**Humes Building Contracts Ltd v Charlotte Homes (Surrey) Ltd** [2007] Adj.L.R. 01/04

**JUDGMENT : HIS HONOUR JUDGE GILLILAND Q.C.** : High Court. QBD. Salford District Registry. TCC. 4th January 2007

1. This is an application by the claimant for the summary enforcement of an award made by Mr. Sliweski as adjudicator whereby he ordered that the defendant should pay the claimant the sum of £158,486.25 plus VAT and should also pay his fees amounting to £9,408.73 plus VAT. The adjudicator made and published his decision on 3 November 2006. By a letter dated 13 November 2006 from the defendant's solicitors it was made clear that the defendant would not pay the amount awarded for the reasons set out. The present proceedings to enforce the adjudicator's decision were commenced by the claimant on 15 November 2006.

2. The claimant is a building contractor and in 2005 it entered into a written contract with the defendant based on the JCT Intermediate Building Contract with Contractors Design 2005 Edition for the construction of a 4 bedroom detached house and also for the construction of 2 ground floor offices with flats above and associated works at 2 sites at Milford in Surrey. Work started on 17 October 2005. Changes to the works and delays occurred with the consequence that the works had not been completed by the contractual completion date of 20 March 2006. Relations between the parties deteriorated and on 21 July 2006 the defendant sent a letter to the claimant terminating the contract. The letter had been preceded by the service of a default notice dated 28 June 2006 under clause 8.4 of the conditions of the contract alleging failures on the part of the claimant to proceed regularly and diligently with the work, refusal or neglect to comply with architects instructions and notices and failure to comply with CDM regulations

3. On 27 July 2006 the claimant sent the defendant a document dated 26 July 2006 headed "*Valuation Number 10*". This was a claim for measured works at the house in the sum of £158,950 and at the flats and offices in the sum of £227,570.18. There was in addition a claim for variations in the sum of £178,425.27. Effectively this was a claim for the value of all works carried out up to the receipt of the letter terminating the contract. The claimant's position was that the defendant had wrongfully terminated the contract and that it was entitled to be paid for the work it had carried out. The defendant's position was that the contract had been validly determined and that the contractual provisions applied. It also claimed to be entitled to deduct sums in respect of alleged defects and for liquidated damages.

4. On 18 September 2006 the claimant gave notice of adjudication pursuant to the Scheme for Construction Contracts which had been incorporated into the contract. The dispute was identified in paragraph 4 of the notice as follows: *"On 27 July the Responding Party purportedly determined the Contract. The dispute relates to the sums due to the Referring Party from the Responding Party arising at the date of determination of the Contract or alternatively as claimed as due by the Referring Party but not accepted by the Responding Party in relation to the following..."* There were then set out 4 headings namely measured works, variations, loss and/or expense and /or damages and extension of time with brief details of why the claimant contended that the items were recoverable. There was no reference to the legal basis for any entitlement.

5. In the referral notice the claimant amplified its claims under the headings of wrongful termination of the contract, sums due under the contract, loss and expense and extension of time. Under the heading of wrongful termination it was contended that the defendant had not been entitled to serve the default notice dated 28 June 2006, that practical completion had already occurred and that the defendant's termination of the contract had been unwarranted for that and other reasons, that it had not been permitted to return to site to complete snagging works and that it could not accept any contra charges for snagging works carried out by others. In paragraph 33 it was stated that as a consequence of the wrongful termination of the contract, the claimant was entitled to recover *"as damages or otherwise all other sums due to it under the Contract up to and including the date of termination"*. At paragraph 35 under the heading of sums due under the contract, it was stated that the claimant was *"content to allow its Valuation Number 10 ... to stand as its assessment of the sums due to it under the Contract as at the date of termination save that the measured works are 100% complete"*. It was then alleged that the responding party had failed to value the works properly throughout the period of the contract notwithstanding that proper information had been supplied in accordance with the contract.

6. In its response to the referral the defendant identified the issues in the adjudication as being the correct value of the measured works, entitlement to and correct value of variations, entitlement to and length of any extension of time, the validity of the defendant's termination of the contract and the claimant's claim for prolongation costs. Each of these issues was then dealt with and the defendant then also dealt with the various matters which had been raised in the claimants referral. This followed the headings and paragraphs of the referral. The defendant then set out its detailed contentions. Under the heading of wrongful termination of contract it was contended that the contract had been validly determined and that the provisions of the contract in clause 8.7 for the consequences of termination by the employer were applicable. In relation to paragraph 33 of the referral, the defendant observed that the claimant's principal claim appeared to be for common law damages and that it was unhelpful for the claimant to refer to it as being for damages *"or otherwise"*. The defendant then went on to say the claim for damages could not succeed because it was no part of the claimant's case that the defendant had repudiated the contract or that any repudiation had been accepted by the claimant. The submission of Valuation 10 was said to be inconsistent with the acceptance by the claimant of any repudiatory breach by the defendant and that in any event it had not been entitled to submit that valuation at all. Either there had been a repudiation of the contract which the claimant had accepted and its claim was thus in damages or if the contract had continued in force the provisions of the contract relating to the termination of the contact by the employer would apply which excluded the submission of further valuations. When dealing with paragraph 35 of the referral under the heading of sums due under the contract, the defendant repeated these points.

7. The defendant then went on to deal with the amounts claimed by the defendant under valuation 10 by reference to a report from by the Robinson White Partnership which appeared as Bundle 3 in the defendant's response. This report dealt both with entitlement to payment and quantum. The claims for variations, loss and expense and delay were also challenged in the defendant's response. The defendant specifically challenged any entitlement of the claimant to an extension of time and asserted a claim to withhold liquidated damages for delay at £2,500 a week from 20 March and to set £45,000 off against any sum that might be found to be due to the claimant. The claimant then served a reply to the defendant's response and the defendant served a rejoinder.

8. There is no dispute that among the issues raised by the defendant in relation to the claimant's claim for payment for the work it had carried out was the contention that there were various defects in the claimant's work. The amount claimed for defects was £135,916.48.

9. The adjudicator in his decision held first that practical completion of the works had not been attained by 21 July 2006. Accordingly the default notice dated 28 June was not invalid on the ground that practical completion had already occurred. He did find however that the defendant's termination of the contract by the letter dated 21 July had been wrongful because none of the alleged defaults had been established. In relation to delay the adjudicator concluded that a full extension of time up to 11 July 2006 should be awarded but that the claimant was entitled to claim for loss and delay for part only of this period because of concurrent delays for which both parties had been at fault and 17 days for which the claimant had been at fault. His conclusion was that the claimant was entitled to claim for 44 days. In relation to any claim for liquidated damages, the adjudicator at paragraph 49 said: *"No notice of withholding has been issue[d] with regard to Valuation No. 10 and consequently I am unable to deal with any liquidated damages that may arise".*

10. In dealing with valuation No. 10, the adjudicator noted that valuation No. 10 had not been referred to as a final account and he said that he was not deciding its value on that basis. He also noted that the architect had not certified any sum in respect of valuation No. 10 and that no notice of withholding had been provided. He then said: *"I can therefore only decide value based on the information provided by the parties but cannot take into account any possible set-off or liquidated damages".* (Paragraph 55). In Paragraph 56 of his decision he referred to reports from a firm of quantity surveyors (Adeo) which had been supplied by the defendant to support the defendant's valuation of valuation No.10. His comment was: "In a large part the matters referred to are defective works and for which a Notice of Withholding would be necessary. Whilst I have regard to [the defendant's] position vis-a-vis these said defective works I am unable to take them into account in this Adjudication". He then referred in Paragraph 57 to the second of the Adeo reports. He noted that it had not been provided to the claimant prior to the adjudication. The claimant had in fact objected to this report because of its lateness but had nevertheless made comments upon it. The adjudicator's comment (Paragraph 57) was: *"and as noted above [it] cannot be taken into account as it does not form part of this dispute: Notwithstanding this position the claimant has commented on the second report, however, as noted above where the report deals with issues outside of this Adjudication I have not been able to take those matters into account".*

11. In dealing with the valuation of the work, the adjudicator essentially accepted the claimant's figures for the measured works subject to some omissions amounting to £3,319.99 for work which was incomplete. In relation to works which the defendant had said were defective, the adjudicator said that those items should be the subject of a withholding notice and as there had not been any such notice *"I cannot take the matters into account within this evaluation".* After dealing with variations his conclusion was that the total due (after taking previous payments into account) in respect of valuation No. 10 was £158,486. In arriving at this sum the adjudicator deducted 5% for retention and the adjudicator explained this in Paragraph 62 saying: *"The above deducts retention as I consider valuation No. 10 to be an interim payment and not a final account. Practical completion had not been attained at the time of wrongful termination and I therefore consider that the 5% retention figure is still operative..."*

12. The Scheme for Construction Contracts which was incorporated into the written contract between the parties provides in Article 23(2) that the decision of the adjudicator shall be binding on the parties and that they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if applicable) or by agreement between the parties.. It is now well settled that an adjudicator's decision on the dispute referred to him is binding and should normally be enforced by way of summary judgment even if it is clear that the adjudicator in reaching his decision has erred as to the applicable law or the facts. See ***Carillion Construction Ltd. v Devonport Royal Dockyard Ltd.*** [2005] EWCA Civ 1358, [2006] BLR 15 at Paras. 52 and 76.

13. Normally the proper course for a party who is dissatisfied with a decision of an adjudicator to follow is to pay the amount ordered by the adjudicator to be paid and then to pursue its objections in arbitration or legal proceedings as provided by the contract. It is not normally legitimate to refuse to pay and seek to resist enforcement of the adjudicator's decision. Enforcement of the adjudicator's decision may however properly be resisted on the grounds that the adjudicator did not have jurisdiction to make the decision he did or that the decision was made in breach of the rules of natural justice. A successful challenge will however be the exception and generally it will only be in the plainest cases that a challenge will be successful. The Court of Appeal in ***Carillion*** also considered at Paragraphs 84 to 87 of the judgment the approach which should be adopted by a court when a challenge is made to the jurisdiction of the adjudicator or on the grounds of breach of natural justice.

14. *"84 It will be apparent from what we have said in giving our reasons for refusing permission to appeal that we are in broad agreement with the propositions which the judge set out at paragraph 81 of his judgment and which we have ourselves set out at paragraph 53 in this judgment. Those propositions are indicative of the approach which*

*courts should adopt when required to address a challenge to the decision of an adjudicator appointed under the 1996 Act...*

*85 The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should only be in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case which (contrary to DMZ's submissions to which we have referred in paragraph 66 of this judgment ) may indeed aptly be described as `simply scrabbling around to find some argument however tenuous to resist payment'.*

*86 It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels of `excess of jurisdiction' or `breach of natural justice'. It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge . The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the need of the case. Parliament may be taken to have recognised that , in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their sub-contractors. The need to have the `right' answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order provide definitive answers to complex questions. Indeed it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme; or whether such disputes are suitable for adjudication under the scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present.*

*87 In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicators decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to substantial waste of time and expense - as we suspect, the costs incurred in the present case will demonstrate only too clearly.".*

15. The defendant seeks to resist enforcement of the adjudicator's decision in the present case on the grounds both of excess or lack of jurisdiction and breach of natural justice. The first point which was raised on behalf of the defendant may be dealt with briefly. It was suggested that the adjudicator had exceeded his jurisdiction in deciding that the termination of the contract by the defendant had been wrongful. There are 2 answers to this objection. The first is that the notice of adjudication clearly stated that the defendant had *"purportedly determined"* the contract. That in my judgment clearly raised the issue of the validity of the defendant's termination of the contract by the letter dated 21 July 2006. The second answer is that both parties in their respective statements of case clearly treated that as an issue in the case. There was no objection from the defendant to the jurisdiction of the adjudicator to deal with the issue of the wrongful termination of the contract and indeed the defendant in paragraph 3 of its response expressly accepted that the validity of the defendant's termination of the contract was one of the 5 main issues in the adjudication. Mr. Lewis on behalf of the defendant did not press this objection and he was clearly right not to do so. The issue of the validity of the defendant's termination of the contract was clearly within the scope of the dispute referred to in the notice of adjudication and was the subject of extensive submissions by both parties to the adjudication.

16. The second objection raised to the jurisdiction of the adjudicator is that adjudicator decided a different question from that which had been referred to him and that accordingly his decision was outwith the matters which had been referred to him. Mr. Lewis submitted correctly as it seems to me that the scope of the dispute referred to adjudication was set out at paragraph 4 of the notice of adjudication. There, after the reference to the purported determination of the contract, to which I have already referred, it is stated: *"The dispute relates to the sums due to the Referring Party from the Responding Party arising at the date of determination of the Contract or alternatively as claimed as due by the Referring Party but not accepted by the Responding Party in relation to the following: (a) Measured Works (b) Variations (c) Loss and/or expense and/or damages (d) Extension of Time ...."*. If one looks at Paragraphs 59, 60 and 61 of the adjudicator's decision it can be seen that that the adjudicator has valued the measured works and the variations. He has also dealt with the claim for loss and expense which he assessed at £13,352.85 (Paragraph 52) and with the claim for an extension of time. All the sums involved have been quantified in paragraph 61 and together with the extension of time are set out and in his findings. It is perfectly clear in my judgment that the adjudicator has given answers to the very matters set out at Paragraph 4 of the notice of adjudication and in those circumstances it is difficult to see how it can fairly be said that the adjudicator asked himself and decided questions which had not been referred to him for decision. He may have answered the questions incorrectly but that is not the issue.

17. The way in which Mr. Lewis has put the defendant's case is that the adjudicator, instead of asking himself what was due to the claimant at the determination of the contract, had wrongly treated the dispute which had been

referred to him as being a dispute concerning the valuation of an interim application for payment in the form of valuation No. 10 and had as a result been misled into thinking that a withholding notice was required if he was to consider the defendant's allegations of defective work when valuing the works and the defendant's claims for liquidated damages. It is unclear to me however what the adjudicator considered was the legal basis or status of valuation no 10. In Paragraph 62 of his decision, he refers to valuation no.10 as an *"interim payment"*, not it is to be noted an interim application. He then says it is not a final account He also appears to have treated the contract as still being on foot because he deducted a retention of 5%. However his rejection of the defendant's claims for defects and for liquidated damages because there had been no withholding notice is, in my judgment at the most, an error of law on the part of the adjudicator. Any error of law in relation to the need for a withholding notice to be served before he could consider the defendant's claims for defects or liquidated damages an error which he made within the scope of his jurisdiction which was to determine how much was due to the claimant as at the determination of the contract in July 2006. If valuation No. 10 were regarded as an interim application for payment under the contract which seems to have been one of the bases upon which the claimant had put its case in its referral, it is difficult to see how the adjudicator could properly have concluded that anything was payable under the valuation since as the adjudicator himself had noted, there had been no certification by the architect. It was also clear that the contract provided for the valuation to be a valuation of work which had been properly carried out. Any question of serving a withholding notice under the contract would not arise until monies became due under any interim application.

18. The adjudicator was in my judgment clearly in error in rejecting the defendant's contentions in relation to defective works and liquidated damages for the lack of any withholding notice and it may be that his valuation would have been different if he had applied the provisions of the contract correctly when making his valuations of the items referred to him for decision. However those matters do not in my judgment go to the jurisdiction of the adjudicator. Likewise if he treated the claim as a claim for damages, as seems more probable, the view that a withholding notice was required before he could consider whether the damages should be reduced because of alleged defects or liquidated damages is also wrong, but again that is an error of law within his jurisdiction. In my judgment the adjudicator did however ask himself the correct questions - see for example the 8 questions which the adjudicator sets out on page 3 of his decision as the questions the claimant had asked him to decide The Defendant's position is also correctly set out at the foot of page 3 and on page 4. The criticisms made by Mr. Lewis are criticisms that the adjudicator reached the wrong decision because he misunderstood and/or misapplied the relevant law. That however is not a valid ground for refusing to enforce an adjudication decision. The risk that the adjudicator may err either as to the law or the facts is a risk which is inherent in the system of adjudication and one which the parties to an adjudication must accept. See ***Carillion Construction Ltd v. Devonport Royal Dockyard*** [2005] BLR 310, paragraph 81 per Jackson J.

19. Mr. Lewis also criticised the failure of the adjudicator to take the second Adeo report into account. See paragraph 57 of the decision. Whether the adjudicator did actually treat the second report as inadmissible because it had not been provided to the claimant before the adjudication is not entirely clear but it is clear that the adjudicator was aware that the claimant had commented upon it. The use of the words in paragraph 57 *"as noted above"* suggests to me that he did not rule it inadmissible but rather that he rejected its contents relating to defects as irrelevant because the issue of defects could not be considered unless a withholding notice had been served. If this is the correct reading of Paragraph 57, that is simply an error of law. If he did treat the report as inadmissible because it had not been served prior to the adjudication, that is a procedural matter and his decision was equally within his jurisdiction. The claimant had in fact objected to the second report being admitted and the adjudicator may have upheld the objection. Whichever view is correct, the treatment of the report was a matter well within the jurisdiction of the adjudicator even though his decision may have been wrong.

20. The next ground relied on by the defendant is that of breach of natural justice. The position is that neither the claimant nor the defendant in the adjudication had suggested that any withholding notice was necessary before the question of defective work or the deduction of liquidated damages could be taken into account. It is clear that the point about the need for a withholding notice was a point taken by the adjudicator himself. The adjudicator during the adjudication did not raise the point with the parties and it is clear that the defendant did not have any opportunity to make submissions to the adjudicator on his rejection or proposed rejection of the defendant's claims for defects and liquidated damages. If a court had acted in this way and decided issues on a ground which had not been raised before it and where the parties had not been given an opportunity to make submissions on the point, there is little doubt but that the decision would be open to challenge on the grounds of breach of natural justice. The issue in the present case is how far the principles which a court would be expected to follow apply to an adjudication..

21. In the present case the adjudicator has failed to consider the merits of the defendant's case on defects or any deduction for liquidated damages for a reason which on its face appears to be wrong in law and in circumstances where the defendant was given no hint that the adjudicator would take what on its face appears to be a bad point and on which he had not been addressed by either party. That a breach of the rules of natural justice is a ground for refusing to enforce an adjudicator's decision is not in issue. Mr. Singer has referred to propositions 1 and 3 in paragraph 81 of the judgment of Jackson J in ***Carillion*** where it is said:

> *"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 an 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....*

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

These propositions met with the *"broad approval"* of the Court of Appeal and at paragraph 85 of their judgment the Court of Appeal expressed the matter as being whether the adjudicator had gone about his task in a manner which was obviously unfair and indicated that it would only be in rare circumstances that a court would interfere with an adjudicator's decision. Any breach of the rules of natural justice must be plain and obvious.

20 Mr. Singer for the claimant has submitted that the failure of the adjudicator to give effect to the defendant's claims defects and liquidated damages claims was at most merely a mistake of law on the part of the adjudicator and that no question of breach of the breach of the rules of natural justice arises therefrom. It must I consider be regarded as established since the decision of the Court of Appeal in ***Carillion*** that the rejection by the adjudicator of the defendant's claims for defects and for liquidated damages because of the absence of any withholding notice does not of itself amount to a breach of the rules of natural justice. The adjudicator's analysis of the law was wrong but on his view of the matter these claims could not be pursued and the present case is in this regard well within the first of the propositions stated by Jackson J. It is also clear in my judgment from the third proposition stated by Jackson J. that the rules of natural justice so far as they are applicable to adjudications do not necessarily mean that a decision will be invalidated if the adjudicator has made his decision on a point or points which have not been put to the parties for their comment. The tight timetable which adjudicators are obliged to follow does not admit of every point which the adjudicator may regard as relevant to his decision but which has not been expressly addressed in the adjudication being referred back for comment by the parties before he acts upon it and publishes his decision. It is only in an exceptional case or to use the language adopted by the Court of Appeal, that it is plain that the manner in which the adjudicator has gone about his task is obviously unfair. The unfairness relied upon in the present case is that the adjudicator did not indicate before making his decision that he was minded to exclude elements of the defendant's case for what was an incorrect legal reason which had not been raised by the claimant and on which the defendant had had no opportunity to address the adjudicator. It is submitted that the adjudicator had had more than sufficient time to invite submissions from the parties. Mr. Lewis has submitted that it is not for the Court however to speculate on what would have happened if submissions had been invited. I accept that last submission.

21 Mr. Lewis has referred me to the decision of Lord Clark sitting in the Outer House of the Court of Session in ***Ardmore Construction Ltd. v Taylor Woodrow Construction Ltd*** (Unreported 12 January 2006) where an adjudication award was not enforced because the adjudicator had found for the claimant on grounds which had not been raised by either party. There, although the case raised in the referral and submissions had related to an entitlement to be paid overtime based upon the effect of a letter, the adjudicator had found for the claimant on the basis of either verbal instructions or an acquiescence in allowing the work to continue, neither of which contentions had been raised by the parties. The weight of that decision is however weakened by the fact that it was there conceded by leading counsel for the claimant that if that is what had in fact occurred, there would have been a breach of the rules of natural justice and that the decision could not be enforced. Neither was any reference made to decisions of Jackson J. or of the Court of Appeal in ***Carillion.***

22 An example of an exceptional case or of a plain and obvious case of a breach of the rules of natural justice is provided by ***Balfour Beatty v the London Borough of Lambeth*** [2002] BLR 288. There an adjudicator in a delay claim had properly taken the initiative in ascertaining the facts but had then had applied his own knowledge and had constructed his own critical path analysis without giving the parties an opportunity to address him on its methodology or its appropriateness. In that case the claimant had not provided any critical path analysis because it considered that it was impractical because of the many changes which had occurred on a weekly basis. It was held that the adjudicator's decision should not be enforced. The adjudicator was held to have acted unfairly and in effect he had made a case for one of the parties without giving the other party an opportunity to challenge it. Mr. Lewis has submitted that this is what in effect the adjudicator has done in the present case in that he took a bad point which the claimant had not raised and as a result had excluded a significant part of the defendant's cross claims.

23 It is clear from decisions such as ***Balfour Beatty*** and ***Discain Project Services Ltd*** [2000] BLR 402 that it is not every breach by an adjudicator of the rules of natural justice which will result in a refusal by the court to enforce summarily an adjudicator's decision. In Balfour Beatty HHJ Lloyd QC regarded the matter as being one of basic fairness to the party or parties concerned. As in Balfour Beatty the adjudicator in the present case had power under the Scheme to take the initiative in ascertaining the facts and the law necessary to determine the dispute. However in doing so the adjudicator must in my judgment still act fairly towards the parties. Whether the interests of fairness will require an adjudicator to put a matter which has not been raised by the parties to them for comment will depend upon all the circumstances and no hard and fast rule can be laid down. In ***Balfour Beatty*** HHJ Lloyd Q.C. said that the matter which should be put to the parties for comment *"must be one which is either*

*decisive or of considerable potential importance to the outcome and not peripheral".* See [2000] BLR 288, 302. In my judgment this provides a practical commonsense approach to a difficult question and is fully consistent with the approach of both Jackson J. and of the Court of Appeal in ***Carillion***.

24 Mr. Singer in his submissions relied upon ***Carillion*** and submitted that the present case was not an exceptional case because it is not exceptional for adjudicators to make errors as to the facts or the law. But, accepting that that may be correct, it does not in my judgment meet the point that what the adjudicator has done in the present case in disregarding for reasons which had not been raised by the parties the defendant's case on defects (and to a lesser extent) on liquidated damages can fairly be said to have been unfair to the defendant. The question in my judgment is whether what the adjudicator did in the present was so unfair to the defendant that the court should refuse to enforce his decision in a summary manner.

25 In my judgment what the adjudicator has done was manifestly and seriously unfair to the defendant. The defendant's claims that the claimant's work was defective was an important part of its defence. The defendant claimed the defects amounted to £135,916.48 and if that was correct the amount of any award in favour of the claimant would have been very significantly reduced. The adjudicator however rejected this claim (and any balance of the claim for liquidated damages) without considering it upon its merits as in my judgment he should have done. The defendant has been deprived of any opportunity of persuading the adjudicator that his view of the law was incorrect and the consequence is that the adjudicator has excluded a very substantial part of the defence without any consideration of its merits for reasons which are wrong in law. There is nothing to suggest that the defendant should have realised that the adjudicator might be of the view that a withholding notice was necessary before he could consider these claims. In my judgment the failure of the adjudicator to raise the point with the parties and to invite their comments before issuing his decision was so unfair to the defendant that the court should not enforce the decision summarily. It would be a strong thing to hold a party to a decision which is obviously wrong on an important part of the defendant's case when the defendant has not had any opportunity to address the adjudicator on the point. There is nothing in ***Carillion*** which compels such a result. It cannot in my judgment be said that the defendant at trial would not have a reasonable prospect of establishing its defence that the adjudicator had reached his decision in serious breach of the rules of natural justice and that in the circumstances the decision is not binding.

26 It follows that the claimant's application to enforce the adjudicator's decision summarily must be dismissed. Mr. Lewis also submitted that if the court had otherwise been disposed to enforce the adjudicator's decision, no order for payment of the sum awarded should be made because the financial position of the claimant was such that there would be a real risk that the claimant would not be able to repay any monies which might subsequently be ordered to be repaid. Accordingly Mr. Lewis submitted that the proper order to make would have been an order for the payment of the monies into court. Although it is not strictly necessary for me to deal with the point, my view is that, subject to a point which has only arisen since the case was argued before me, this is not a case upon which an order for payment to the claimant should be refused. It is clear at the time the contract was entered into in 2005 the claimant was in a weak financial position. According to its accounts for the year ending 31 August 2005 its liabilities exceeded its assets by £151,956 and it had incurred a trading loss for the year of £71,295. However it does not seems to have been commercially insolvent and it was able to and did continue trading and entered into a substantial contract with the defendant. The inference is that finance has been made available to enable the claimant to continue trading and it is still trading. It does however have cash flow problems and there are outstanding, according to a credit search made by the defendant 5 county court judgments. Its credit rating appears to be zero. Mr. Humes' evidence is that one of the judgment debts has been satisfied and that the remaining judgments (which total about £15,000) are in the process of being satisfied out of current cash flow. No further accounts have been produced however but the claimant does have work currently on hand. The claimant attributes its present cash flow difficulties to the failure of the defendant to make any payment to it since May 2006. Bearing in mind that one of the purposes of the introduction of adjudication into building disputes was to assist the cash flow of contractors who might be in difficulty because of delays or failure on the part of an employer to make payments, it would be likely to defeat this purpose if an order for payment were refused to a successful party to an adjudication because it was having cash flow difficulties and was in delay in paying its debts. There is also the further consideration that the defendant must be taken to have known when it entered into the contract with the claimant that the claimant was in a financially weak position or alternatively that it did not concern itself with the claimant's financial strength or otherwise. In those circumstances it is not an attractive argument for the defendant now to complain that there might be risk that it might not be repaid by the claimant if an adjudicator has found in favour of the contractor. See ***Wimbleton Construction Company 200 Ltd. v Derek Vago*** [2005] EWHC 1086. In the present case there is no satisfactory evidence that the claimant's financial position is materially worse now than it was in 2005. The defendant has suggested that the claimant now has a deficit of over £800,000 but the basis for that calculation is obscure and is not accepted by the claimant. There is no dispute that the defendant has not paid the claimant for work it has carried out and if the adjudicator's decision had been enforceable, no doubt the payment of the monies ordered would have significantly improved the claimant's cash flow. In the circumstances I would not have refused an order for payment of the amount ordered by the adjudicator.

27 Since the matter was argued before me however it has now become apparent that a winding up petition was issued against the claimant apparently on 22 November 2006 but it is unclear when (or if) it was served. It is due to be heard on 24 January. Mr. Humes has claimed that he was unaware of the petition when he signed his

witness statement on 1 December. He does not appear to have become aware of the petition until told of it by the defendant's solicitor and a copy was received on 15 December. The petitioning creditor has a claim for £1898.62 which I am told will be paid but there is a supporting creditor for £78,614.87. The supporting creditor's claim is I am told disputed and will be defended. On the basis of this further information the proper order would have been to order payment into court of any monies under the adjudicator's decision. It would not be right in my judgment to order payment to the claimant if there is an outstanding winding up petition on foot.

28 This judgment is released in draft and is subject to editorial correction. It will be handed down on a date to be notified to the parties but it may in the meantime be released to the parties. I shall deal with any consequential applications including costs if not agreed when the judgment is formally handed down.

Mr. Andrew Singer, counsel, instructed by E.A.D. Solicitors, Liverpool appeared for the claimant.
Mr. Jonathan Lewis, counsel, instructed by Neale Turk, solicitors, Fleet appeared for the defendant.