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No: TCC 30/05 HT-05-82

Neutral Citation Number: [2005] EWHC 778 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Court No 7
TECHNOLOGY AND CONSTRUCTION COURTS
St Dunstan's House
133-137 Fetter Lane
London EC4A 1HD

Tuesday, 26th April 2005

Before:

THE HONOURABLE MR JUSTICE JACKSON

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BETWEEN:

CARILLION CONSTRUCTION LIMITED

Part 7 Claimant/Part 8 Defendant

-v-

DEVONPORT ROYAL DOCKYARD

Part 7 Defendant/ Part 8 Claimant

- - - - - - -

Tape Transcript of
Smith Bernal Wordwave Limited
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(Official Shorthand Writers to the Court)

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MR N DENNYS QC and **MR S LOFTHOUSE** (instructed by Pinsent Masons) appeared on behalf of the Part 7 Claimant/Part 8 Defendant.

MR S FURST QC and **MISS L RANDALL** (instructed by Herbert Smith) appeared on behalf of the Part 7 Defendant/Part 8 Claimant.

Tuesday, 26th April 2005
(1.00 pm)

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Judgment

1. MR JUSTICE JACKSON: This judgment is in ten parts, namely:

Part 1.	Introduction.
Part 2.	The facts.
Part 3.	The adjudication.
Part 4.	The present proceedings.
Part 5.	The law.
Part 6.	The first challenge to the adjudicator's decision (target cost and jurisdiction).
Part 7.	The second challenge to the adjudicator's decision (target cost and natural justice).
Part 8.	The third challenge to the adjudicator's decision (defects).
Part 9.	The fourth challenge to the adjudicator's decision (interest).

Part 10: conclusion.

Part 1: Introduction

2. This is the trial of two actions between a main contractor and a subcontractor concerning the validity and enforceability of an adjudicator's decision. The main contractor is Devonport Royal Dockyard Limited, to which I shall refer as "DML". The sub-contractor is a company which used to be called Tarmac Construction Limited and is now called Carillion Construction Limited. In order to avoid confusion, I shall refer to this company as "Carillion" at all stages of the story.

3. The Ministry of Defence, which was the employer of DML under the main contract, will be referred to in this judgment as "MoD".

4. The statutory framework within which this litigation arises is provided by the Housing Grants, Construction and Regeneration Act 1996, to which I shall refer as "the 1996 Act". Section 108 of the 1996 Act provides:

> "(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.
>
> "For this purpose 'dispute' includes any difference.
>
> "(2) The contract shall --
>
> "(a) Enable a party to give notice at any time of his intention to refer a dispute to adjudication;
>
> "(b) Provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within seven days of such

notice;

"(c) Require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

"(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;

"(e) impose a duty on the adjudicator to act impartially; and

"(f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

"(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

"The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

"(4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.

"(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply."

5. Section 114 of the 1996 Act provides:

"(1) The minister shall by regulations make a scheme (the Scheme for Construction Contracts) containing provision about the matters referred to in the preceding provisions of this Part ...

"(4) Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned."

6. By the Scheme for Construction Contracts (England and Wales) Regulations 1998, the Secretary of State made a Scheme for Construction Contracts in accordance with section 114 of the 1996 Act. That Scheme for Construction Contracts, which I shall refer to as "the Scheme", is set out in the schedule to the regulations. The Scheme includes the following provisions:

“1. (1) Any party to a construction contract (the 'referring party') may give written notice (the 'notice of adjudication') of his intention to refer any dispute arising under the contract, to adjudication.

“(2) The notice of adjudication shall be given to every other party to the contract.

“(3) The notice of adjudication shall set out briefly --

“(a) the nature and a brief description of the dispute and the parties involved,

“(b) details of where and when the dispute has arisen,

“(c) the nature of the redress which is sought, and

“(d) the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices) ...

“12. The adjudicator shall --

“(a) act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract; and

“(b) avoid incurring unnecessary expense.

“13. The adjudicator may take the initiative in ascertaining the facts and the law necessary to determining the dispute, and shall decide on the procedure to be followed in the adjudication. In particular he may --

“(a) request any party to the contract to supply him with such documents as he may reasonably require including, if he so directs, any written statement from any party to the contract supporting or supplementing the referral notice and any other documents given under paragraph 7(2),

“(b) decide the language or languages to be used in the adjudication and whether a translation of any document is to be provided and if so by whom,

“(c) meet and question any of the parties to the contract and their representatives,

“(d) subject to obtaining any necessary consent from a party or third parties make such site inspections as he considers appropriate, whether accompanied by the parties or not,

"(e) subject to obtaining any necessary consent from a third party or parties carry out any tests or experiments,

"(f) obtain and consider such representations and submissions as he requires, and, provided he has notified the parties of his intention, appoint experts, assessors or legal advisers,

"(g) give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with, and,

"(h) issue other directions relating to the conduct of the adjudication.

"14. The parties shall comply with any request or direction of the adjudicator in relation to the adjudication ...

"17. The adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute and shall make available to them any information to be taken into account in reaching his decision ...

"19(1). The adjudicator shall reach his decision not later than --

"(a) 28 days after the date of the referral notice mentioned in paragraph 7(1), or,

"(b) 42 days after the date of the referral notice if the referring party so consents, or,

"(c) such period exceeding 28 days after the referral notice as the parties to the dispute may, after the giving of that notice, agree ...

"20. The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute. In particular, he may --

"(a) open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive,

"(b) decide that any of the parties to the dispute is liable to make payment under the contract (whether in sterling or some other currency) and, subject to section 111(4) of the Act, when that payment is due and the final date for payment,

"(c) having regard to any term of the contract relating to the payment of interest, decide the circumstances in which, and the rates at which, and the

periods for which simple or compound rates of interest shall be paid ...

"22. If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision.

"23(1) In his decision, the adjudicator may, if he thinks fit, order any of the parties to comply peremptorily with his decision or any part of it.

"(2) The decision of the adjudicator shall be binding on the parties and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."

7. Having set out the statutory framework, I must now turn to the facts of the present case.

Part 2. The facts

8. Devonport Royal Dockyard refits and refuels warships and nuclear submarines for the Royal Navy. In March 1997, DML purchased the dockyard from the Secretary of State for Defence. At the time when the dockyard was privatised, it was decided that the existing facilities should be upgraded and new facilities should be provided.

9. Part of the purpose of these works was to enable the dockyard to refit and refuel Vanguard class submarines, as well as Swiftsure and Trafalgar class submarines. The Secretary of State engaged DML to carry out the whole of these works under a modified engineering contract which contained a target cost mechanism.

10. DML engaged Carillion as subcontractor to carry out one part of the works, namely the upgrading of 9 Dock. The works to be carried out at 9 Dock included replacing the dock walls and base and constructing four new buildings. These works would provide facilities for refitting and refuelling Vanguard submarines. One of the new buildings was a decontamination building which would contain apparatus for removing nuclear contamination.

10. Carillion started work on 9 Dock under the provisions of a written instruction to proceed dated 18th November 1998. On 10th March 1999, DML and Carillion entered into a written sub-contract under seal, whereby Carillion undertook to carry out the works at 9 Dock as subcontractor. The original completion date as specified in clause 1 of the sub-contract and the programme referred to in that clause was 21st March 2001. The price which was originally agreed for the works in the sub-contract was £54,198,373.

11. Section 17 of the sub-contract dealt with defects in the maintenance period. Clause 17(1) provided:

"The subcontractor shall forthwith at the request of DML make good at his own cost to the reasonable satisfaction of DML any defects in the subcontract works which appear during the maintenance period."

12. Clause 17(3) provided:

> "If the subcontractor fails to comply with his obligations under this condition DML may do anything reasonably necessary to make good any defects notified to the subcontractor under clause 17(1). Save to the extent that any defects were not caused by the subcontractor's neglect, default or breach or the neglect, default, or breach of a subcontractor of his, all reasonable costs incurred by DML in making good any such defects shall be recoverable from the subcontractor or may be deducted from any monies due or to become due to the subcontractor."

13. At the same time as entering into the subcontract, DML and Carillion also entered into a written agreement called the "Alliance Agreement" dated 10th March 1999. The Alliance Agreement supplemented and in part superseded the provisions of the subcontract. The Alliance Agreement contained provisions to promote partnering and harmonious relations between the parties. In particular, clause 22 provided:

> "The status of the parties shall be that of independent companies, and the relationship of the parties shall in no event be construed to be that of principal and agent or master and servant, partnership, association or trust. Each party shall exercise control, management and direction of its activities so that they are carried out for the common good of the Alliance parties and the subcontract works."

14. Clause 9 of the agreement, together with appendix B, provided a procedure for resolving disputes between the parties. Such disputes were to be referred first to the "Alliance Board" and then to the "Star Chamber". Clause 10 of the Alliance Agreement included the following provisions in respect of payment for the subcontract works:

> "10.1. Target cost.
>
> "For the purposes of this agreement the target cost shall, subject to further adjustment in accordance with clause 13, comprise:
>
> "TCL's cost estimate: £41,065,067.
>
> "Provisional sums: £6,969,500.
>
> "The base cost: £48,034,567.
>
> "TCL's risk contribution: £4,000,000.
>
> "DML's risk contribution: £4,000,000.
>
> "Total contingency: £8,000,000.
>
> "The target cost: £56,034,567.

“TCL's firm fee: £3,165,433.

“Total Alliance cost provision: £59,200,000.

“10.2. Gainshare.

“(a) Underspend of target cost.

“Following satisfactory completion of the subcontract and in the event that the target cost exceeds the final actual cost properly incurred, the parties shall share the unspent difference between the target cost and the final actual cost in the following proportions:

“DML: 30 per cent. TCL: 70 per cent.

“(b) Overspend of target cost.

“In the event that the final actual cost exceeds the target cost, the parties shall share the cost and liability for the overspend above the target cost in the following proportions:

“DML: 60 per cent. TCL: 40 per cent.

“10.3 For the avoidance of doubt, the amount due in final settlement under this agreement shall be:

“(a) For underspend of the target cost

“Final actual cost, plus

“70 per cent of the difference between the actual cost and the target cost plus

“100 per cent of the fee.

“(b) For overspend of the target cost

“Final actual cost, less

“40 per cent of the difference between the actual cost and the target cost, plus

“100 per cent of the fee.

“(a) and (b) above can be expressed as:

“Amount due = A + g(T - A) + F

“Where,

"A = final actual cost

"T = target cost

"F = fee

"g = gainshare, being 70 per cent in underspend and 40 per cent in overspend."

15. Clause 13 of the Alliance Agreement provided for adjustment of the target cost and of Carillion's fee in the event of variations or similar matters. Appendix C to the Alliance Agreement defined the "actual costs" which Carillion was entitled to recover from DML. One of the matters excluded from those costs was:

"All works not in accordance with the subcontract."

16. In the course of this judgment, it will sometimes be necessary to discuss what is the sum which is due to Carillion under clause 10 of the Alliance Agreement if one excludes the fee element. For brevity, I shall refer to this sum as "the primary sum due to Carillion" or "the primary sum".

17. Substantial delays occurred during the course of the works as a result of design matters for which Carillion was not responsible. Whether some lesser part of the delays can be blamed upon Carillion may be an issue between the parties for future resolution. Suffice it to say that during the course of the works a series of six amendments were made to the Alliance Agreement, which reflected the delays and cost overruns and which provided for additional payments to be made to Carillion.

18. Amendment number 1 to the Alliance Agreement was dated 12th September 2000. By this amendment, the target cost was increased to £69,634,567. Carillion's fee was increased to £4,065,433. On top of that, it was agreed that Carillion would be paid a bonus of £1.5 million if "prime contract stage 1 completion" were achieved by 31st January 2002 or any other date that may be agreed.

19. The purpose of this latter provision was to enable HMS Vanguard to enter 9 Dock and to be refitted during February 2002.

20. Amendment number 2 to the Alliance Agreement was dated 8th June 2001. By this amendment, target cost was increased to £71,950,156. Carillion's fee was increased to £4,209,000.

21. Amendment number 3 to the Alliance Agreement was dated 24th August 2001. By this amendment target cost was increased to £81,715,695. Carillion's fee was increased to £4,780,273.

22. Amendment number 3 contained a further provision which was set out in a covering letter from DML to Carillion dated 24th August 2001 as follows:

> "1. This amendment to the target cost and the total Alliance cost provision is made 'on account' for the purposes of providing an interim uplift. It is provided on a 'without prejudice basis' and is subject to review arising out of the final agreement reached with the authority and DML and in accordance with this Alliance Agreement."

23. The background to amendment number 3 was that DML was in negotiation with MoD concerning a substantial increase in the pricing of the main contract works.

24. In a letter to Carillion dated 3rd July 2001, DML stated that in the event that it negotiated a financial settlement with MoD, then the target cost in Carillion's subcontract would be adjusted accordingly. A worked example was then set out, showing how the target cost might be increased.

25. Amendment number 4 to the Alliance Agreement was dated 16th October 2001. Target cost increased to £89,794,515. That figure was subject to the same provision for review as had appeared in amendment 3.

26. Amendment 4 was made against the background of ongoing negotiations between DML and the MoD. These were referred to by DML in a letter to Carillion dated 12th October 2001. In that letter DML suggested that if MoD's current offer were accepted then the target cost in Carillion's subcontract would become £97,717,515.

27. On 30th October 2001, Carillion wrote to DML as follows:

> "Further to your letter reference D154-431-12-104106, dated 12th October, we confirm receipt of your calculation sheet for the 'Carillion Alliance final option'.
>
> "The target cost of £97,717,515 is not agreed for the following reasons:
>
> "1. The Carillion reprice value of £107,255,000 (excluding risk) that you have used is based on a target cost to completion at the end of March 2001.
>
> "2. The amount included for 'Carillion's statistical risk' is £1,931,579 whereas we advised DML on 15th March 2001 of £5,069,940 as per the risk register. The statistical risk using a 70 percentile gives £5,464,000.
>
> "3. We do not accept the pro rata formula as we are not responsible for the cost growth and delays to the project. Since March 2001 we have been tasked to carry out works not anticipated nor included in the March 2001 cost forecast. The combined challenge register of threats, opportunities and variations entered on the challenge register since 2nd April 2001 shows an estimated £9.266 million of extra cost.
>
> "4. On a regular basis since March 2001 we have been notifying you of the likely cost increases to enable you to take full account of them in your

discussion with the MoD. (See appendix A attached).

"These cost increases have been caused by instructions from your project manager, variations, scope swaps, continuing design changes and further accelerative measures. The £9.255 million includes for some £3,830,000 of additional work and scope swaps instructed by your project manager alone since March 2001.

"Using the March reprice valuation and adding these costs we arrive at the following target cost.

"Reprice value March 2001: £107.255.

"Less bonus: (1.500).

"Total: £105.755.

"Add Capex: £1.964.

"Add statistical risk: £5.464.

"Total value March 2001 including fee: £113.183.

"Add for changes since March 2001.

"Estimated costs as challenge register.

"April to October 2001: £9.266.

"Less risk register March 2001: (£5.464) £3.802."

Total: £116.983:

"Less fee at 6.2 per cent: (£6.830).

"Target cost: £110.153 (excluding fee and bonus)."

28. It can be seen from this letter that Carillion was in fact arguing for a target cost of £113.955 million. That figure is the sum of (a) the costs derived from the challenge register and the risk register, namely £3.802 million, and (b) the target cost shown of £110.153 million.

29. Amendment number 5 to the Alliance Agreement was dated 20th November 2001. Target cost increased to £95,793,174. That figure was subject to the same provision for review as had appeared in amendments 3 and 4.

30. Amendment 6 to the Alliance Agreement was dated 19th December 2001. Target cost was increased to £105,150,376. The wording of the provision for review in amendment 6 was slightly different to the wording used previously. Clause 3 of amendment 6 read as

follows:

> "This amendment to the target cost and the total Alliance cost provision is made 'on account' for the purposes of providing an interim uplift. It is provided on a 'without prejudice' basis and is subject to review arising out of the final agreement reached with the authority and DML, and DML and Carillion in accordance with this Alliance Agreement."

31. During December 2001, DML's negotiations with MoD came to a conclusion. One of the complaints made by Carillion is that they were not given proper details or documentation relating to the settlement negotiated with MoD.

32. Carillion's works were not entirely completed by February 2002. Nevertheless, sufficient progress had been made to enable HMS Vanguard to enter dock on 9th February. Carillion maintained that this achievement entitled Carillion to be paid the £1.5 million bonus referred to in amendment 1.

33. Thereafter work progressed. Carillion completed its subcontract works in August 2002. By that time, DML had paid to Carillion sums totalling £110 million. There was then an adjudication concerning Carillion's financial claims but that adjudication achieved nothing since the court held that the adjudicator lacked jurisdiction.

34. There then followed extensive debate between the parties concerning what sums were due to Carillion under the terms of the Alliance Agreement or alternatively, as damages for breach of that agreement. The parties will perhaps forgive me if I move with unseemly haste through the correspondence of 2003 and 2004. On two occasions disputes were referred to the Alliance Board and the Star Chamber. However, no resolution was achieved by this means. In those circumstances, Carillion decided to embark upon a second adjudication. For brevity, I shall refer to this as "the adjudication".

Part 3. The adjudication

35. On 4th January 2005, Carillion served on DML a notice of adjudication. The material parts of that notice read as follows:

> "4. Pursuant to clause 10 of the Alliance Agreement Carillion is entitled following completion to be paid actual cost (as defined) subject to a 70 per cent 'gainshare' or 40 per cent 'painshare' for under or overspend against a target cost. Carillion is further entitled to payment of a fee. Clause 13 of the Alliance Agreement sets out the basis on which adjustments might be made to the target cost and fee. Carillion contends that the parties amended the target cost machinery of the Alliance Agreement and in particular clause 10, such that there was to be a 'review' of the target cost arising out of an expected renegotiation of the terms of the main contract between DML and the MoD.
>
> "Alternatively, Carillion contends that the target cost machinery (as amended) broke down and/or become inoperable such that Carillion is

now entitled to be reimbursed actual costs together with a fee. Finally, Carillion contends that the parties agreed Carillion would be paid a bonus of £1,500,000 for completion of Carillion's work sufficient to enable a first submarine to enter 9 Dock by a given date. Carillion contends that it has earned this bonus.

"5. DML has, to date, paid to Carillion the sum of £110 million excluding VAT in respect of the subcontract works carried out by Carillion ...

"7. A dispute has arisen between Carillion and DML as to whether any further sum is due to Carillion in respect of the subcontract works either pursuant to and/or as damages for breach of the Alliance Agreement (as amended by amendments 1 to 6) and/or the subcontract. The dispute and the constituent parts of it have been referred to the Alliance Board on, inter alia, 6th October 2003 and 9th November 2004 and to the Star Chamber on, inter alia, 28th October 2003 and 1st December 2004. The Alliance Board and Star Chamber have failed to resolve the dispute which Carillion now intends to refer to adjudication.

"8. The redress sought by Carillion is a decision that:

"8.1 DML shall pay to Carillion the sum of £10,451,237.61 in respect of further amounts due (excluding bonus) pursuant to the Alliance Agreement (as amended by amendments 1 to 6) and/or the subcontract or such other sum as the adjudicator may determine together with VAT thereon as applicable within seven days of the adjudicator's decision (or within such other period as the adjudicator may decide); alternatively

"8.2. DML shall pay to Carillion the sum of £10,451,237.61 (excluding bonus) as damages for breach of the Alliance Agreement (as amended by amendments 1 to 6) and all the sub-contract or such other sum as the adjudicator may determine together with VAT thereon as applicable within seven days of the adjudicator's decision (or within such other period as the adjudicator may decide); and

"8.3. DML shall pay to Carillion in respect of bonus the sum of £1,500,000 or such other sum as the adjudicator may determine together with VAT thereon as applicable within seven days of the adjudicator's decision (or within such other period as the adjudicator may decide); and

"8.4. DML shall pay to Carillion interest on the above at such rates and for such periods as the adjudicator shall determine or alternatively on the basis that Carillion is entitled to recover interest as part of actual cost ...

"9. Carillion requests reasons for the adjudicator's decision."

36. On 5th January 2005, Mr Gwyn Owen, a civil engineer, was appointed as adjudicator. On 6th January, Carillion served its notice of referral which ran to some 67 pages. In

correspondence, DML's solicitors, Herbert Smith, disputed the jurisdiction of the adjudicator. However, they did not issue proceedings at that stage in order to resolve the matter. On 21st January, DML served its response in the adjudication, running to some 75 pages. In that response, DML disputed Carillion's various claims and also sought to set off damages for defects. DML included in its response a request that the adjudicator should give reasons for his decision.

37. On 28th January, Carillion served its reply, which ran to 56 pages. On 11th February, DML served a rejoinder, which was 76 pages long.

38. The parties also sent lengthy and detailed letters to the adjudicator. They served numerous witness statements, expert reports and appendices. In all, the adjudicator was furnished with 29 lever arch files of materials.

39. Perhaps unsurprisingly, the adjudicator proposed an oral hearing in order to bring matters into focus. For reasons which are in dispute, that oral hearing did not take place. By letter dated 22nd February, the adjudicator proposed that in those circumstances the parties should provide written summaries of their cases. Wisely, the adjudicator directed that each summary should be limited to four pages in length. Each party duly served a written summary of its case.

40. The adjudicator requested and was granted two extensions of time totalling 42 days. Thus in all the adjudicator was allowed a period of ten weeks in which to consider the issues and produce his decision.

41. On 17th March 2005, the adjudicator issued his decision. On page 7 of that decision he identified the four issues which he had been asked to decide as follows:

> "Issue 1: is CCL entitled to be paid an amount in excess of £110 million representing any sums due under the Alliance Agreement as amended, or alternatively by way of damages?
>
> "Issue 2: if so, what is the correct evaluation of any amount due to CCL?
>
> "Issue 3: is CCL entitled to the payment of an amount of £1.5 million representing a bonus?
>
> "Issue 4: is CCL entitled to the payment of a fee and if so what is the evaluation of that fee?"

42. The adjudicator answered those questions as follows:

> "Issue 1: CCL is entitled to be paid an amount in excess of £110 million representing sums due under the Alliance Agreement as amended.
>
> "Issue 2: the correct evaluation of the amount due to CCL in excess of £110 million due to the undertaking of the works is £1,167,436 plus any applicable VAT, exclusive of the fee.

> "Issue 3: CCL is entitled to the payment of an amount of £1,500,000 representing a bonus.
>
> "Issue 4: CCL is entitled to the payment of a fee in the sum of £6,778,986 plus any applicable VAT."

43. The calculation of the sums stated in the answer to issue 2 was set out in appendix 1 to the adjudicator's decision. That calculation was as follows:

> "Target cost, paragraph 3.4, £113,953,000.
>
> "Actual costs, paragraph 3.10, £112,514,757.
>
> "Gainshare difference (70 per cent of target cost minus actual cost), paragraph 3.1, £1,006,770.
>
> "Less provision for defects, paragraph 3.19, minus £2,354,091.
>
> "Sub-total: £111,167,436.
>
> "Less already paid: £110,000,000.
>
> "Sub-total: £1,167,436.
>
> "Fee, paragraph 5.3, £6,778,986.
>
> "Total sum now due, £7,946,422."

44. Finally the adjudicator awarded £1,199,905 interest. When that interest is added to the sums awarded on issues 2, 3 and 4, the total sum due to Carillion is £10,646,327 plus VAT. The adjudicator directed that DML should pay that sum to Carillion within seven days.

45. The adjudicator assessed his own fees and expenses in the rather more modest sum of £26,083 plus VAT.

46. DML declined to pay the sum due under the adjudicator's decision. Instead DML resolved to challenge that decision. Carillion, on the other hand, took the view that the adjudicator's decision was valid and should be enforced.

47. In order to justify their respective positions, both parties, on the same day, commenced proceedings in the Technology and Construction Court. I shall refer to these two actions collectively as "the present proceedings".

Part 4. The present proceedings

48. By a claim form under part 7 of the Civil Procedure Rules issued in the Technology and Construction Court at Salford, Carillion claimed against DML an order enforcing the adjudicator's decision. Carillion also applied for summary judgment on its claim under

part 24 of the Civil Procedure Rules.

47. By a claim form under part 8 of the Civil Procedure Rules, issued in the Technology and Construction Court at St Dunstan's House in London, DML claimed against Carillion the following declarations concerning the adjudicator's decision:

> "(1) The decision was made without and/or in excess of jurisdiction; and/or,
>
> "(2) The decision was made on an intrinsically unfair basis and/or in breach of the rules of natural justice; and/or,
>
> "(3) The decision is not compliant with the requirements of the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts Regulations 1998."

48. The claim forms in both actions were issued on 4th April 2005. There was then a period of consultation between the respective solicitors concerning venue and procedure. In due course, it was agreed that both actions should be heard together in London. On 13th April 2005, I gave directions by consent for the Salford action to be transferred to London and for both actions to be tried together on 20th and 21st April. The necessity for a defence in the Salford action was dispensed with. I also gave directions for the service of evidence.

49. The parties duly completed the service of their evidence and exchanged written submissions. In order to assist my own preparation for the trial, the parties kindly provided to the court, on Friday 15th April, some bundles containing key documents and key authorities.

50. The evidence served by the parties comprises one witness statement of Ms Anita Johns of Herbert Smith, who are DML's solicitors, and two witness statements of Peter Clayton, a partner in Pinsent Masons, who are Carillion's solicitors. These witness statements are supplemented by voluminous bundles of exhibits.

51. The trial duly commenced on Wednesday 20th April. Mr Steven Furst QC and Miss Louise Randall represent DML. Mr Nicholas Dennys QC and Mr Simon Lofthouse represent Carillion. There has been no oral evidence. The trial has taken the form of submissions by counsel on the basis of the written evidence and the documents. The oral submissions of counsel, like their written submissions, have been extremely detailed and thorough. Those oral submissions have occupied the court for two full days.

52. The formulation of each party's case has evolved over the comparatively short life span of these proceedings. The cases as presented by counsel in oral argument are not quite the same as those foreshadowed in the written submissions. Indeed, even during the trial positions have shifted. For example, in his closing speech, Mr Furst placed much less weight on his reasons challenge than he had done when opening. I make no complaint about this. The true issues between the parties have been brought into sharper focus by means of the adversarial process. Instead, what I must now do is to address the parties' contentions in their final form.

54. DML's contentions may be summarised as follows:

1. The adjudicator's decision on target cost (as explained by Mr Dennys in oral argument) was a decision which was outside his jurisdiction and therefore should not be enforced.

2. The adjudicator's decision on target cost was reached in breach of the rules of natural justice and therefore should not be enforced.

3. The adjudicator's decision on allowance for defects was reached in breach of the rules of natural justice and not supported by any or any adequate reasons; therefore it should not be enforced.

4. The adjudicator had no jurisdiction to award interest.

55. If Mr Furst succeeds on contentions 1, 2 or 3, the whole of the adjudicator's decision becomes unenforceable. If Mr Furst succeeds on submission 4 alone, it is common ground that interest is severable and that the balance of the adjudicator's decision can be enforced.

56. Although Carillion is claimant in one of the two actions, its overall position in the present proceedings is a responsive one. Mr Dennys resists each of the four challenges which are made and he contends that the adjudicator's decision should be enforced in full.

57. I must address each of DML's four challenges in turn. Before doing so, however, I must first outline the relevant law.

Part 5. The law

58. The statutory provisions which I read out in part 1 of this judgment came into force in 1998. The first authoritative decision on the manner in which those provisions should be interpreted was given by Mr Justice Dyson in Macob Civil Engineering Limited v Morrison Construction Limited [1999] BLR 93. In that case, Mr Justice Dyson enforced an adjudicator's decision and rejected a challenge on natural justice grounds.

59. At page 97, Mr Justice Dyson said this:

> "The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement: see section 108(3) of the Act and paragraph 23.2 of Part 1 of the Scheme. The timetable for adjudications is very tight (see section 108 of the Act). Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. So far as procedure is concerned, the adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially (section 108(2)(e) of the Act and paragraph 12(a) of Part

1 of the Scheme). He is, however, permitted to take the initiative in ascertaining the facts and the law (section 108(2(f) of the Act and paragraph 13 of Part 1 of the Scheme). He may, therefore, conduct an entirely inquisitorial process, or he may, as in the present case, invite representations from the parties. It is clear that Parliament intended that the 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 difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved."

60. At page 98, Mr Justice Dyson said this:

> "The present case shows how easy it is to mount a challenge on an alleged breach of natural justice. I formed the strong provisional view that the challenge is hopeless. But the fact is that the challenge has been made and a dispute therefore exists between the parties in relation to it. Thus on Mr Furst's argument, the party who is unsuccessful before the adjudicator has to do more than assert a breach of the rules of natural justice, or allege that the adjudicator acted partially, and he will be able to say that there has been no 'decision'.
>
> "At first sight, it is difficult to see why a decision purportedly made by an adjudicator on the dispute that has been referred to him should not be a binding decision within the meaning of section 108(3) of the Act, paragraph 23(1) of the Scheme and clause 27 of the contract. If it had been intended to qualify the word 'decision' in some way, then this could have been done. Why not give the word its plain and ordinary meaning? I confess that I can think of no good reason for not so doing, and none was suggested to me in argument. If his decision on the issue referred to him is wrong, whether because he erred on the facts or the law, or because in reaching his decision he made a procedural error which invalidates the decision, it is still a decision on the issue. Different considerations may well apply if he purports to decide a dispute which was not referred to him at all."

61. The judgment of Mr Justice Dyson in Macob has subsequently been approved by the Court of Appeal and therefore it carries added authority. It should, however, be noted that this judgment has certain consequences. If an adjudicator makes an error of law, he is not complying with the second limb of paragraph 12(a) of the Scheme. Nevertheless, such non-compliance with the Scheme does not prevent his decision being valid and enforceable. Indeed, errors by an adjudicator may give rise to other breaches of the Scheme. For example, an adjudicator may wrongly decide that a piece of evidence is irrelevant and therefore he may fail to take that evidence into account as required by

paragraph 17 of the Scheme. Nevertheless, such non-compliance does not deprive the adjudicator's decision of its temporarily binding force. These are consequences which flow from Mr Justice Dyson's reasoning in Macob.

62. In Bouygues (UK) Limited v Dahl-Jensen (UK) Limited [2001] 1 All ER (comm) 1041 the adjudicator erroneously awarded to a subcontractor monies which should have been retained by the main contractor pending certificates of completion under the main contract. Both this court and the Court of Appeal held that the adjudicator's decision should be enforced. At paragraphs 14 to 15, Lord Justice Buxton said this:

> "Here, Mr Gard answered exactly the questions put to him. What went wrong was that in making the calculations to answer the question of whether the payments so far made under the subcontract represented an overpayment or an underpayment, he overlooked the fact that that assessment should be based on the contract sum presently due for payment, that is the contract sum less the retention, rather than on the gross contract sum. That was an error, but an error made when he was acting within his jurisdiction. Provided that the adjudicator acts within that jurisdiction his award stands and is enforceable.
>
> "15. Bouygues contended that such an outcome was plainly unjust in a case where it was agreed that a mistake had been made, and particularly in a case, such as the present, where Dahl-Jensen was in insolvent liquidation, and therefore the eventual adjustment of the balance by way of arbitration will in practical terms be unenforceable on Bouygues's part. I respectfully consider that the judge was quite right when he pointed out that the possibility of such an outcome was inherent in the exceptional and summary procedure provided by the 1996 Act and the CIC adjudication procedure."

63. At paragraphs 27 to 28, Lord Justice Chadwick said this:

> "27. The first question raised by this appeal is whether the adjudicator's determination in the present case is binding on the parties -- subject always to the limitation contained in section 108(3) and in paragraphs 4 and 31 of the Model Adjudication Procedure to which I have referred. The answer to that question turns on whether the adjudicator confined himself to a determination of the issues that were put before him by the parties. If he did so, then the parties are bound by his determination, notwithstanding that he may have fallen into error. As Mr Justice Knox put it in **Nikko Hotels (UK) Limited v MEPC plc** [1991] 2EGLR 103 at 108, in the passage cited by Lord Justice Buxton, if the adjudicator has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.
>
> "28. I am satisfied, for the reasons given by Lord Justice Buxton, that in the present case the adjudicator did confine himself to the determination of

> the issues put to him. This is not a case in which he can be said to have answered the wrong question. He answered the right question. But, as is accepted by both parties, he answered that question in the wrong way. That being so, notwithstanding that he appears to have made an error that is manifest on the face of his calculations, it is accepted that, subject to the limitation to which I have already referred, his determination is binding upon the parties."

64. Lord Justice Peter Gibson agreed with both judgments. The Court of Appeal decided **Bouygues** on 31st July 2000. Just over a week later, this court gave judgment in the first round of **Discain Project Services Limited v Opecprime Development Limited [2000] BLR 402**. In this case, the adjudicator had oral and written communications with one party, from which the other party was excluded. His Honour Judge Bowsher QC held that this was a serious breach of the rules of natural justice, such that this court ought not to give summary judgment enforcing the award. Instead the judge gave leave to defend.

65. Discain proceeded to trial. Judge Bowsher's judgment at the conclusion of the trial is reported at 80 Construction Law Reports 95. At trial, the judge heard oral evidence from the adjudicator and there was a much more extensive citation of authority than had been possible at the application for summary judgment. Judge Bowsher adhered to his original view that there had been a substantial breach of the rules of natural justice and he declined to enforce the adjudicator's decision.

66. In paragraph 34 of his judgment at trial, Judge Bowsher cited the passage from Mr Justice Dyson's judgment at page 98 of **Macob** which I read out a few minutes ago. He explained that this passage did not mean that any breach of the rules of natural justice by an adjudicator, however serious, had no effect. At paragraph 39, Judge Bowsher cited with approval the following dictum of Judge Humphrey Lloyd in **Glencot Development and Design Co Limited v Ben Barrett & Son (Contractors) Limited** [2001] 80 Construction Law Reports 14 at 31:

> "'It is accepted that the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit ...'"

67. At paragraph 68 of his judgment, Judge Bowsher stated his conclusions in **Discain** in the following terms:

> "So the parties have entered into a compulsory agreement that the decision of the adjudicator is binding until the dispute is 'finally determined' by legal proceedings et cetera. Although I have heard a trial of an action, I have not 'finally determined' the dispute that was before the adjudicator. This action is brought only to enforce the decision of the adjudicator and there has been no examination of the merits of what lay behind that decision. On the face of the 1996 Act and the Scheme, therefore the decision is still binding on the parties. However, just as the court will decline to enforce contracts tainted by illegality, so I do not think it right

that the court should enforce a decision reached after substantial breach of the rules of natural justice. I stress that an unsuccessful party in a case of this sort must do more than merely assert a breach of the rules of natural justice to defeat the claim. Any breach proved must be substantial and relevant."

68. In **C&B Scene Concept Design Limited v Isobars Limited** [2002] Building Law Reports 93 the Court of Appeal held that an adjudicator's decision should be enforced, even though it might be based upon an error of law. Sir Murray Stuart-Smith (with whom Lord Justice Rix and Lord Justice Potter agreed) said this on pages 98 to 99:

> "24. In **Northern Developments (Cumbria) Limited v J&J Nichols**, His Honour Judge Bowsher QC cited with approval the following formulation of principles stated by His Honour Judge Thornton QC **Sherwood v Casson**:
>
> "(i) A decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced;
>
> "(ii) A decision that is erroneous, even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced;
>
> "(iii) A decision may be challenged on the ground that the adjudicator was not empowered by the Act to make the decision, because there was no underlying construction contract between the parties or because he had gone outside his terms of reference.
>
> "(iv) The adjudication is intended to be a speedy process in which mistakes will inevitably occur. Thus, the Court should guide against characterising a mistaken answer to an issue, which is within an adjudicator's jurisdiction, as being an excess of jurisdiction.
>
> "(v) An issue as to whether a construction contract ever came into existence, which is one challenging the jurisdiction of the adjudicator, so long as it is reasonably and clearly raised, must be determined by the Court on the balance of probabilities with, if necessary, oral and documentary evidence.
>
> "25. I respectfully agree with this formulation. I would also add, as I have already pointed out, the provisional nature of the adjudication, which, though enforceable at the time can be reopened on the final determination.
>
> "26. Errors of procedure, fact or law are not sufficient to prevent enforcement of an adjudicator's decision by summary judgment. The case of **Bouygues (UK) Limited v Dahl-Jensen (UK) Limited** [2000] BLR 522 is a striking example of this. The adjudicator had made an obvious

and fundamental error, accepted by both sides to be such, which resulted in a balance being owed to the contractor, whereas in truth it had been overpaid. The Court of Appeal held that the adjudicator had not exceeded his jurisdiction, he had merely given a wrong answer to the question which was referred to him. And, were it not for the special circumstances that the claimant in that case was in liquidation, so that there could be no fair assessment on the final determination between the parties, summary judgment without a stay of execution would have been ordered ...

"29. But the adjudicator's jurisdiction is determined by and derives from the dispute that is referred to him. If he determines matters over and beyond the dispute he has no jurisdiction. But the scope of the dispute was agreed, namely as to the Employer's obligation to make payment and the Contractor's entitlement to receive payment following receipt by the Employer of the Contractor's applications for interim payment, numbers 4, 5 and 6 (see paragraph 12 above). In order to determine this dispute the adjudicator had to resolve as a matter of law whether clauses 30.3.3-6 applied or not, and if they did, what was the effect of failure to serve a timeous notice by the Employer. Even if he was wrong on both these points, that did not affect his jurisdiction.

"30. It is important that the enforcement of an adjudicator's decision by summary judgment should not be prevented by arguments that the adjudicator has made errors of law in reaching his decision, unless the adjudicator has purported to decide matters that are not referred to him. He must decide as a matter of construction of the referral, and therefore as a matter of law, what the dispute is that he has to decide. If he erroneously decides that the dispute referred to him is wider than it is, then, insofar as he has exceeded his jurisdiction, his decision cannot be enforced. But in the present case there was entire agreement as to the scope of the dispute, and the adjudicator's decision, albeit he may have made errors of law as to the relevant contractual provisions, it is still binding and enforceable until the matter is corrected in the final determination."

69. The Court of Appeal's judgment in **C&B Scene** was delivered on 31st January 2002. Some three months later, in **Balfour Beatty Construction Limited v Lambeth LBC** [2002] BLR 288, His Honour Judge Humphrey Lloyd QC refused to enforce an adjudicator's decision for breach of natural justice. The facts of this case, however, were extreme. The dispute concerned a claim for extension of time, together with loss and expense, on a Local Authority building contract which had overrun. The adjudicator used a different methodology to that which either party had put forward and made his own independent analysis of the critical path. The adjudicator did not invite either party to comment on this approach before issuing his decision.

70. On 22nd January 2003, the Court of Appeal gave judgment in **Levolux AT Limited v Ferson Contractors Limited** [2003] EWCA Civ 11; 86 Construction Law Reports 98. The Court of Appeal upheld the judgment of this Court, enforcing an adjudicator's

decision. Lord Justice Mantell (with whom Lord Justice Ward and Lord Justice Longmore agreed) cited with approval the passage on page 97 of Mr Justice Dyson's judgment in **Macob**, which I read out a few minutes ago. Lord Justice Mantell then discussed the Court of Appeal's decision in **Bouygues**. At paragraph 9, Lord Justice Mantell said this:

> "The case of **Bouygues** is a good illustration of the scheme put into practice. The adjudicator had made what was acknowledged to be an obvious and fundamental error which resulted in the contractor recovering monies from the building owner whereas in truth the contractor had been overpaid. The Court of Appeal held that since the adjudicator had not exceeded his jurisdiction but had simply arrived at an erroneous conclusion, the provisional award should stand."

71. Later in 2003, the Court of Appeal returned to the topic of enforcing adjudicators' decisions. In **Pegram Shopfitters Limited v Tally Weijl (UK) Limited** [2003] EWCA Civ 1750; [2004], 1 All ER 818, the Court of Appeal held that there should not be a summary judgment enforcing an adjudicator's award, because it was arguable that there was no construction contract between the parties. Lord Justice May gave the leading judgment. He set out the historical background to the 1996 Act. At paragraph 9, Lord Justice May said this:

> "A number of first instance decisions in the Technology and Construction Court have striven to implement the policy of Parliament. Enforcement proceedings, as they are called, are brought using the CPR part 8 procedure and habitually there is a claim to summary judgment. Judges of the Technology and Construction Court have rightly been astute to examine technical defences to such applications with a degree of scepticism consonant with the policy of the 1996 Act, aptly described by Lord Justice Ward in **RJT Consulting Engineers Limited v DM Engineering (Northern Ireland) Limited** [2002] EWCA Civ 270, (2002) 83 Con LR 99, [2002] 1 WLR 2344 as 'pay now, argue later'. There has been a number of appeals to this court. I understand anecdotally that this Court may be regarded as less than entirely supportive of the policy of the 1996 Act. There certainly are cases in which this Court has upheld challenges to the enforceability of decisions of adjudicators, but examination of the cases shows that this has occurred when legal principle has to prevail over broad-brush policy, as was the case in the **Gilbert-Ash** case."

72. In paragraph 12 Lord Justice May went on to note that, despite the general policy of the 1996 Act, the Court of Appeal would not uphold an adjudicator's award, if a respectable case had been made out for disputing the adjudicator's jurisdiction.

73. In **Gillies Ramsay Diamond & Others v PJW Enterprises Limited** [2004] BLR 131 the Inner House of the Court of Session in Scotland dismissed certain challenges to the decision of an adjudicator. One of the unsuccessful challenges concerned the adequacy or

inadequacy of the reasons given by the adjudicator. Lord Justice Clerk, (with whom Lord MacFadyen and Lord Caplan agreed) said this at paragraph 31:

> "31. In my opinion, a challenge to the intelligibility of stated reasons can succeed only if the reasons are so incoherent that it is impossible for the reasonable reader to make sense of them. In such a case, the decision is not supported by any reasons at all and on that account is invalid (**Save Britain's Heritage v No 1 Poultry Limited,** supra). In my view, that cannot be said in this case. The adjudicator has understood what questions he had to answer. He has reached certain conclusions in law on those questions which, however erroneous, are at least comprehensible. Even if the question is one of the adequacy of the reasons, I am of the opinion that the reasons are sufficient to show that the adjudicator has dealt with the issues remitted to him and to show what his conclusions are on each (**Save Britain's Heritage v No 1 Poultry Limited**, supra, at page 167)."

74. The last case which I must refer to in this series is **Amec Capital Projects Limited v Whitefriars City Estates Limited** [2004] EWCA Civ 1418; [2005] BLR 1. In this case, the Court of Appeal reversed the decision of His Honour Judge Toulmin CMG QC that an adjudicator's decision should not be enforced for breaches of the rules of natural justice. Lord Justice Dyson in his judgment (with which Lord Justice Kennedy and Lord Justice Chadwick agreed) included the following important passages:

> "14. The common law rules of natural justice or procedural fairness are two-fold. First, the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made. Secondly, the person affected has the right to an unbiased tribunal. These two requirements are conceptually distinct. It is quite possible to have a decision from an unbiased tribunal which is unfair because the losing party was denied an effective opportunity of making representations. Conversely, it is possible for a tribunal to allow the leading party an effective opportunity to make representations, but be biased. In either event, the decision will be in breach of natural justice, and be liable to be quashed if susceptible to judicial review, or (in the world of private law) to be held to be invalid and unenforceable ...
>
> "22. 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 ...

> "41. A more fundamental question was raised as to whether adjudicators are in any event obliged to give parties the opportunity to make representations in relation to questions of jurisdiction. I respectfully disagree with the judge's view that the requirements of natural justice apply without distinction, whether the issue being considered by the adjudicator is his own jurisdiction or the merits of the dispute that has been referred to him for decision. The reason for the common law right to prior notice and an effective opportunity to make representations is to protect parties from the risk of decisions being reached unfairly. But it is only directed at decisions which can affect parties' rights. Procedural fairness does not require that parties should have the right to make representations in relation to decisions which do not affect their rights, still less in relation to 'decisions' which are nullities and which cannot affect their rights. Since the 'decision' of an adjudicator as to his jurisdiction is of no legal effect and cannot affect the rights of the parties, it is difficult to see the logical justification for a rule of law that an adjudicator can only make such a 'decision' after giving the parties an opportunity to make representations."

75. In preparing this judgment, I have looked at a large number of first instance judgments concerning the validity or enforceability of adjudicators' decisions. For the sake of brevity, I will not embark upon an analysis of every such case. Instead, let me set out my own observations.

76. Prior to 1998, if there was a dispute about payment within the construction sector, money would generally remain in the pocket of the paying party until final resolution of that dispute. This was a source of concern, for reasons set out in a number of reports including Sir Michael Latham's report, "Constructing the Team", published in 1994. The statutory system of compulsory adjudication was set up to address this problem. The purpose of an adjudication was and is to determine who shall hold the disputed funds, and in what proportions, until such time as the dispute is finally resolved.

77. In order to achieve this objective, it is necessary that adjudication should be as speedy and inexpensive as circumstances permit. The adjudicator is not necessarily expected to arrive at the solution which 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.

78. Over the last seven years, adjudication has been widely used in the construction industry. On many occasions, the parties have chosen to use the adjudicator's decision as, or as the basis for the final settlement of their disputes. This is a perfectly sensible and commercial approach. It has been remarked upon by the judges of this Court. Nevertheless that perfectly sensible and commercial approach, which many parties choose to adopt, cannot change the juridical nature of adjudication or transform the legal duties which are imposed upon adjudicators by statute.

79. One can detect in the first instance cases over the last six years some slight differences in emphasis and approach. In borderline cases what one judge may regard as a permissible error of law or procedure on the part of an adjudicator, another judge may characterise as excess of jurisdiction or a substantial breach of the rules of natural justice.

80. In my view, it is helpful to state or restate four basic principles:

1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the 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 **Discain**, **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**.

81. May I now turn from general principles to five propositions which bear upon this case:

1. If an adjudicator declines to consider evidence which, on his analysis of the facts or the law, is irrelevant, that is neither (a) a breach of the rules of natural justice nor (b) a failure to consider relevant material which undermines his decision on Wednesbury grounds or for breach of paragraph 17 of the Scheme. If the adjudicator's analysis of the facts or the law was erroneous, it may follow that he ought to have considered the evidence in question. The possibility of such error is inherent in the adjudication system. It is not a ground for refusing to enforce the adjudicator's decision. I reach this conclusion on the basis of the Court of Appeal decisions mentioned earlier. This conclusion is also supported by the reasoning of Mr Justice Steyn in the context of arbitration in **Bill Biakh v Hyundai Corporation** [1988] 1 Lloyds Reports 187.

2. On a careful reading of His Honour Judge Thornton's judgment in **Buxton Building Contractors Limited v Governors of Durand Primary School** [2004] 1 BLR 474, I do not think that this judgment is inconsistent with proposition 1. If, however, Mr Furst is right and if **Buxton** is inconsistent with proposition 1, then I consider that **Buxton** was wrongly decided and I decline to follow it.

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 the 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.

4. During argument, my attention has been drawn to certain decisions on the duty to give reasons in a planning context. See in particular **Save Britain's Heritage v No 1 Poultry Limited**, [1991] 1 WLR 153 and **South Bucks DC and another v Porter (No 2)** [2004] 1 WLR 1953. In my view, the principles stated in these cases are only of limited relevance to adjudicators' decisions. I reach this conclusion for three reasons:

(a) Adjudicators' decisions do not finally determine the rights of the parties (unless all parties so wish).

(b) If reasons are given and they prove to be erroneous, that does not generally enable the adjudicator's decision to be challenged.

(c) Adjudicators often are not required to give reasons at all.

5. If an adjudicator is requested to give reasons pursuant to paragraph 22 of the Scheme, in my view a brief statement of those reasons will suffice. The reasons should be sufficient to show that the adjudicator has dealt with the issues remitted to him and what his conclusions are on those issues. It will only be in extreme circumstances, such as those described by Lord Justice Clerk in **Gillies Ramsay**, that the court will decline to enforce an otherwise valid adjudicator's decision because of the inadequacy of the reasons given. The complainant would need to show that the reasons were absent or unintelligible and that, as a result, he had suffered substantial prejudice.

82. Having reviewed the relevant legal principles, I can now turn to the four challenges, which are made in the present case to the adjudicator's decision.

Part 6. The first challenge to the adjudicator's decision (target cost and jurisdiction)

83. DML contend that the adjudicator's decision on target cost (as explained by Mr Dennys in oral argument) was a decision which was outside his jurisdiction and therefore should not be enforced.

84. The adjudicator's decision on target cost was one stage in the reasoning process, whereby the adjudicator calculated the primary sum due to Carillion under the Alliance Agreement. The adjudicator's reasoning and decision on target cost are set out in paragraphs 2.1 to 2.9 and 3.3 to 3.4 of the section of his decision, headed “Reasons”.

85. The latter part of that passage reads as follows:

> "3.3. My consideration of the target cost concerns the dispute raised by CCL in relation to its revised valuation of the target cost as noted in its letter to DML dated 30th October 2001. I have been provided with an alternative calculation of target cost by DML after allowances for provisional sums and scope swaps. However as the dispute in this case concerns CCL's estimation of the cost I shall not consider the alternative calculation. I have read and taken into consideration the various witness statements and the detailed quantum observations of Mr Ennis with respect to the target costs and conclude that I prefer the position of CCL. It appears to me that the considerations of the parties relating to the target cost were discussed at great length during 2001 and the calculations of CCL were ultimately submitted in October 2001 as a result of those discussions. The valuation takes into account revisions and changes to the risk register and challenge register and make revised calculations due to cost.
>
> "3.4. I therefore decide that the revised target cost is £113,953,000."

86. Mr Furst contends that the adjudicator has there carried out an exercise which he was not asked by the parties to carry out and which was outside his jurisdiction.

87. The adjudicator performed what Mr Furst described as a judgment of Solomon. I do not accept this argument for six reasons:

1. The adjudicator was required to determine the primary sum due to Carillion under the Alliance Agreement. This determination inevitably involved along the way making an assessment of the target cost. All this was spelt out in the notice of adjudication dated 4th January 2005.

2. In its notice of referral dated 6th January 2005, Carillion specifically asked the adjudicator to assess target costs in the sum of £113,953,000, as set out in Carillion's letter dated 30th October 2001. DML responded to this claim in its various written submissions to the adjudicator.

3. It is quite true that Carillion subsequently put forward an argument (based on recently disclosed documents concerning the settlement with MoD) that target costs should be £110 million. See paragraph 1.11 of Carillion's reply dated 28th January and section 11 of Carillion's summary dated 2nd March. Nevertheless, Carillion made it clear that it was not abandoning its original case on target cost. See Pinsent Masons' letter to the adjudicator dated 17th February 2005, which was copied to Herbert Smith. DML understood that this was the position, as can be seen from its rejoinder.

4. The method by which the adjudicator should determine target cost was a matter of controversy between the parties and ultimately for decision by the adjudicator. Both parties provided to the adjudicator voluminous factual and expert evidence to assist him in determining target cost by whichever route he chose to adopt. See, for example, the evidence of Mr Duckworth and Mr Ennis's comments on that evidence.

5. The adjudicator rejected Carillion's argument that a target cost of £110 million could somehow be derived from the documents disclosed concerning the settlement with MoD. In those circumstances, as Mr Dennys has argued, the adjudicator was quite entitled, if he saw fit, to assess target costs at £113.953 million in accordance with Carillion's letter dated 30th October 2001.

6. The adjudicator's assessment of target cost is highly likely to be revised either upwards or downwards, if and when an arbitrator or this court comes to determine the matters in issue between the parties. The adjudicator's approach to or assessment of target cost may well embody errors of both fact and law. This would be unsurprising in view of the statutory constraints under which he was operating and the sheer volume of evidence and intricate submissions which were thrust upon him. Nevertheless, any such errors of law and fact cannot be characterised as excess of jurisdiction.

88. Accordingly, I reject the first challenge to the adjudicator's decision.

Part 7. The second challenge to the adjudicator's decision (target cost and natural justice)

89. DML contend that the adjudicator's decision on target cost was reached in breach of the rules of natural justice and therefore should not be enforced.

90. In the third sentence of paragraph 2.8 of his reasons, the adjudicator wrote as follows:

> "Although the parties have made submissions to me relating to the detail of the discussions between the authority and DML which were concluded during late 2001, as they do not appear to me to have been undertaken under this agreement, I cannot and therefore do not intend here to enter into the merits or otherwise of their outcome if any, which may affect the issues referred."

91. In argument, Mr Furst referred to this passage as "the first disregard". I shall adopt the same terminology.

92. In the third sentence of paragraph 3.3 which I have already read out, the adjudicator said that he would not consider "the alternative calculation". In argument, Mr Furst referred to this sentence as "the second disregard". I shall adopt the same terminology.

93. Mr Furst makes a further complaint that five specific defence arguments were not referred to in the adjudicator's decision. These five arguments are summarised in paragraph 28 of DML's skeleton argument as follows:

> "(a) CCL's failure to identify the factual and legal basis of its claim meant that its claim should fail ...
>
> "(b) DML was not obliged to put forward the letter of 30th October 2001 to MoD, nor was it in a position to do so ...
>
> "(c) DML did not secure payment in the sum set out in the letter from

MoD ...

"(d) Even if DML were obliged to put forward the letter of 30th October, CCL's remedy would be the loss of the chance to fix a target cost based on those figures ...

"(e) There was no obligation on DML to make disclosure of the DML -- MoD negotiation documents."

94. Mr Furst describes the omission to refer to these five defence arguments as "the third disregard". I shall adopt the same terminology.

95. Mr Furst submits that individually and cumulatively, these three disregards are fatal to the adjudicator's decision.

96. Mr Furst characterises these three disregards in two ways. First, he says that they amount to an exclusion of relevant considerations. Thus the adjudicator was in breach of paragraph 17 of the Scheme. Secondly, Mr Furst says that these three disregards are a breach of the rules of natural justice.

97. Let me deal separately with each of the three disregards. The first disregard was no more than the implementation of a decision of law. The adjudicator concluded that negotiations between DML and MoD could not impact upon the calculation of target cost under the Alliance Agreement and its amendments. In this respect, the adjudicator was rejecting an argument advanced by Carillion and accepting an argument which had been advanced more than once by DML. By way of example, see DML's letter to Carillion dated 19th August 2003. It is quite true that during the adjudication, DML put in evidence about its negotiations with MoD, in particular the statements of Mr Wyborn. Nevertheless, DML contended in the adjudication that no figure attributable to Carillion's works could be derived from the negotiations with MoD and that Carillion's proposed figures were neither advanced nor accepted in those negotiations. See paragraphs 2.45 and 4.8.3 of DML's response. These arguments were developed in paragraph 7.18 to 7.25 of the response and also in DML's rejoinder.

98. It was clearly an issue for the adjudicator to decide whether the negotiations between DML and MoD were relevant to the assessment of target cost and, if so, how. The adjudicator concluded that those negotiations were not relevant.

99. Whether the adjudicator was right or wrong in this conclusion cannot affect the validity of his decision. Having reached such a conclusion, the adjudicator, when assessing target cost, did not take into account the negotiations between DML and MoD. The adjudicator cannot be criticised for taking that course. See part 5 of this judgment.

100. I turn now to the second disregard. Mr Christopher Ennis, one of DML's expert witnesses, dealt with the assessment of target cost on the contractual basis for which Carillion contended (ie the review clause contained in amendments 3 to 6) on pages 10 to 23 of his first report. The adjudicator took this passage into account, although in the end he did not agree with its conclusions. See the fourth sentence of paragraph 3.3 of the

adjudicator's reasons.

101. On page 30 of his first report, Mr Ennis undertook an alternative calculation. He took the target cost contained in amendment 2 and adjusted that figure in accordance with clause 13 of the Alliance Agreement. For the purposes of this exercise, he disregarded amendments 3 to 6. See paragraph 3.4.7 of Mr Ennis's first report and appendix T1 to that report. This alternative calculation produced a target cost of £81 million to £84 million. The adjudicator rejected the contractual basis of Mr Ennis's alternative calculation. Therefore the adjudicator did not make use of Mr Ennis's paragraph 3.4.7 or appendix T1 in assessing target cost. There was nothing objectionable in the adjudicator adopting that course. See part 5 of this judgment.

102. I turn now to the third disregard. The adjudicator was the recipient of literally hundreds of pages of legal argument. The parties' positions shifted as the adjudication progressed. By way of example, DML took numerous points of jurisdiction which were subsequently not pursued. The adjudicator did a remarkable job in keeping abreast of the battle and in keeping under control the torrent of incoming material. He made it plain in his written decision which arguments he accepted and how his figures were calculated. It is clear that the adjudicator was not persuaded by the five specific arguments mentioned in paragraph 28 of DML's skeleton argument. There was no need for the adjudicator specifically to recite and address those five arguments in his decision.

103. I therefore reject DML's case insofar as it is based upon the three disregards.

104. Mr Furst has a further natural justice argument, which is a variant of his first challenge to the adjudicator's decision. This argument is set out in paragraph 54(a) of DML's skeleton argument. It is that the adjudicator decided the issue concerning target cost on a different basis to that advanced by the parties and without giving DML an opportunity to make representations.

105. I do not accept this argument. DML had proper opportunity to make representations concerning the assessment of target cost on the basis adopted by the adjudicator. Indeed DML did make such representations in the form of Mr Ennis's reports.

106. For all of the above reasons, I reject the second challenge to the adjudicator's decision.

Part 8. The third challenge to the adjudicator's decision (defects)

107. DML contend that the adjudicator's decision on allowance for defects was reached in breach of the rules of natural justice and was not supported by any, or any adequate, reasons. Therefore it should not be enforced.

108. The position in relation to defects was this: DML maintained that it had a counterclaim for defects which originally it quantified at £2.9 million. See paragraphs 21 to 25 of DML's dispute notice dated 8th November 2004, which was submitted to the Alliance Board on 9th November 2004. In January 2005, DML revised its defects claim upwards to £21 million, as set out on pages 101 to 106 of Mr Ennis's first report. A revised version of this claim (on an abated cost basis) amounting to £19.8 million was set out on pages 54

to 62 of Mr Ennis's second report.

109. Carillion's stance on the defects issue, as set out in section 11 of its reply, was as follows: there could be no set-off for defects. There was no withholding notice. There was no crystallised dispute in relation to defects. The existence of the defects had not been proved by any satisfactory evidence. Contrary to clause 17 of the subcontract, DML had not given Carillion the opportunity to remedy the defects. The quantum of the defects claim had been inflated for tactical reasons at a late stage. There was no evidence to suggest that DML would carry out remedial works.

110. On this issue, the adjudicator rejected all of Carillion's threshold defences. He held that an allowance of £2,354,091, reflecting the cost of defects, should be deducted from the sums otherwise due to Carillion.

111. DML considers that the allowance made for defects should have been higher. Mr Furst mounts three separate attacks on the adjudicator's assessment of £2,354,091. These attacks are: .

1. The Adjudicator focussed on DML's original defects claim of November 2004. He did not address the expanded defects claims of January and February 2005, despite the fact that these had been prepared after further and fuller investigation.

2. The adjudicator applied a reduction factor of 20 per cent to DML's original defects claim: "... in an attempt to more accurately reflect the regular and routine nature of the intended works and their actual cost." See paragraph 3.19 of the adjudicator's reasons. The adjudicator took this course without giving either party the opportunity to comment on his proposed reduction.

3. The adjudicator gave no, or no adequate, reasons for his decision in respect of defects.

112. Let me deal separately with each of these lines of attack. As to the first line of attack, it is clear from paragraph 3.12 of his reasons that the adjudicator specifically considered DML's expanded defects claims of January and February 2005. As can be seen from paragraph 3.17 of his reasons, the adjudicator considered that the defects alleged by DML in November 2004 had been properly notified to Carillion under clause 17(3) of the subcontract. However the adjudicator did not find that the second batch of defects (which came to light in or around January and February 2005) had been properly notified to Carillion. Furthermore, the adjudicator took the view that the only satisfactory evidence relating to defects was the evidence supporting the first batch of defects. See the last sentence of paragraph 3.17 and the second sentence of paragraph 3.18.

113. Although it is irrelevant to anything which I have to decide, I have read the evidence of Mr Evans and Mr Ennis supporting the second batch of defects. It can be seen that of the £21 million claimed for defects, only £56,614.10 had so far been expended. Also, the assessment of future remedial work involved a significant degree of speculation. See, for example, Mr Evans's report at bundle C, page 158. The adjudicator was perfectly entitled to find that the expanded defects claim had not been satisfactorily proved at that stage. The adjudicator may have been right or he may have been wrong in (a) his analysis of the

effect of clause 17 of the subcontract and (b) his assessment of the expert evidence. These are two separate and independent justifications of the decision which the adjudicator reached. Whether the adjudicator was right or wrong in these matters, it cannot be said that he failed to consider and address DML's expanded claims for defects in the sum of about £20 million.

114. I turn now to Mr Furst's second line of attack. The adjudicator accepted DML's original claim for defects, but made a modest reduction in quantum for perfectly sensible reasons. This reduction amounted to about £550,000. In the context of the overall dispute between the parties, this was a very small sum. The circumstances of the present case are far removed from **Balfour Beatty Construction v London Borough of Lambeth** [2002] BLR 288, upon which Mr Furst relies.

115. The 20 per cent reduction in quantum which the adjudicator made was the result of casting a critical eye over the expert evidence. This is precisely the kind of exercise which one would expect the adjudicator (who is himself an experienced engineer) to undertake. It is unrealistic to expect an adjudicator, who is struggling under tight time limits with a growing mass of evidence and legal submissions, as well as a barrage of intricate correspondence, to contact the parties and to invite their comments on a matter of this nature.

116. I turn now to the third line of attack. In my view, the reasons which the adjudicator gave for his decision on defects were perfectly adequate. The adjudicator explained why he rejected the expanded defects claim. He also explained the reduction factor which he applied to the original defects claim.

117. For all of the above reasons, I reject the third challenge to the adjudicator's decision.

Part 9. The fourth challenge to the adjudicator's decision (interest)

118. DML contend that the adjudicator had no jurisdiction to award interest.

119. The background to this challenge is as follows: Carillion advanced a claim for interest in paragraph 8.4 of its notice of adjudication dated 4th January 2005. The basis of this claim was spelt out in paragraph 7.1 to 7.9 of Carillion's referral dated 6th January 2005, together with the appendices referred to in those paragraphs. Carillion relied upon paragraph 20(c) of the Scheme. On page 74 of DML's response, one finds the sentence:

> "No sum is due and owing to CCL. Therefore the question of interest does not arise."

120. Despite ferreting through the bundles, I have been unable to find any other reference to interest in DML's various submissions to the adjudicator.

121. In paragraph 6.2 of his reasons, the adjudicator concluded in the absence of any submissions to the contrary from DML, that he had power to award interest under paragraph 20(c) of the Scheme. The issue which now arises is whether the adjudicator did indeed have power to award interest under paragraph 20(c). I have read that paragraph

out in part 1 of this judgment.

122. Mr Furst submits that under paragraph 20(c) of the Scheme an adjudicator can only award interest if the contract between the parties provides for interest. Paragraph 20(c) does not create a freestanding power to award interest. Mr Dennys on the other hand submits that paragraph 20(c) does create such a power.

123. On this issue, I have come to the conclusion that Mr Dennys is right, and that paragraph 20(c) of the Scheme creates a freestanding right to award interest. I reach this conclusion for five reasons: .

1. As a matter of impression, this seems to me to be the more natural meaning of subparagraph (c), when read in the context of the whole of paragraph 20 of the Scheme.

2. In my view it is reading too much into the second and third sentences of paragraph 20 to hold that everything in subparagraphs (a), (b) and (c) must arise from some other express term of the contract.

3. It makes obvious commercial sense for an adjudicator to have the power to award interest. The Scheme takes effect as a set of implied terms in many construction contracts pursuant to section 114(4) of the 1996 Act. I would certainly expect the Scheme to include a power to award interest.

4. In my view, the phrase in paragraph 20(c) "having regard to any term of the contract relating to the payment of interest ..." means that if there is any such term, the adjudicator must have regard to it. In other words, the freestanding right conferred by paragraph 20(c) does not override any express term of the contract dealing with interest.

5. If paragraph 20(c) had the meaning for which Mr Furst contends, it would be unnecessary. The clause would be saying that which was self-evident.

124. For all of the above reasons, I reject the fourth challenge to the adjudicator's decision.

Part 10. Conclusion

125. For the reasons set out in parts 6, 7, 8 and 9 of this judgment, DML fails in its various challenges to the adjudicator's decision and Carillion is entitled to an order enforcing that decision.

126. I cannot part with this case without expressing my thanks to the legal teams on both sides for the remarkable efficiency and speed with which they have progressed the present proceedings. These two actions have moved from commencement to trial and judgment within the space of 22 days. The solicitors on both sides have collaborated in the rapid exchange of evidence, in agreeing directions for trial and in the preparation of excellent trial bundles.

127. I also express my thanks to all counsel for the admirable written submissions and oral arguments which they have presented to the court.

128. For the reasons previously indicated, there will be judgment for Carillion in each of the two actions. I invite counsel to assist the court in formulating the appropriate order.