JUDGMENT : His Honour Judge Bowsher QC : 18th April 2002. TCC.

1. This action relates to some very strange circumstances.

2. The action is brought under CPR Part 8. The principal relief claimed is for an order that the appointment of an Adjudicator should be revoked and that some other person should be appointed in his place. At the outset of the hearing, I pointed out that while I have power in certain circumstances under the Arbitration Act, 1996, to remove an arbitrator, the Court is not by the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) granted any power to remove an adjudicator. Nor does the contract in this case give the court any power to remove an adjudicator. Counsel for the parties agreed that I should hear the case on the footing that it should be regarded as an application for a declaration in some suitable terms, though the terms were not drafted.

3. The claimant and the defendant entered into a sub-contract in about September, 1999 for the construction of concrete works to the sub-structure and building frame and ancillary works for a new Heritage Centre and Library in Norwich. The sub-contract incorporated the standard DOM/1 sub-contract terms and contained contractual provisions for adjudication that complied with the requirements of the HGCRA 1996.

4. The HGCRA 1996 requires that every construction contract shall include terms for disputes to be resolved by an Adjudicator. The decision of the Adjudicator is to be binding on the parties until the Court or an arbitrator comes to a decision on the same matter. The Adjudicator is required to reach a decision within very little time limits. The Adjudicator may be someone agreed on by the parties or may be someone nominated (by agreement by the parties) by a nominating body, such as, in this case, the Royal Institution of Chartered Surveyors.

5. Among the contract terms there was a term, in clause 38A.5.5 that, *"In reaching his decision the Adjudicator shall act impartially …"*

6. The course of the sub-contract was marred by a number of disputes.

7. Between July 2000 and November 2001, there were three adjudications. The President of the Royal Institution of Chartered Surveyors was asked on each occasion to appoint an adjudicator skilled in making valuations of work done. Mr C D H Wakefield was appointed on each of those occasions and he made adjudications. His conduct and his appointments have not been questioned.

8. Then there was a substantial dispute about extensions of time and claims for loss and expense arsing out of delays. The parties asked the President of the RICS to appoint a different adjudicator for an adjudication about that dispute. There was no criticism of Mr Wakefield, it was just that the parties wanted someone with a different skill, namely someone skilled in the programming of a building contract. The referring party, the defendant in this action on, 14 December 2001 requested that the dispute be referred to an adjudicator nominated by the President of the RICS and Mr David Richards of Mouchel Consulting Limited was appointed on 18 December 2001. That was the fourth adjudication. The Referral Notice was due by 21 December 2001, by agreement between the parties it was deferred to 4 January 2001, though an advance draft was served on 23 December 2001. I mention those dates because there has been much talk in the construction industry generally and in this case in particular, of *"ambush"* in adjudication. Certainly, the scheme for adjudication does give a party to a contract the opportunity quietly to prepare a massive case for adjudication and then make a referral to adjudication at an inconvenient time and hold the other party to tight time limits in answering a case prepared at leisure. In one published article, a learned commentator asked *"How many adjudications started on Christmas Eve?"* In this case, the adjudication started close to Christmas Eve, but the parties did agree that time should only begin to run after the Christmas and New Year holidays. The claimants allege that they were ambushed. The defendants deny that allegation. I have insufficient evidence to make a finding as to whether there was or was not a deliberate ambush. None is proved. The granting of time to cover the mid winter holidays rather suggests that there was no intent to ambush. I do not think that it is relevant to the issue before me save that it is clear that, even after the relaxation of the time limits to cover the Christmas and New Year Holidays, the claimants were subject to very tight time limits, as are all respondents to adjudications. That is the flip side of the injustice of delay in deciding the disputes that the HGCRA was intended to ameliorate. It may be that

the HGCRA has introduced a new injustice that was not there before, but that is not a matter for my consideration.

9. On 1 February 2002 Mr Richards published his decision in the adjudication. He decided that the payment of very substantial sums of money totalling well over £1 million was due to be paid by R G Carter Limited.

10. An action was brought in the Court by a Claim Form dated 20 February 2002 to enforce payment of those sums. That action was heard by His Honour Judge Seymour QC. In that action there was dispute about what was the meaning of "dispute" for the purpose of adjudications. On 21 March 2002, Judge Seymour held that what Mr Richards decided in his Decision was not a dispute that had been referred to him for decision and the decision was this made without jurisdiction and was unenforceable. Judge Seymour refused an application for permission to appeal against that judgment and an application to the Court of Appeal for permission to appeal is, I understand presently before the Court of Appeal. It is not for me to say whether or not I agree with the decision of Judge Seymour, but if permission to Appeal were to be granted and the appeal were to be decided it would be better if it were done quickly. Only the Court of Appeal can decide on the priorities of its listing but I would support any application for expedition of any appeal from Judge Seymour in this case.

11. The history of the relationship between the parties then took an extraordinary course. On the day of the judgment given by Judge Seymour 21 March 2002, R G Carter Limited gave notice of adjudication of disputes that covered some of the same ground as the dispute previously submitted by Edmund Nuttall Limited. R G Carter Limited applied to the president of the RICS for the appointment of an adjudicator but specifically asked that the adjudicator should not be Mr David Richards. Despite that request, the President appointed Mr David Richards for the fifth adjudication. It is that appointment that R G Carter Limited seek to attack in this action.

12. In the one hand, R G Carter Limited say that Mr Richards has prejudged the adjudication. On the other hand, while it has not been submitted in so many words, it seems to me that if Mr Richards is not appointed for the fifth adjudication, then the fees paid to him for the fourth adjudication will have been wasted. Those fees total the astonishing sum of £45,000 for what was supposed to be a cheap way of resolving disputes.

13. Mr Bowdery for R G Carter Limited forcefully submits that his clients were ambushed by the claim in the fourth adjudication and the adjudicator, Mr Richards decided that claim based upon a new report from a new expert having considered a response produced by R G Carter Limited in days rather than in the months that would have been allowed by the sub-contract for consideration of a time claim in the normal way. Having overturned Mr Richards decision on the ground of lack of jurisdiction R G Carter Limited now find that he is appointed to decide the same matter in response to their request for a decision on that matter.

14. The complaint made by R G Carter Limited is not that Mr Richards has done anything wrong so far (save with regard to one finding to which I shall later refer), but rather that he cannot be trusted to be impartial in the future. As to impartially, the parties are agreed that I should apply the test expressed by Lord Philips of Worth Matravers in **In re Medicaments** [2001] 1 WLR 700 at 726, 727. After considering recent decisions, including **Locabail v Bayfield** [2000] QB 451 and reviewing the decision of the House of Lords in **R v Gough** [1993] AC 646, Lord Phillips held that in the light of decisions from Strasbourg *'a modest adjustment of the test in **R v Gough** is called for'*. He said at page 727:
"The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.

The material circumstances will include any explanation given by the judge under review as to his knowledge or appreciation of those circumstances. Where that explanation is accepted by the applicant for review it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the viewpoint of the fair-minded observer. The court does not have to rule whether the explanation should be accepted or rejected. Rather it has to decide whether or not the fair minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced."

15. Mr Bowdery submits that Mr Richards mind has been poisoned by deciding the dispute without jurisdiction. What would the fair minded and informed observer think about that allegation? Whether Mr Richards in fact had jurisdiction is a matter for debate in the Court of Appeal. Whatever the Court of Appeal decides about that, I do not see that the fair minded and informed observer could or would think that Mr Richards was biased or acted unfairly in proceeding with the fourth nor with the fifth adjudication. Moreover, as to the fifth adjudication now in question, in construction contracts professional people, surveyors, architects and engineers, as certifiers are used to making decisions involving large sums of money that they later revise. The certifier may decide that on, say, Certificate 2 too much or too little was awarded and the matter is corrected on Certificates 3, 4, or 5 or on the Final Certificate. Any fair and reasonable professional person in the construction industry is perfectly capable of a change of mind on different evidence. Of course there are professional people in the construction industry who are neither fair nor reasonable but professional people should be accepted as fair and reasonable until the contrary is shown.

16 What would persuade a fair minded and informed observer that Mr Richards is not fair and reasonable and unbiased?

17. Firstly, Mr Bowdery submits that as a result of the alleged ambush by the fourth adjudication R G Carter Limited were forced to respond to a claim based on material that was mainly new to them with inadequate time to prepare their case and Mr Richards formed a view that was firmly against them. He says that they were presented 10 files of new documentation 3 new witness statements and a totally new experts report from a new expert and his clients had inadequate time to respond. So far there is no reasonable complaint against Mr Richards. Even if Edmund Nuttall Limited did deliberately ambush R G Carter Limited (and there is no evidence that they did, other than the timing close to Christmas), that is not a complaint against Mr Richards it is a complaint against one of the parties appearing before him. Accepting that new material was presented to R G Carter Limited and they had very little time to prepare a response, that also would not be regarded by an informed and fair minded observer as casting doubt on the impartially of Mr Richards. He was conducting his enquiry within the strict time limits laid down by Parliament. There may be a reasonable criticism of the process, but not of Mr Richards.

18. Mr Bowdery goes on to submit that: *"Mr Richards had made it clear that he is going to reach the very same conclusion in respect of Nuttall's claim without bothering to wait for R G Carter to serve its Referral Notice. In these circumstances, the Adjudicator seems to be attempting to vindicate his earlier very costly mistake by repeating his decision without bothering to understand why that earlier decision was fatally flawed - what dispute R G Carter wish to have resolved - why both parties are entitled to have a fair hearing before any decision is made."*

19. Those are very serious criticisms of Mr Richards and I do not see that they are in any way justified. I should say that I am told that Mr Richards was informed of this action before me and declined to take part in it.

20. This main plank in the criticism of Mr Richards rests on what he wrote in a letter dated 26 March, 2002. That letter was addressed to both parties to this action. Mr Richards stated that he had been nominated adjudicator under the Notice of Adjudication dated 21 March, 2001. He then went on to write: *"Both Parties will be aware of my previous involvement in disputes between them. While there appears to be some similarity between this matter and the matter I considered previously and while it is likely that I would make the same decision on the same facts, I am not aware of the precise case being mounted by the Referring Party. I have an open mind on this matter and will consider it on the merits of the submissions made by the parties. However, in order to save time, and consequently cost, please do not duplicate within your submissions, material presented to me earlier. Kindly merely direct me to the relevant document in the previous submissions."*

21. It is submitted that that paragraph shows that Mr Richards had a *"mindset"* that he would decide the dispute (whatever it turned out to be) against R G Carter regardless of the evidence. That is simply not what Mr Richards wrote. I read the sense of his letter as having quite the opposite meaning. However, I apply the test propounded by Lord Phillips: *"The court does not have to rule whether the explanation*

should be accepted or rejected. Rather it has to decide whether or not the fair-minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced."

Notwithstanding the difficulty of considering whether a fair-minded observer might have a view different from my own, I cannot conceive that any reasonable, informed and fair minded person could read Mr Richards letter as anything other than an expression of a desire to reach a fair decision on the basis of whatever material was put before him. Moreover, if the fair-minded observer had not seen that letter, he would still have had no reason to believe that there was any danger of bias.

22. Mr Bowdery also points to the fact that when the President of the RICS notified R G Carter Limited of the appointment of Mr Richards, he stated that he had received *"appropriate assurances that Mr Richards would approach the matter with an open mind"* and when asked for details of those assurances, the President made no reply. It is said, as I understand it, that because assurances were thought desirable, that is evidence of a risk of bias. It is also said that the absence of disclosure of the terms of those assurances also gives rise to suspicion. I do not agree with either proposition, nor, I think, would be fair-minder observer.

23. The one respect in which it is alleged that Mr Richards has been unfair so far is that in his decision of the fourth adjudication he said that a Mr Rasmussen from R G Carter Limited had *"knowingly falsely maintained various costs had been incurred"* and that he had made that finding without warning Mr Rasmussen of the possibility of such a damaging finding and without giving him an opportunity to give oral evidence. As to that, Mr Furst QC on behalf of R G Carter Limited responded that the criticism was based on Mr Richards finding in his Decision: *"In view of Mr Rasmussen's own admission within his witness statement the amounts set off are clearly not a cost, which the Respondent has incurred."*

No doubt, since the Adjudicator thought that he was basing his view on an admission in the witness's own witness statement, he thought that no further notice or evidence was required. That seems to be a reasonable approach though whether I would agree with it depends on the terms of the Witness Statement that I have not seen. Mr Furst also made the point that this criticism was not made until 3.30pm on the day before the hearing before me.

24. R G Carter Limited also have some concern about the terms of Mr Richards' proposed terms of appointment. I do not understand that concern. There is also concern that R G Carter Limited were invoiced for an appointment fee by Mr Richards in the sum £2,700 and were later told to destroy the invoice as it had been sent in error. That certainly seems a very large fee for just accepting an appointment, particularly in view of the large fee that had already been paid to Mr Richards. That may be the reason why it was said by Mr Richards to have been sent in error.

25. R G Carter Limited also object that Mr Richards has indicated a willingness to decide the dispute without having received a Referral Notice from R G Carter Limited. The scheme of the contract, like the scheme set out in the Schedule to the HGCRA 1996, provides that first a notice of adjudication is sent to the respondent and to the adjudicator and then not more than 7 days later a Referral Notice is sent to the Adjudicator and the respondent. In litigation terms, that is rather like the service of a Claim Form followed by a Statement of Case, or in old fashioned terms, a Writ followed by a Statement of Claim. Mr Furst QC for Edmund Nuttall Limited says that Mr Richards is in a quandary about how to proceed. I do not know how he knows that, Mr Furst QC submits that the adjudicator has a duty to proceed and that the referring party, R G Carter Limited, cannot stop the adjudication by failing, in breach of contract, to serve a Referral Notice. Mr Richards seems to have decided that he should go ahead and determine the dispute referred to in the Notice of Adjudication without a Referral Notice. That is like a judge saying that he is going to try an action having received only a generally indorsed writ without a Statement of Claim or a Defence.

26. It is difficult to know what Edmund Nuttall Limited really want. They are applying for leave to persuade the Court of Appeal that Judge Seymour was wrong and that the decision of Mr Richards in the fourth adjudication should stand. They oppose an application to me for some relief that will stop Mr Richards proceeding with the fifth adjudication. But at the same time they say that Mr Richards has a duty to proceed with the fifth adjudication even though the referring party has not provided a referring notice. If they are successful in getting a decision that Mr Richards should proceed with the

fifth adjudication and if they are also successful in obtaining from the Court of Appeal an order that Judge Seymour was wrong and that the decision in the fourth adjudication was enforceable, then they might well end up with the fourth and fifth adjudications decided in different terms by the same adjudicator on a similar dispute but on different evidence and both being on their face enforceable.

27. Mr Furst submits, and I accept, that R G Carter Limited is in breach of clause 38A.4.1 of the contract in failing to refer the dispute to the selected adjudicator with "particulars of the dispute or difference together with a summary of the contentions of which he relies, a statement of the relief or remedy which is sought and any material he wishes the Adjudicator to consider". But does it follow that the adjudicator should proceed as though the contract had been complied with? I do not see how he can fairly do so. He cannot decide a dispute unless he has particulars of the dispute and a summary of the contentions in support. To return to the analogy of the Claim without supporting Particulars of Claim, if an action is started and the Claimant fails to comply with the rules requiring the claim to be pursued, the action is likely to be struck out: the Court does not insist on trying the action in the absence of any activity from the Claimant. It may be that on a claim being struck out, the Claimant may be required to pay some costs. It may be that as a result of R G Carter Limited starting an adjudication and not proceeding with it that there may be some damages payable for breach of contract (for example the legal costs of considering the claim or the appointment fee paid to the adjudicator), I do not say that there are damages payable in this case, but there might be. If I had been asked to grant an injunction ordering R G Carter Limited to proceed with their adjudication proceedings I would definitely have refused to make such an order. The purpose of the HGCRA is to reduce disputes, not promote them. As to the duty of the adjudicator, one looks to the contract Clause 38A.5.3 requires him to reach his decision "within 28 days of his receipt of the referral and its accompanying documentation under clause 38A.4.1…". The adjudicator has not received the "referral" nor any accompanying documentation and so the time for the giving of his decision has not begun to run and he has no further duty or jurisdiction.

28. I turn to the relief claimed in this action.

29. The first claim is that "Mr Richards' appointment should be revoked on the basis that there are legitimate reasons which give rise to justifiable doubts as to his impartiality". As to that, I find that I have no jurisdiction to make such an order and if I have such jurisdiction I would not make such an order. Moreover since I do not find that there are legitimate reasons giving rise to doubts as to the impartiality of Mr Richards, I decline to make any declaration that would have the effect of disqualifying Mr Richards on the ground of lack of impartiality.

30. The second claim is that I should make an order that Mr Richards appointment contravenes the claimant's rights under the Human Rights Act, 1998. I asked Mr Bowery whether he wished to argue this point before me or whether he thought that if it were argued I would be likely to decide the question whether the Human Rights Act applied to adjudication in the same terms as my decision in **Austin Hall Building Ltd v Buckland Securities Ltd** (2001) BLR 272 that the Human Rights Act does not apply to decisions by adjudicators. Mr Bowdery declined to argue the point but I understand that he would wish to reserve the point if there were to be any appeal against the judgment. I stand by my decision in Austin Hall Building Ltd v Buckland Securities Ltd. I do not believe that the Human Rights Act, 1998 applies, but if it does, for the reasons I have already given, I do not think that there has been any breach of the Human Rights Act. I do not believe that the Human Rights Act makes any difference to this case.

31. The third claim is that some other person should be appointed adjudicator in respect of this dispute. I do not think that I have any jurisdiction to make such an order but if I did I would not make it.

32. The fourth claim is that "the claimant be granted an extension of time to serve its referral notice pending the appointment of an adjudicator who has not already prejudged, without jurisdiction, the claimant's claim". I do not have any jurisdiction to make such an order. However, Mr Furst QC on behalf of Edmund Nuttall Limited stated in submissions that his clients *"are prepared to agree to an extension of time to enable R G Carter Limited to put forward any admissible material to the adjudicator."* Since Mr Furst QC stressed the word "admissible", I pressed him to define what he meant by that word,

was it "admissible" in the terms of Judge Seymour's judgment or "admissible" in the terms of the submissions that Mr Furst QC would like to submit to the Court of Appeal on appeal from that judgment. After a 10 minute adjournment, he said that "*admissible material"* in the terms of the undertaking that he had offered without any pressure meant *"any material relevant to this dispute generated between the decision of the fourth adjudication and 21 March, the date of the fifth adjudication"*. Since the hearing, the solicitors to Edmund Nuttall Limited have by fax to the Court withdrawn the undertaking. That is another unusual feature of this case. However, that withdrawal does not affect my decision.

33 I do not propose to grant any of the relief requested by the claimants and I therefore dismiss this action.

34. There are various ways forward for the parties. Either the parties by agreement proceed with the fifth adjudication with agreed extensions of time. Or the parties abandon the fifth adjudication and one to the parties starts a fresh adjudication. Or the parties abandon adjudication and resort to arbitration or litigation as a means of settling their differences. I stress that in my view the adjudicator can only proceed with the fifth adjudication if both parties agree and by agreement set fresh time limits for the procedure. However, it does seem to me that in this most extraordinary case, the parties would be best advised to forget adjudication as a means of resolving their differences and go straight to arbitration or litigation so as to obtain a final resolution of the disputes. For the moment negotiation seems to be out of the window.

For the claimant: Martin Bowdery QC (Greenwoods, Solicitors)
For the defendant: Stephen Furst QC with him Ian Pennicott (Shadbolt & Co, Solicitors)