable to the Scottish Scheme for Construction Contracts, and there was one dissenting judgment. However, the case is very difficult to reconcile with English authority such as *Simon's Construction Limited v Aardvark Developments Limited* [2004] BLR 117, and *Barnes & Elliot Limited v Taylor Woodrow Holdings Limited and George Wimpey Southern Limited*.

Then, in *Wimbledon Construction Company 2000 Limited v Vago (Derek)* (2005) CILL 2257, it was held that, on the facts, the Defendant to adjudication enforcement proceedings was not entitled to a stay of execution pending the outcome of arbitration proceedings, on the grounds of the Claimant's uncertain financial position. Whilst the Court recognised that, in principle, a stay would be available, see *EGAWG Construction Services v Rockingham Motor Speedway* [2004] EWHC 888, the Court could also take into account the possibility that the uncertain financial position of the Claimant stemmed from non-payment of the sum in dispute and, further, that the financial position of the Claimant was no worse than when the Respondent entered into the construction contract, thereby assuming the risk of insolvency.

Natural justice

Since the inception of adjudication, the Court's attitude to natural justice has ebbed and flowed. Initially, it was considered by many commentators that natural justice had no role to play in the process at all given that it is not expressly stipulated in the Act. However, as the cases referred to adjudication have become more substantial and, often, the adjudicator's decision is accepted as determinative, the Courts seem to have required more procedural rigour to be exercised. This is despite the fact that, being a brief process, the full procedural requirements of natural justice, as it applies to arbitration, cannot be demanded and that, unless the parties agree otherwise, the adjudicator's decision can ultimately be reversed by arbitration or adjudication.

Thus, back in 1999, in *Macob Civil Engineering Limited v Morrison Construction Limited*, Dyson J said that "the adjudicator is given a fairly free hand" and that "it is clear that Parliament intended that adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find hard to accept". The tide then turned with cases such as *Discain Project Services Limited v Opecprime Developments* (2001) which required the rules of natural justice to be observed more strictly.

The most recent case of significance that considers natural justice is *Amec Projects Limited v Whitefriars City Estates Limited* (2005) CIL 2177. This was an appeal to the Court of Appeal from a decision of Judge Toulmin. Amec were engaged by Whitefriars to carry out pre-construction works under a letter of intent incorporating the JCT Form with Contractor's Design 1998. Amec carried out the pre-construction services but, three months later, had their contract determined by Whitefriars as the parties could not agree on the second stage tender. Two of Amec's invoices were unpaid. Following the determination, Amec submitted a draft final account. Whitefriars said it had a counterclaim for much more than the value of the invoice and refused to pay the balance.

Eighteen months later, Amec commenced an adjudication relying on the fact that Whitefriars had not served timeous withholding notices. The adjudicator found for Amec after taking independent legal advice. Amec brought proceedings in the High Court to enforce the adjudicator's decision.

Mr "George Ashworth" of Davis Langdon was named as adjudicator. However, Amec's solicitors merely applied to the RIBA for an adjudicator to be appointed pursuant to the Scheme for Construction Contracts. The adjudicator found for Amec. Amec commenced enforcement proceedings which Whitefriars resisted on grounds which included that the adjudicator had no jurisdiction because he had not been appointed in accordance with the terms of the contract, and that he had acted in breach of natural justice. Judge Humphrey Lloyd decided that the Scheme was not applicable. The adjudicator had been the said "George Ashworth" or, in the event of his unavailability, a person nominated by him. Accordingly, the adjudicator had no jurisdiction.

Amec served a further notice of adjudication. However, they established that there was no George Ashworth at Davis Langdon although there had been a Geoffrey Ashworth who had died a few weeks earlier. Accordingly, they applied again pursuant to the Scheme to the RIBA for an adjudicator requesting the previous adjudicator to be nominated; and the RIBA duly nominated him. The adjudicator found again for Amec and, Whitefriars refusing to pay, Amec sought to enforce.

Judge Toulmin found that the Scheme did indeed apply regarding the appointment of the adjudicator. He held that the adjudicator had breached natural justice in that he had carried over legal advice received in the first adjudication on the issue of withholding notices, which had not been disclosed to the parties, and in the course of the second adjudication, took legal advice on the issue of his jurisdiction, which he only disclosed to the parties after he had reached his decision on the point. He also had a conversation on the telephone with the partner of the firm acting for Amec which went beyond purely administrative matters.

Amec appealed and the decision was reversed. Again, it was accepted that the Scheme applied and the adjudicator had been properly appointed. However, there was nothing to lead a fair-minded and informed observer to conclude that there was any real possibility of bias. Merely having previously decided the dispute was not in itself sufficient to justify a conclusion of apparent bias. The fact that the first decision had been made without jurisdiction was irrelevant to this issue and would not necessarily make the adjudicator more likely to approach the second adjudication with a closed mind. Further, legal advice that was obtained in relation to Whitefriars' defence in the first adjudication was not relevant to the issues raised in the second adjudication. Even if that advice had been relevant it would not have led a fair-minded and informed person to conclude that it was more likely that the adjudicator had a closed mind.

The Court cited with appoval the Court of Appeal decision in the case of *Re Medicaments and Related Classes of Goods (No. 2)* [2002] 1WLR 701 at Paragraph 37:

> Bias is an attitude of mind which prevents the Judge from making an objective determination of the issues that he has to resolve. A Judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a Judge towards a particular view of the evidence or issues before him.

As to the telephone conversation, the solicitor in question had telephoned the office of the adjudicator during which the adjudicator asked why the matter was being referred to him again and the solicitor explained that his clients had taken enforcement proceedings following the issue of the decision and the Judge had not enforced it. It was held that this conversation was innocuous – it was not, as contended, an invitation for the adjudicator to decide the second adjudication in the same way as the first.

It was further held that the adjudicator was not bound to follow the rules of natural justice in deciding whether he considered he had jurisdiction (a point upon which he could not, in any event, make a binding decision) although it might be valuable for an adjudicator, in such circumstances, to obtain representations from the parties.

The Court of Appeal made it clear that it was concerned not to allow adjudication to be undermined by allegations of breaches of natural justice, stating:

> 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.

It is also noteworthy that Dyson LJ referred to a threat by Whitefriars to the adjudicator that they would seek their costs of defending an adjudication in the event that he did not have jurisdiction as amounting to "crude bullying". He said that the adjudicator would be protected from liability by the provisions of the Act provided he acted in good faith. It is

suggested that that issue remains open to doubt. If the appointment is not valid the decision is not made as "adjudicator" and, as such, it is arguable that the indemnity does not apply.

It is also noteworthy that it was observed that "adjudication can, as in this case, be an extremely expensive form of alternative dispute resolution".

Natural justice arose again in *A&S Enterprises Limited v Kema Holdings Limited* (2004/2005) CILL 2165. Kema was a developer and A&S a building contractor. A&S contracted with Kema for certain construction works under a building contract incorporating JCT with Contractor's Design 1998. A sixth interim certificate was disputed by Kema. A&S commenced an adjudication against Kema. On appointment, the adjudicator wrote to the parties setting out his proposed timetable, including a provisional date for a site visit and/or meeting if required. A representative of A&S wrote to the adjudicator suggesting alternative dates, and further dates again were suggested by the adjudicator.

In due course, a meeting was arranged to be attended by both parties and the architect. Kema had intended to have representative, Mr Overend, attend the meeting but he was unable to do so owing to a prior commitment. In the course of his decision in favour of A&S, the adjudicator stated:

> … Mr Overend chose not to make himself available by telephone and therefore played no part in the meeting. No proper explanation was offered as to why. Mr Overend played a crucial role in the events leading to the dispute. His failure to take part in the meeting was very unhelpful, and I view the Responding Parties submissions and the arguments they have put forward in this light.

Until the day before the meeting there had been no mention in the proceedings of Mr Overend's involvement and no reference to him in the Parties' submissions. Kema resisted enforcement of the decision on the grounds of apparent bias by the adjudicator and breach of natural justice in that Kema should have been put on notice that an oral contribution from Mr Overend was required.

It was held that the adjudicator's comments did raise the possibility of bias and that he had breached natural justice: if he had considered that it was important to hear from Mr Overend, he should have made this clear to Kema so that Mr Overend could have been made available if wished.

As to the test with bias, the Judge cited the *Re Medicaments* case (above) where it was stated:

> The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and information observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.

22 November 2005

Dr Julian Critchlow

Fenwick Elliott LLP