JUDGMENT : HIS HONOUR HUMPHREY LLOYD QC : TCC : 31st July 2002

1. This is an application for summary judgment made under Part 24 of the CPR in order to enforce the award of an adjudicator, Mr. John L. Riches, the managing director of Henry Cooper Consultants Limited, which he made on 13 June 2002. The adjudication, of course, arose between the claimant (PSH) and the defendant (SE). The adjudicator decided that SE should pay PSH £25,234.95 plus interest, his fees and VAT, making a total of £33,558.95. The defendant was one of a number of sub-sub-contractors to PSH which had itself been engaged by Sir Robert McAlpine Limited (McAlpine) to install glazing for a new building at Caspian Point in Cardiff. The sub-contract with McAlpine incorporated the standard DOM/1 conditions. The adjudication is about the claim by McAlpine that, during the course of the installation, a large number of panes of glass were damaged by a welding spatter, and in other ways, as a result of which McAlpine had to replace them.
2. The adjudication was not the first to have been carried out. Two others had preceded it. The first had taken place last year at the instance of McAlpine who had sought adjudication as to the liability of PSH for the damage to the glazing. Mr. Riches had also been appointed as an adjudicator. He had decided that McAlpine were entitled to recover £123,456.45 by a decision of 30 August 2001.
3. As appears from that decision, which I have now but which was not readily available to the parties before me, Mr. Riches had met the parties, i.e. McAlpine and PSH, on site on 23 August 2001 and had then carried out a site inspection and an examination with the parties of the respective cases that they had submitted in writing. That appears from paragraph 10 of the decision. Amongst those attending included three representatives of PSH, Mr. Richard Pring, a director, Mr. David Eccles, a site supervisor, and Mr. Melvyn Douglass, of MD Associates, claim consultants to PSH.
4. At that meeting, liability was apparently determined by agreement since PSH, as appears from paragraph 22 of the decision, agreed that they had damaged a number of the panes of glass; the agreed numbers were 178 out of a total of 410. The number of panes affected has actually increased to some 318.
5. Mr. Riches then had to determine the cost of replacement (see paragraph 25 of his decision). In arriving at his figure, he came to certain conclusions as to the proportion of certain basic costs claimed by McAlpine. Thus, as I have indicated, he arrived at £123,456.
6. Moving ahead a little, it appears from the referral notice in the adjudication (No 3) that SE had been engaged under a very simple form of sub-contract to erect the support steelwork for the glazing. It started work in the middle of February 2001. Its performance, however, was not to the satisfaction of PSH. It was slow. It failed to complete the erection and, according to PSH, abandoned the work on 30 March 2001.
7. By that time, another sub-sub-contractor, J C Howell (JCH), had been taken on by PSH, initially to work on the same work as that for which SE had been engaged, starting on 13 March 2001 for a period of three weeks. JCH were instructed to report to SE. When SE left the site, PSH extended the order to JCH for it to work through to completion. An adjudication was to ensue between PSH and JCH.
8. However, in the same period, in March, PSH had also engaged Hanford Construction for some four days. In the period from 22 March to 7 April, it had also engaged a company known as Tema Fabrications. There were therefore four potential parties who might have caused or contributed to the damage to the glazing.
9. This adjudication, i.e., between PSH and SE, was started in April 2002. Mr. Riches was again appointed as the adjudicator. He notified the parties in a letter of 26 April 2002:

   "I have already carried out two adjudications on this particular project between the main contractor and Pring and St Hill. There may well be information from those two adjudications which will be of assistance in this adjudication. I am also asked to run this adjudication in parallel with an adjudication with J C Howell UK Site Fix. I am sure that the reasons for that request will become clear when I receive the referral."

   Under the heading of "Procedure", he said, "At this stage I know very little about the dispute," something which I now find surprising, given his involvement in 2001.

10. That letter, therefore, refers to two adjudications. I may call the adjudication in 2001 between Sir Robert McAlpine and PSH adjudication No. 1. The second adjudication, No. 2, was one which it is said concerned the final account between PSH and Sir Robert McAlpine. We know very little about that adjudication. There is also the further adjudication, which I may call adjudication No. 4, between PSH and JCH. This one is No 3. That sets the scene.

11. In reply to the adjudicator's letter and also on 9 May 2002, the solicitors acting for the defendant (SE) wrote to the adjudicator saying that they would not consent to the adjudication (No 3) being run in parallel with the adjudication with JCH (No 4). They said:

"We wish to advise that our client has not been asked to consent to any such request and does not wish to do so. Whilst we have no wish to suggest that you would not otherwise be competent to act as an adjudicator in either or both of these status two adjudications, both we and our client are concerned that there is a serious risk that a breach of natural justice may arise were you to act as an adjudicator in the present proceedings and/or indeed in relation to the proposed parallel proceedings."

Later in that letter, they say:

"Our client is quite naturally concerned that in the context of your prior involvement in earlier adjudication proceedings between the referring party and Sir Robert McAlpine and your proposed involvement in yet further proceedings brought by the referring party against yet another party, there is a risk that information gained in other proceedings to which our client is not a party and which has not been made available to our client, may influence your judgment in deciding issues in the present proceedings between the referring party and our client.

In those circumstances regrettably we do not believe that it would be appropriate for you to act as adjudicator in the proceeding to which our client is a party. In so far as your appointment may have been validly made in these proceedings (as to which we expressly reserve our client's position) we would therefore invited you to resign from your appointment to act as an adjudicator. A fresh application ... could then be made by the referring party with minimal delay".

The adjudicator replied on the same day (9 May) saying:

"There is nothing in my appointment, having regards to the two previous adjudications, that offends natural justice.

In terms of any influence from the two previous adjudications I am fully aware of the guidance given in the case of Fox v. Wellfair and it has been my intention from the outset, when I receive the response, to reveal all of the relevant information from the previous adjudications to ensure that both parties are fully informed.

I am proceeding with this adjudication."

The adjudicator was then asked, again on 9 May, to confirm whether he had accepted an appointment to act in respect of the proposed parallel proceedings. He wrote back, again on the same day, saying:

"Some further explanation is warranted concerning the two previous adjudications I carried out between Pring and St Hill and McAlpine. The first of these adjudication's [sic] concerns a claim for damages by McAlpine against Pring and St Hill. The claim for damages arose through the work being carried out to the Bris Soleil support steelwork on the project at Caspian Point in Cardiff. The claim for damages arose through physical damage caused to the glazing to the building arising through weld spatter and grinding of welded joints when Bris Soleil steelwork was erected.

The second adjudication concerned the final account between Pring and St Hill and McAlpine.

In the present two adjudication's Pring and St Hill are seeking to pass on the damages claim for the physical damage caused to the glazing, which was the subject of the first adjudication between Pring and St Hill and McAlpine.

It may well be that Pring and St Hill thought that my former knowledge of this project would assist in these two adjudication's in terms of the economy.

"It is obvious that there will be some common evidence which will bridge the two current adjudication's. The Scheme for Construction Contracts (England and Wales Regulations) 1998 under paragraph 13 states: "The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication."

It is inevitable that there will be some overlap in the evidence concerning damage to the building.

It is my view that the subject of common evidence may well be best served by a joint meeting at covering both of the current adjudication's. This will enable me to ascertain the facts in both adjudication's and keep the three parties fully informed."

He concluded:

"If the parties [are] not agreed on amalgamating some of the procedure, in order to reduce costs and to ensure exchange of common evidence I am under a duty to ensure that in both adjudication's what materials I have which might touch on each adjudication and importantly those matters which will lead to my decisions. I will therefore ensure that there is nothing in the two adjudication's that the respective parties [are] not aware of."

That led to further correspondence from SE's solicitors on 13 May. I will not read it because it says very little beyond what has already been set out.

12. PSH's referral notice set out the involvement of the other sub-contractors. It also made it clear that the claim was primarily for the amount which Mr. Riches had decided was due by PSH to McAlpine. That claim was therefore going to be passed to SE, plus other amounts such as: £5,636.60 for Mr Riches' fees in that adjudication; £10,189.60 for legal costs: £23,511.58 for "Quantity Surveying Consultants Costs"; £13,383.25 for "additional management costs". That made about £197,782.

13. A number of points have been taken by SE in opposition to the application for summary judgment in respect of the decision. The first point that arises, chronologically, is based upon paragraph 8(2) of the Scheme for Construction Contracts 1998. That provides:

"The adjudicator, with the consent of all the parties to those disputes, adjudicate at the same time on related disputes under different contracts whether or not one or more of those parties is a party to those disputes."

It has been accepted by Mr. Gideon Scott Holland, for PSH, in the course of his careful and considered submissions, that the disputes between PSH and SE and the disputes between PSH and JCH are related disputes for the purposes of paragraph 8(2). That is plainly correct as each dispute was about the extent to which some breach of contract by a sub-subcontractor might have caused or contributed to the damages for which PSH was liable to McAlpine. PSH's liability to McAlpine and the factual reasons for it and its extent in term of damages would therefore have had to be established afresh since liability had been agreed and, also, in the case of the damages, the parts played by each of the many actors, and as well as of course as the liability of each sub-sub-contractor. Accordingly the dispute with SE should obviously not have been called the same dispute as PSH had with JCH (as PSH said in its referral notice which might well have misled the RICS when it appointed Mr Riches in both disputes.). However, it is said that paragraph 8(2) does not apply, contrary to the contentions advanced for SE, because it is directed solely to an adjudicator conducting two or more adjudications at the same time, that is to say in a consolidated manner. Mr. Scott Holland suggested that the words "at the same time" mean something akin to consolidation, that is to say that the adjudicator would require the consent of the parties before he could physically bring together the parties at a meeting and in investigations and, if necessary, perhaps even making a single decision covering the disputes arising out of the two contracts (which I doubt could be done on the strength of that paragraph alone).

14. Miss Susan Lindsey, for SE, however, takes the point that the words are not so to be read. They are not narrow. They are concerned precisely with the mischief which could be seen emerging from the facts which I have described, but which could occur in a variety of circumstances, namely where the same adjudicator is appointed in relation to disputes which have a relationship with each other. They may, for example, be concerned about the same facts, or substantially the same facts, or some of the same facts, or they might even be about the same provision in a contract, a standard form contract, or a contract devised by a particular party. In some cases, only the adjudicator might be aware of the fact that there were two adjudications giving rise to such a related dispute.

15. It was thus submitted that the purpose of paragraph 8(2) was to ensure that the parties knew that the adjudicator might acquire knowledge or hear submissions in relation to the instant dispute which would have to be considered in the light of what he might learn or be told or find out, carrying out his investigative powers, on the other dispute.

16. This is a risk which the parties might well wish to take. As the adjudicator himself pointed out in the correspondence, and as suggested by Mr. Scott Holland, that risk is minimised by conducting the proceedings not in parallel but in tandem, or by ensuring in some way that what is learnt in the one is not revealed in the other. Of course, that latter course cannot take place without the consent of all the parties involved. In my judgment paragraph 8(2) is intend to cover, and does cover, a variety of circumstances. It is intended to cover all the situations in which there may be related disputes under different contracts, whether or not the parties are the same and whether or not there may be permissibly be consolidation of the two proceedings. It applies whenever where one party needs to know or may need to know, *before* allowing the adjudication to proceed in that way, whether the adjudicator is going to have to pass on information or may acquire information which would not be available in the other adjudication to which it is not a party. In other words they are all circumstances where, as a matter of principle, a party's rights to the resolution of a dispute, privately and confidentially, would or might be infringed by the introduction of a third party, either in the same proceedings or by having the dispute determined by a person who would or could acquire knowledge from the other proceedings but which could not used in the resolution of the dispute, yet might either consciously or unconsciously influence its outcome. A party must give a real and informed consent to any reduction in such rights. I therefore accept Miss Lindsey's description of the ambit of that paragraph.

17. Mr. Scott Holland also suggested, by reference to paragraph 10 of the Scheme, that, in any event, an adjudicator who acted in two related disputes, where the consent of the parties was required, was not necessarily a reason to justify a fundamental objection to the adjudicator's jurisdiction. That paragraph reads:

 "10. Where any party to the dispute objects to the appointment of a particular person as adjudicator, that objection shall not invalidate the adjudicator's appointment nor any decision he may reach in accordance with paragraph 20."

 In my judgment, paragraph 10 of the Scheme is concerned about the consequences of an objection to the appointment of a particular person to be the adjudicator - for that is what it says - and it has nothing to do with whether that person, if otherwise validly chosen and appointed, has jurisdiction. Accordingly SE's objections to Mr Riches are not thereby thwarted. In any event it follows that an adjudicator could not properly so act against the wishes of a relevant party, unless that party had agreed otherwise.

18. In my judgment, paragraph 8(2) effectively provides that, although the appointment might in itself have been validly made, even if in relation to a dispute which is or proves to be a related dispute for the purpose of paragraph 8(2), it is necessarily a conditional appointment which is thus dependent upon the consent of all the parties to those disputes. In my view, this was such a case - and obviously so on the facts. Plainly the disputes with which Mr Riches had been appointed - those between PSH and SE and between PSH and JCH were related, not just for the purposes of paragraph 8(2) of the Scheme, as conceded, but also in any ordinary sense. Furthermore, this is not one of these instances, where one could say, equating the approach with principles of natural justice (to which I shall be coming), that the proof of the pudding, is, as it were, in the eating. It would be necessary to show that there was some material consequence as a result of which the appointment was in some way invalid. The words of the Scheme do not say that the consent should not be unreasonably withheld: they give an absolute right to a party not to consent.

19. In my judgment, Miss Lindsey is correct in her submission that paragraph 8(2) has to be read as part of the contract between the parties, since section 114(4) of the Act states:
 "Where any provisions of the Scheme for Construction Contracts apply ... in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned."

 Therefore paragraph 8(2) takes effect as a contractual term. In any event, in my view, SE was entirely reasonable in withholding its consent to the appointment of Mr. Riches in relation to its dispute, since, as I have indicated, the purposes of PSH's reference to adjudication were to attempt to apportion responsibility amongst the several sub-sub-contractors for the liability which PSH had accepted and

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the damages which it had had to pay McAlpine. There was, therefore, every reason to ensure that the rights of the parties had to be observed, since that attempt was going to call into question Mr Riches' previous decisions.

20. That is not to say, of course, that, as Mr. Scott Holland rightly pointed out, there are circumstances in which it will be valuable for the parties to have the same adjudicator, to avoid duplication of time and effort, and to make the best use of the adjudicator's knowledge. But the people best placed to reach a decision about that are those very people whose interests are to be determined by the adjudicator. Sensibly, they have therefore been given the right under the Scheme to consent. The express requirement for consent means that it should be clearly sought and given so that it will be an informed consent. In the absence of such a consent, the party's rights must be upheld as a matter of law and the provisions of the Scheme must be enforced as a matter of contract, i.e. there can be no consolidation or the like.

21. I find it extremely difficult to understand why Mr. Riches could possibly have thought, as he himself had referred to the Scheme in his correspondence, that he could go ahead without the consent of the parties. The point was put very clearly and forcefully to him by the defendant's solicitors (and by the solicitors for JCH). He ought then to have said: "Very well, I will have to withdraw from this appointment," and, as the defendant's solicitors correctly pointed out, a fresh appointment of somebody else should have been made by the RICS in each adjudication. Quite why he thought that not only he could take it upon himself to usurp the rights of one of the parties but that intrusion was in some way in its interest, of which he was to be best judge, because of his prior knowledge, completely escapes me. (For reasons to which I shall come he could not even have acted in one adjudication, let alone both, against the wishes of the relevant sub-subcontractor.)

22. He did not do what he ought to have done. In my judgment, his refusal to do so means that he proceeded without jurisdiction to determine this adjudication. That, in my view, provides SE with not only a defence, and for the purposes for Part 24 of the CPR, a realistic defence, and certainly not a fanciful defence, but also, in my judgment, an absolute defence to the claim. It is therefore not strictly necessary to deal further with the other points relied put forward ably by Miss Lindsey for SE. For the sake of completeness and because it is conceivable that my interpretation of paragraph 8(2) of the Scheme may be wrong, I turn now to some of those other grounds for opposing the application for summary judgment.

23. The second ground is what has been conveniently called "Bias". There are a number of ways of looking at this. Miss Lindsey, in her skeleton, referred to a number of recent decisions, in particular **Director General of Fair Trading v. Proprietary Association of Great Britain** [2000] All ER (D) 2425 and the proposition set out in paragraph 86 of the judgment of the Court of Appeal in that case:
"The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. He must then ask whether those circumstances would lead a fair mind and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

She also drew attention to paragraph 37, which describes the many forms in which bias may be found. It reads:
"37. Bias is an attitude of mind which prevents the Judge from making an objective determination of the issues that he has to resolve. A Judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a Judge towards a particular view of the evidence or issues before him."

There are a number of factors which need to be taken into account. I have already read passages from the decision in the adjudication initiated by McAlpine which show the following. First, Mr. Riches had a familiarity with the site. Secondly, although it was left to the parties, he was involved in examining the work. Both are factors which were not available to SE, which was not present and which was not invited to be present. Thirdly, and this is of equal, if not greater, importance, Mr Riches had decided

on the amount which PSH had to pay to McAlpine, which was the amount which was sought to be passed on by the PSH. When one looks ahead to the decision made by Mr. Riches that amount is exactly the same amount which he used in his own decision. As he said in paragraph 73 of his decision:

"Issue 2. If SE are liable, what are the damages claimable? The basic damages are £123,456.45 for replacing 318 panes of glass."

In my view, in these circumstances, there is a very real risk that an adjudicator in the position of Mr. Riches would be carrying forward from an earlier adjudication not merely what he had seen or been told but also the judgments which he had formed, the opinions which he had reached, which led him to conclude that sum was the correct measure of McAlpine's damages recoverable from PSH.

24. Accordingly, in my judgment, these circumstances, on their face, fall exactly within paragraph 37 of the passage from **Director General of Fair Trading,** to which I have referred. There is, therefore, a sound and logical justification for the conclusion that Mr. Riches might be predisposed for a particular view of the evidence or issues before him, namely that the figure claimed by PSH was the right figure. SE's response to the referral notice quite rightly put that figure, and all its constituent elements, very firmly in issue for reconsideration. Mr Scott Holland drew attention to paragraph 17 of the Scheme:

"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."

Whilst this provision usefully restates basic principle it does not in any way amount to a waiver or detract from a party's right not to have tribunal who might be biased. Thus on this ground SE has established, at the very least, that it has realistic prospects of success in showing that Mr Riches was biased or was likely to have been biased by his previous knowledge, his dealings with one only of the parties and generally by the likelihood of being disposed towards upholding his previous reasoning and conclusions and ought not to have accepted the appointment or proceeded with the adjudication. Had this ground been concerned only with this conclusion and not with the assembly of the facts, in the absence of a party, that led to it, then it might possibly not have succeeded if the decision had shown that Mr Riches had truly reconsidered his previous conclusion. However the decision does not do so, and for the purposes of the present application, at least, SE has established that it has realistic prospects of success in showing that the result was affected by bias.

25. It is fair to point out that Mr. Scott Holland relies upon the fact that the makeup of McAlpine's claims, as presented to Mr. Riches in 2001, were passed to the defendant's loss adjusters. They did not reach the defendant's advisers in the adjudication, and that is not a matter for which PSH should in any way suffer. They passed it on. That it did not reach the defendant is no concern of theirs. Those submissions do not in my view really grapple with the point fully. The question is not what McAlpine claimed but with Mr. Riches's use of what McAlpine claimed. Mr. Riches would have had to have made available to the SE, in the course of his adjudication, his thought processes as to why McAlpine's claim might or might not be right and how he had arrived at the figure claimed by PSH. At the least, it is not at all clear to me that that was ever done. Not to have done so would have been a breach of the principles of natural justice as they apply to adjudication (see **Discain Project Services Limited v Opecprime Limited (No 1)** [2000] BLR 402). As it is not clear that Mr Riches, in discharging his duty to ascertain the law and the facts, acquainted SE with the basis upon which McAlpine's claim was thought by him to sound (which should include why PSH was right to admit liability) SE has realistic prospects of success in its defence that the principles were not observed. Mr Riches did not fulfil the intention that he has expressed on 9 May: *"to reveal all of the relevant information from the previous adjudications to ensure that both parties are fully informed"*. It was a bold statement since its implementation depended on matters beyond the powers of most adjudicators.

26. There are further difficulties stemming from the conduct by Mr Riches of the proceedings in parallel. First, there was correspondence in May between the adjudicator and the defendants' solicitors in both proceedings (Nos 3 and 4). Reynolds Porter Chamberlain was instructed on behalf of JCH in No 4. They also refused consent but also protested that Mr Riches had sent them correspondence in the other adjudication. That led to the adjudicator accepting that he had in fact addressed letters intended

for one party to the other party, and vice versa, an error which he sought to correct, but not successfully, since, in the end, he still managed to copy the letters addressed to one party to the other, as appears from page 152 in the bundle, thereby infringing the confidentiality to which the party was entitled. This again suggests that Mr Riches did not appreciate that how important it might be that each set of the proceedings should be conducted independently of the other.

27. In addition SE maintained that PSH refused to provide a copy of the decision in adjudication No 2. However PSH maintained that since it concerned the final account it was irrelevant. If left uncorrected that would have constituted a communication to which SE was not a party (see **Discain Project Services Limited v Opecprime Limited (No 2)** [2001] BLR 287). However I no longer have to pursue this and therefore deal with it for completeness. Obviously unless the decision of an adjudicator is agreed to be made available to third parties or unless it is to be equated to an arbitral award subsequent proceedings based on it may be difficult to pursue, at the least.

28. Mr Riches thought that the decision and the proceedings in adjudication no 2 might be relevant since he said that he intended "to reveal all of the relevant information from the previous *adjudications* to ensure that both parties are fully informed" [emphasis supplied]. Moreover in paragraph 33 of his decision he thought it necessary to record that SE had sought from PSH the decision in adjudication No 2 but "PSH declined to provide a copy, *despite my doing my best to persuade them"* [Emphasis supplied]. Furthermore, PSH did not include it in its evidence on this application.

29. In such circumstances SE was right, in my judgment, to infer that there was something in adjudication No 2 that might have been relevant to its case in Adjudication no 3 and of which Mr Riches was aware but which he did not or could not reveal. Mr Scott Holland, on instructions, somewhat belatedly said that PSH was worried that SE might take advantage of knowledge of items in the account to include similar items. That explanation does not account for Mr Riches' concern as that consideration was obviously irrelevant to Adjudication No 3. It is possible that Mr Riches did not think that the decision in Adjudication No 2 affected his decision in Adjudication No 3. Had he done so then when it became clear that PSH would not consent to SE seeing the decision he ought to have resigned since he could not have complied with his obligation to tell SE what he knew. The more material point is whether the information might be relevant to SE. On the evidence of Mr Riches' acts I accept SE's submission that it was. Accordingly in my judgment SE has established, first, that the decision may have been affected by Mr Riches' prior knowledge which he ought to have but did not (or could not) disclose, contrary to principles of natural justice (and **Fox v Wellfair);** secondly, that SE was not treated fairly in that Mr Riches had in effect communications with PSH (via Adjudication No 2) to which SE was not a party (see **Discain v Opecprime (No 2)** cited above); and thirdly that, taking into PSH's refusal, there are real (and not fanciful) grounds for concluding that Mr Riches' was biased (not, of course, deliberately).

30. In addition, in the decision itself, Mr Riches made a number of errors, which he now accepts were made, in which he described JCH as the defendant party liable to PSH rather than using the words SE. Errors of this kind may be pardonable. Each of them would not necessarily be decisive. There were however quite a number of them so Miss Lindsey submitted that the adjudicator had not asked himself the right questions whereby his decision was a nullity: **Bouvgues v Dahl-Jensen** [2001] BLR 522 at paragraph 12. Paragraph 71 is prefaced

"I find it more probable than not that the operations carried out by J C Howell contributed to the damage to the glass.
71.00 I do not accept the way in which PSH has allocated liability to J C Howell."

Paragraph 72:
"On this basis I have calculated the total number of panes for which I think JCH has liability. This is shown in appendix 1."

Paragraph 76:
"I do not accept that other than replacing the glass the other heads of claim constitute damages. They are actually costs in pursuing JCH prior to this adjudication.

I find that the sum due to PSH from JCH in respect of damages is 65 panes of glass @ £388.23 = £25,234.95."

It was submitted that these errors give SE real grounds, not fanciful grounds, for contending that Mr. Riches had not only brought with him material which he would have had to have taken extreme steps to counter in the course of the adjudication, but also, in the adjudication itself, he got confused between the position of JCH and the position of SE and thus failed to ask himself the right questions. It is as if the adjudicator had made one decision and then edited it, imperfectly and without proper thought, so as to arrive at the other decision. In addition these errors were the product of a departure from the principles of natural justice: see ***Discain (Nos 1 and 2)***, cited above.

31. As to whether the adjudicator had asked himself the vital question, looking at the rest of the decision, I cannot conclude that the adjudicator did not have in mind the liability of SE. He therefore must be taken to have asked the right question. On the other hand I consider that SE has established that it has realistic grounds for questioning whether, in arriving at the decision, Mr Riches demonstrated, both to himself and to SE, enabling it to have confidence in the decision, that he was considering its position alone without confusing it with that of J C Howell.

32. In a nutshell, SE has established, in my judgment, that there are realistic grounds for considering that Mr. Riches was unable to distinguish between the two parties and, therefore, may have confused the position of one with the position of the other. Certainly I have seen nothing in the evidence that I have before me about the conduct of the proceedings which indicates that Mr. Riches did what the SE's solicitors called for in their response to the referral notice, and in their final submissions, which was to reconsider what he had already decided in the McAlpine decision.

33. It has been said by both parties that the adjudicator should only have acted if a case had been put. Obviously a defendant will be in some difficulties in trying to put itself in the shoes of the claimant when it is the classic third party trying to challenge the award ultimately in favour of a original claimant which is passed on. In an adjudication, where the documents are solely those upon which a party relies, it is always going to be difficult for a party in the position of SE to challenge an award made off stage in another adjudication which is being sought to be passed on. In adversarial terms, that was bound to be the case.

34. However, an adjudication is not premised on an adversarial procedure. Far from it. It is the adjudicator who must take the initiative in finding the facts and the law (paragraph 13 of the Scheme, implementing section 108(2)(f) of the Act). That in turn means that an adjudicator has to be particularly conscious if the facts which he is to find are facts which he has already found. He must also realise that his previous decision has to be open to effective scrutiny by whichever party may be affected by it. He must expose the real basis for those earlier factual conclusions, and for the reasons, for the motivation, and all the factors relating to the final conclusion, all to the scrutiny of the party affected as an integral part of taking the initiative in investigating the facts and ascertaining them. Some one in the position of a third party would otherwise be unable to question the fundamentals upon which the original claimant succeeded so as to know what they were and to challenge them if they were incorrect or were not relevant to whichever decision was material.

35. I cannot see that this adjudicator performed any such exercises which SE was entitled to have conducted by him. On the face of it there has been a breach of the rules of natural justice as SE was never given a proper opportunity to know the legal and factual roots of the case that it had to meet, namely McAlpine's case against PSH. Accordingly, it seems to me that the prima face case that SE has made out is a real one and that the adjudicator's decision would be unenforceable in summary proceedings on that ground alone if it had stood by itself, i.e. without another set of parallel adjudication proceedings.

36. A ground also arose in relation to the final submissions which were sent following a meeting on 28 May 2002. First, did the final submissions reach each of the other parties? The position is extremely confused on the facts. On the one hand, the defendant says that, following a meeting with the adjudicator, agreement was reached for final submissions to be prepared. That was done at the end of

May. Neither party got the final submissions of the other party. Both sent them to the adjudicator. Both thought that the adjudicator would pass them to the other party. I do not know why this procedure was adopted. It seems to be very unwise, particularly as time may be needed to deal with a new case or errors that call fall correction. In itself it might be regarded as one of the hazards of adjudication and one which was self inflicted and would not justify non-enforcement of the decision.

37. However there is substance in the ground. The result was that the adjudicator in fact accepted a material proposition in the final submissions of PSH as to the extent of the allocation of responsibility for liability to SE. He allocated the contribution of SE's operations on a 4/7 basis. Of the total panes of glass affected in this part of the decision, he allocated responsibility to SE for 65 panes out of 151. This part of PSH's case had not featured at any of the meetings or prior thereto. Indeed, it was part of SE's final submissions that it did not really know what allocation was to be made by PSH. Against that background, it maintained that there was minimal liability.

38. It is contrary to the principles of natural justice for an adjudicator not to pass to the other party final submissions which might be adopted when those submissions contain a case which has previously not been presented to that party. Clearly if SE had known that a specific proportion was to be alleged in respect of part of the works, it would have said something about it. It had the time to do it since the decision was not made until 12 June 2002. However would it have said very much beyond that which it had already said? Here I doubt if it would have done so.

39. SE's final submissions were very extensive and seemingly comprehensive. In my view they covered all the evidence and facts known to SE. I do not think that SE would actually have been able to have dealt with this submission beyond saying, as SE's advisers did, what had already been said. Accordingly, on this point, although there was a breach of the principles of natural justice, I do not consider that there were any material consequences to SE. It is not enough to show a breach of the principles: see Judge Bowsher QC in **Discain (No 1**) at page 405 (which I followed in **Balfour Beatty Construction v London Borough of Lambeth** [2002] BLR 288).

40. The final point which requires to be mentioned, if not decided, is that the claim includes a sum for VAT on the principal amount awarded of £25,234.95 awarded by the adjudicator and on the interest on that amount.

41. Two points were taken. One is that there was no liability for VAT in the absence of a VAT invoice which had not yet been issued. That point is not a material point. A party is obliged to issue a VAT invoice, but payment must be made contractually under this form of very simple contract without necessarily the VAT invoice being present.

42. Of more moment is that VAT is not payable on damages (or interest on damages). This was a claim by PSH for damages. It is not, as Mr. Scott Holland at one stage suggested, a claim that was made under the terms of the contract; it is a claim for breach of contract, a breach of a failure to carry out the works with good workmanship and skill, as a result of which the panes of glass became damaged. This point was clearly identified in SE's final submissions. To be fair to the adjudicator, all he said in paragraph 79 was:

"To this sum is to be added such value added tax as is due in law."

The error is that of the claimant's solicitors. For the avoidance of doubt, no value added tax is due in law on damages for breach of contract. That seems to be such a self-evident proposition that it does not feature in leading textbooks, apart from ***Emden on Construction Law*** (see Section V, paragraph 1089) where the position is correctly and succinctly stated, together with helpful advice from the experienced editor which confirms that the adjudicator's formulation was right. Care has to be taken in framing claims. All too frequently one sees a claim inaccurately or incorrectly as described for "loss and expense" where the contract is not a JCT form or a derivative which uses such an expression. They are also treated as synonymous with a claim for damages even where the event or events relied on do not constitute a breach or breaches of contract. Yet one is a claim for compensation that is contractually under the contract and will attract VAT and the other is not. Therefore I would not have given judgment for the VAT on those heads. As it is, PSH's application is dismissed.

Gideon Scott Holland appeared on behalf of the claimant, instructed by Eversheds.

Susan Lindsey appeared on behalf of the defendant, instructed by Hazell & Co.

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