JUDGMENT : HIS HONOUR JUDGE BOWSHER. TCC. 11th April 2001

1. There are three applications before me. The first application was an application for a stay of the action for the dispute to be heard by an arbitrator. I dismissed that application on the ground that I found that there was no agreement for arbitration. I have given my reasons orally and I shall not repeat them. The second application is an application for summary judgment to enforce a decision of an Adjudicator. The third application is an application for summary judgment on the counterclaim in the action.

2. The principal application is the claimants' application for summary judgment to enforce an award of the adjudicator. The defendants by way of defence raise important points relying on the European Convention on Human Rights. For the first time, a defendant makes a frontal assault on the whole system of adjudication established by the Housing Grants Construction and Regeneration Act, 1996 (the 1996 Act). There have been cases in which complaints have been made about the conduct of adjudicators, that they have acted without jurisdiction or that they have acted unfairly. But in this action it is said that the system itself is unfair and offends against the European Convention on Human Rights. Unusually, no allegation is made against the adjudicator. In fairness, I should therefore name him at the outset. It is not alleged that the Adjudicator did or omitted anything that reflects on his personal conduct. I agree with counsel for the claimant that the adjudicator deserves praise. The adjudicator certainly did not by fault in his personal conduct deny the defendant a proper and equal opportunity to present its case. Within the restrictions of the statute and the contract between the parties, the adjudicator repeatedly tried to extract from the defendant a statement of the defendant's case. The adjudicator appointed was Mr. Christopher M. Linnett of Harold Crowter Associates.

3. Austin Hall, the Claimant, is a building contractor. Buckland Securities, the Defendant, employed Austin Hall to carry out building work at 1-5 Chance Street, London E1. Practical completion occurred in February 2000. Austin Hall submitted a draft final account in March 2000. No final decision on that final account was made by Buckland's contract administrator, and towards the end of the year Austin Hall submitted the dispute to adjudication. Buckland made allegations which are now repeated in their Defence. The adjudicator decided on 8 December 2000 that Austin Hall should be paid £81,928.14 with interest from 17 March 2000 at 5% above the Bank of England base rate, and that Buckland should also pay his own fees. The agreement was made between the parties before the Human Rights Act came into force. The adjudication the subject of this action was made after the Human Rights Act came into force.

4. The contract between the parties included the terms of the JCT Agreement for Minor Building Works. That standard form agreement includes provision for adjudication that complies with the requirements of the 1996 Act. The 1996 Act requires that every construction contract (as defined in the Act) shall contain terms providing for adjudication. Section 108(2) of the Act provides: *"The contract shall-*
   - *(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;*
   - *(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;*
   - *(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;*
   - *(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;*
   - *(e) impose a duty on the adjudicator to act impartially; and*
   - *(f) enable the adjudicator to take the initiative in ascertaining the facts and the law."*

5. Clause D5.3 of the agreement in this case complies with the requirements of the Act and in particular complies with the requirements of section 108(2)(c) and (d) of the 1996 Act as to time limits.

6. In the written Defence it is alleged*: "The defendant was denied its right to a fair trial guaranteed under article 6 of the European Convention on Human Rights and the said decision was a nullity and/or should be set aside. In particular in the determination of the defendant's rights and obligations in the adjudication the defendant was denied:*

- *a proper and equal opportunity to present its case on the claimant's Final Account;*
- *a reasonable time within which to respond to the Final Account of the claimant."*

7. On the second day of the hearing, counsel for the defendants added to those complaints the further complaint that the defendant was not given a public hearing and the decision was not pronounced publicly.

8. In a supplementary written skeleton argument, counsel for the defendants put the submission boldly and clearly, *"The defendants' case is that section 108 [of the Housing Grants Construction and Regeneration Act, 1996] and the procedure which any adjudicator is required to adopt is inherently unfair and contrary to Article 6 [of the Convention on Human Rights] and that accordingly the Court ought not to give effect to the decision."*

9. Counsel for the defendant submits that the statutory requirement that the adjudicator shall reach a decision within 28 days is manifestly unfair and is particularly unfair when the only liberty given to the adjudicator to extend that time is a liberty to extend the time by 14 days but only with the consent of the party by whom the dispute was referred. That provision, counsel submits, gives the referring party the whip hand and enables referring parties to ambush another party to a contract by preparing a detailed case over an extended period of time and then requiring a detailed answer from the other party in a very limited period. The possibility of *"ambush*" is not limited to the submissions in this case. It is a real public concern: see Keating on Building Contracts, 7th edition, page 531 para 16-103. But although there is a concern about "*ambush*" generally, there is no evidence of "*ambush*" in this case.

10. I have read evidence of the details of time requirements in this case, but the main thrust of the defence case is not so much on the details as on the general unfairness of the statutory scheme. The adjudicator is not personally criticised for the time limits that he set. It is said that the time limits that he set were unfair but they were the inevitable result of the overall time limit for decision set by the statute. Because that is the main thrust of the defence, I will deal with the case on the general allegations before dealing with the particular details of this case.

11. In the many cases coming before this court on enforcement of adjudications, it has been commonplace to look at the Convention and in particular at Article 6.

12. Article 6(1) is in the following terms: *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".*

13. The right to the fair administration of justice is so important that Article 6 is to be given a broad and purposive interpretation: **Delcourt v. Belgium** (1970) 1 EHRR 355 para 25; **Moreira de Azevedo v. Portugal** (1990) 13 EHRR 721 para 66.

14. But before considering Article 6, it is important to look first at some of the terms of the Human Rights Act, 1998 (HRA) to see how and in what manner the Convention is made a part of the law of this country. Section 1 of HRA indicates that Article 6 is one of the "*Convention Rights*" referred to in the Act. Section 2 requires the court to take into account the jurisprudence of the Strasbourg court. Section 3 is particularly important in this case: *"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. This section Applies to primary legislation and subordinate legislation whenever enacted; Does not affect the validity, continuing operation or enforcement of any incompatible primary legislation."*

15. Section 4 of the Act gives the court power to make what is called a declaration of incompatibility. It has been suggested that I should make such a declaration in this case, but I could not do so without notice being given to the Crown pursuant to section 5 of the HRA, and even if I were to make such a declaration it would not affect the rights of the parties in this case. Section 4(6) provides: *"A declaration under this section ('a declaration of incompatibility') does not affect the validity, continuing*

operation or enforcement of the provision in respect of which it is given; and is not binding on the parties to the proceedings in which it is made."

16. I must make it plain that even if the necessary notices had been given, I would not consider making a declaration of incompatibility without evidence of the workings of adjudication in general & much more argument on the law. The first question is, Does the Convention apply to adjudicators? To answer that question, one turns first to the statute. The Human Rights Act, 1998, (HRA) section 6 provides:

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if as the result of one or more provisions of primary legislation, the authority could not have acted differently; or in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section 'public authority' includes
a court or tribunal, and any person certain of whose functions are functions of a public nature .

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private."

17. Section 7 of the HRA provides that : *"A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may bring proceedings against the authority under this Act in the appropriate court or tribunal, or rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act."*

18. There is a short answer to almost the whole of the defendants' case on this application. Even assuming that the adjudicator is a public authority and that the HRA applies Article 6 of the Convention to his conduct, almost the whole of his conduct complained of is covered by section 6(2) of the HRA, *"Subsection (1) does not apply to an act if as the result of one or more provisions of primary legislation, the authority could not have acted differently*". In order to comply with the 28 day time limit provided by statute, the adjudicator could not have acted differently in imposing the time limits that he imposed on the parties. That proposition is, I think, not disputed. Accordingly, since the adjudicator was acting in accordance with primary legislation, even if the Convention applies to his function, the defendant cannot pray in aid section 7(1)(b) of the HRA as a defence to this application so far as time limits are concerned.

19. But I have said that that is the short answer to "almost" the whole of the defendants' case on this application. What is not covered by the short answer is the point taken on the second day of the hearing before me, but not on the first, that the defendant was not given a public hearing and the judgment was not pronounced publicly.

20. It may be very difficult, and not necessarily very fruitful, for an adjudicator to arrange a hearing between the parties, whether public or not, within the constraints imposed on him by the 1996 Act but it has not been suggested to me that it is impossible. Information about the conduct of adjudications in general is hard to come by, but I doubt if there has ever been a public hearing between parties to an adjudication. Sometimes there is a hearing in private, sometimes not. Certainly, it would be possible for the adjudicator to pronounce his decision publicly, but I doubt if that has been done. In this connection, I should at once remark that while Article 6 speaks of the pronouncement of a judgment, the 1996 Act refers always to the making of a "decision". It has been suggested that a register of adjudicators' decisions could be set up, but would parties to adjudications want such a register? Mr. Clay has said that parties have quite enough trouble getting off the register of County Court Judgments when they have not acted in a way that should affect their credit-worthiness and they are unlikely to want another register. Notwithstanding those considerations, it cannot be said, following the words of section 6(2) of the HRA that "as the result of one or more provisions of primary legislation, the authority could not have acted differently". Because of the complaint of lack of publicity, I am compelled not to be content with the short answer to this case but instead consider the whole argument.

21. The first question is, *"Is an adjudicator a public authority and on that account required not to act in a way which is incompatible with a Convention right?"* Looking at sub-sections (3) and (5) of section 6 of the HRA, one asks, *"Are certain of the functions of an adjudicator functions of a public nature? Is the nature of the acts done by the adjudicator, the investigation of a dispute and a decision in the adjudication, private?"*

22. To help me answer those questions, I have asked for submissions comparing an adjudicator to an arbitrator. It seems to be agreed that normally an arbitrator exercises functions that are private in nature, just as his jurisdiction springs from a private agreement. By agreement the parties to an arbitration waive the right to a public hearing. On that analysis, it is not a breach of the Convention that arbitrations should be heard in private and the decisions of arbitrators given in private despite the requirement of Article 6 of the Convention that there shall be a public hearing. Can the same be said of adjudications?

23. However, in asking about the position of the arbitrator, one must remember that there are at least two questions. Is the arbitrator a public authority? Have the parties waived some of their Article 6 rights? Particularly when arbitration is in a sense compulsory, the arbitrator may well be a public authority. In **Bramelid and Malmstrom v. Sweden** (1982) 29 DR 64 the applicants complained of proceedings before arbitrators who, under Swedish company law ruled that majority shareholders in a company were entitled to make a compulsory purchase of the applicants' shares in a company at a certain price. The Commission noted that, in accordance with **Ringeisen v. Austria** (1997) EHRR 455 the purpose of the proceedings was to determine the applicants' private civil rights and obligations and the applicants were entitled to a hearing before a tribunal within the meaning of Article 6(1). Anticipating the decision in **Bryan v. United Kingdom** to which I shall later refer, the Commission noted that the remedy before the District court was so limited as to be negligible: and because it did not give the applicants the opportunity to challenge the arbitrators' decision, the Commissioners focussed their attention on the arbitration procedure. The Commission said:

"Furthermore, the Commission notes that a distinction must be drawn between voluntary and compulsory arbitration. Normally Article 6 poses no problem where arbitration is entered into voluntarily ***(cf App. No. 1197/61, 5 Yearbook 88****). If, on the other hand, arbitration is compulsory in the sense of being required by law (as in this case) the parties have no option but to refer their dispute to an Arbitration Board and the Board must offer the guarantees set forth in Article 6(1).*

Since in this case recourse to arbitration was compulsory, and since the applicants were unable to bring their case to a court capable of settling the dispute and offering the guarantees set forth in Article 6(1) of the Convention, the Commission has to consider whether those guarantees were respected in the proceedings before the Arbitration Board."

24. But even when the arbitrator is a public authority, the parties may waive their rights. That was recognised (obiter as we would say in English proceedings) by the European Court of Human Rights in a criminal case, **Deweer v. Belgium** (1980) 2EHRR 439, at page 460; *"The 'right to a court', which is a constituent element of the right to a fair trial is no more absolute in criminal than in civil matters. It is subject to implied limitations. In the Contracting States' domestic legal systems, a waiver of this kind is frequently encountered both in civil matters, in the shape of arbitration clauses in contracts, and in criminal matters in the shape, inter alia, of fines paid by way of composition."*

25. Waiver of the right to a public hearing was also considered by the European Court of Human Rights in one of the many cases concerning social security disputes. While social security disputes may seem a million miles away from construction contracts, the judgment of the Court in that case is remarkably apposite to the considerations arising in the present case. I refer to **Schuler-Zraggen v. Switzerland** (1993) 16 ECHHR 405.

> *"58. The Court reiterates that the public character of court hearings constitutes a fundamental principle enshrined in Article 6(1). Admittedly, neither the letter nor the spirit of this provision prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public, but any such waiver must be made in an unequivocal manner and must not run counter to any important public interest.*

> *In the instant case the Federal Insurance Court's Rules of Procedure provided in express terms for the possibility of a hearing 'on an application by one of the parties or of the [presiding judge'sl own motion." As the proceedings in that court generally take place without a public bearing, Mrs. Schuler-Zgraggen could be expected to apply for one if she attached importance to it. She did not do so, however. It may reasonably be considered, therefore, that she unequivocally waived her right to a public hearing in the Federal Insurance Court.*
>
> *Above all, it does not appear that the dispute raised issues of public importance such as to make a hearing necessary. Since it was highly technical, it was better dealt with in writing than in oral argument; furthermore, its private, medical nature would no doubt have deterred the applicant from seeking to have the public present.*
>
> *Lastly, it is understandable that in this sphere the national authorities should have regard to the demands of efficiency and economy. Systematically holding hearings could be an obstacle to 'the particular diligence required in social security cases," and could ultimately prevent compliance with the 'reasonable time' requirement of Article 6(1)."*
>
> *There has accordingly been no breach of Article 6(1) in respect of the oral and public nature of the proceedings."*

From this judgment one can infer, that where a right to a public hearing exists that right can be waived; that such waiver can be inferred from a failure to ask for a public hearing; technicality of the proceedings may make a public hearing less desirable; in the interests of speed national authorities may dispense with the requirement of public hearings. All of those considerations apply in the present case.

26. An adjudication under the many standard forms of construction contract that now provide for adjudication may appear simply on reading the contract to be something freely agreed to between the parties, but in fact it is not. Any construction agreement, as defined by the Act, that does not contain adequate provision for adjudication will be subjected to compulsory contract terms imposed by statute. For that reason, it is strongly arguable that the nature of the act of the adjudicator cannot be said to be private in the sense of section 6(5) of the HRA. Mr. Clay for the claimants on the other hand argues that in building contracts there is a continuum of decision makers spreading from certifiers (usually architects or engineers) to the House of Lords. Some of those decision makers are readily identified as being in the terms of the HRA "a court or tribunal", some (like certifiers) are not, and some, like adjudicators fall on the borderline. Even the position of certifiers is not easily allocated: sometimes the parties agree that the certifier's decision shall be conclusive and final.

27. In the matter of definition in this regard the HRA provides a little help. In more than one section it is said that "court includes a tribunal" and in the definition section 21, it is said, *"Tribunal means any tribunal in which legal proceedings may be brought"*.

28. Unlike a certifier, an adjudicator is only appointed when there is a dispute. That puts the adjudicator closer along the scale to a court or tribunal. The French text of Article 6, but not the English text, requires that for Article 6 to apply, there must be a "*contestation*", or dispute. It does not follow that wherever there is a dispute Article 6 applies. In **Fayed v. United Kingdom** (1994) 18 EHRR 393 it was said that for an individual to be entitled to a hearing before a tribunal, there must exist a dispute or '*contestation'*. For there to be an adjudication there must be a dispute. But the Court continued: *"It follows, so the Court's case law has explained, that the result of the result of the proceedings in question must be directly decisive for such a right or obligation, mere tenuous connections or remote consequences not being sufficient to bring Article 6(1) into play."*

29. Applying the definition of "*tribunal*" in section 21 of the HRA in the light of the decisions to which I have referred, I do not regard an adjudicator under the 1996 Act as a person before whom legal proceedings may be brought. Legal proceedings result in a judgment or order that in itself can be enforced. If the decision at the end of legal proceedings is that money should be paid, a judgment is drawn up that can be put in the hand of the Sheriff or Bailiff and enforced. That is not the case with an adjudicator. The language of the 1996 Act throughout is that the adjudicator makes a decision. He does not make a judgment. Nor does he make an "award" as an arbitrator does though he can order

that his decision be complied with. Proceedings before an arbitrator are closer to court proceedings because an award of an arbitrator can in some circumstances be registered and enforced without a judgment of the court. But the decision of an adjudicator, like the decision of a certifier, is not enforceable of itself. Those decisions, like the decisions of a certifier, can be relied on as the basis for an application to the court for judgment, but they are not in themselves enforceable.

30. The 1996 Act itself makes a distinction between the decision of an adjudicator and legal proceedings. Section 108(3) provides that: *"The contract shall provide that the decision of the adjudicator is binding until the dispute is determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement."*

31. There, Parliament clearly is not regarding the decision of the adjudicator as having been reached as a result of *"legal proceedings"*.

32. Section 108(3) of the Act is by no means conclusive of the matter. I have looked for guidance to **Benthem v. Netherlands** (1985) 8 EHRR 1. At paragraph 30, the Court first considered the applicability of Article 6(1) to a dispute over an application for a licence to sell petrol at a garage. The licence was refused on safety grounds. At page 8 the Court wrote:

"A. Existence of a 'contestation' (dispute) concerning a right

1.Principles adopted by the Court in its case law

32. The principles that emerge from the Court's case law include the following:

(a) Conformity with the spirit of the Convention requires that the word 'contestation' (dispute) should [not] be 'construed too technically' and should be 'given a substantive rather than a formal meaning'.

(b) The 'contestation' (dispute) may relate not only to 'the actual existence of a ... right' but also to its scope or the manner in which it may be exercised. It may concern both 'questions of fact' and 'questions of law'.

(c) The 'contestation' (dispute) must be genuine and of a serious nature.

(d) According to the RINGEISEN judgment of 16 July 1971, 'the ... expression "contestations sur (des) droits et obligations de caractere civil"' [disputes over civil rights and obligations] covers all proceedings the result of which is decisive for [such] rights and obligations'. However, 'a tenuous connection or remote consequences do not suffice for Article 6(1) . . . : civil rights and obligations must be the object----or one of the objects--of the 'contestation' (dispute); the result of the proceedings must he directly decisive for such a right'."

33. I have inserted the word "**not**" in paragraph 32(a) as it appears from an examination of the decision in **Le Compte et al v. Belgium** 4EHRR 1 that there is plainly a misprint in the report of Benthem.

34. The court cited the case of **Ringeisen v. Austria** already cited by me, and to which I shall later refer again, but then, unfortunately, said *"The court does not consider that it has to give on this occasion an abstract definition of the concept of 'civil rights and obligations'. In its view, the proper course is to apply to the present case the principles set out above"*. The facts of that case are so far removed from adjudication that it is difficult to extract from the facts of the decision any guidance as to the applicability of Article 6(1) in the present case.

35. A further submission made on behalf of the claimants is that the adjudicator does not look like a tribunal. He is an ad hoc appointee of the parties. He might be appointed once only and never appointed again (though that is not so in this case).

36. The matter is finely balanced, but I find that an adjudicator exercising functions of the sort required by the 1996 Act is not a public authority and is not bound by the HRA not to act in a way incompatible with a Convention right subject to the limitation provided by section 6(2) of the HRA. Proceedings before an adjudicator are not legal proceedings. They are a process designed to avoid the need for legal proceedings.

37. I make that finding that an adjudicator is not bound in the manner I have stated conscious that I have approached the matter from a different direction from the decision of a brother judge of the Technology and Construction Court, His Honour Judge Havery Q.C. in **Elanay Contracts Limited v. The Vestry** [2001] BLR 33, a decision described by the Editors of the Building Law Reports, de haut en

bas, as "*intellectually respectable*" though in their opinion wrong. In that case, Judge Havery said that Article 6 of the Convention did not apply to an adjudicator's award or to proceedings before an adjudicator "because, although they are the decision or determination of civil rights, they are not in any sense a final determination".

38. At first sight, I was unwilling to agree that Article 6 can only apply to the final determination of civil rights and obligations (leaving aside criminal matters). I have therefore looked to the jurisprudence from the European Court of Human Rights. In **Ringeisen v. Austria** (1971) 1 EHRR 455 para 94 the European Court of Human Rights held that Article 6(1) "covers all proceedings the result of which is decisive for private rights and obligations". In that case, decisions of Real Property Transactions Commission refusing approval of sales of land were held to be subject to Article 6(1) because they determined the applicant's rights. Similar words were used in **Robins v. United Kingdom** (1997) EHRR 527, in a case concerning the assessment of costs. But the court in those cases was not considering whether the result was required to be finally decisive. But the court in Ringeisen did add: *"The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence".*

39. The adjudicator's decision is binding until the dispute is finally determined by legal proceedings, by arbitration, or by agreement: see section 108 of the 1996 Act. The enforcement of an adjudicator's decision through the courts might put one party into liquidation or bankruptcy or save the other from a similar fate. An adjudicator's decision may be at least as important as a decision of a court making an order for a temporary injunction or for a payment on account. No one would suggest that a court making orders of that sort should not comply with the common law rules of natural justice. But the decision of Judge Havery is supported to some extent by a decision of the European Court. However, as I read that decision, it does not suggest that Article 6 does not apply, but rather that if one views that matter in the round there is unlikely to be a breach of Article 6.

40. The decision to which I refer is **Bryan v. United Kingdom** (1995) 21 EHRR 342. In that case, the decision was that the whole process should be looked at as one. At page 359 the court said: *"Even where an adjudicatory body determining disputes over 'civil rights and obligations' does not comply with Article 6(1) in some respect, no violation of the Convention can be found if the proceedings before that body are 'subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1)."*

41. If, contrary to my opinion, the adjudicator is a public authority for the purposes of the HRA, one should consider not just his decision taken alone but also the whole process necessary to enforce his decision. If one considers the whole of that process, including the court proceedings necessary to enforce the decision then there is necessarily a public hearing before the decision is enforced (if enforcement be necessary) and all the other requirements of Article 6 are satisfied. To illustrate the principle behind that decision one need look no further than consider the long standing process of the court granting an interim injunction without notice, or ex parte as it used to be said. An injunction granted without notice to the defendant, if viewed on its own, is made in breach of the rules of natural justice and in breach of Article 6 of the Convention. To test whether there is a breach of Article 6 or of the rules of natural justice, one must look at the process as a whole, including the urgency of the situation, the safeguards ordered by the court including a cross-undertaking in damages, and, more importantly, an order limiting the length of the injunction in time until an early public hearing on notice to the defendant. One has to balance against those safeguards the consideration that the rights of the citizen, such as the rights of a newspaper's rights of freedom of expression, may be seriously limited and the short period of the limitation of those rights may be very important. For example, publication of a news item of great public interest and importance might be prevented in a Sunday newspaper on one weekend and held over to the next weekend without that newspaper having been given an opportunity to put its case.

42. One of the points mentioned by Judge Havery in the **Elanay** Case was the fact that proceedings before an adjudicator are not in public while Article 6 of the Convention requires a public hearing. Whether

proceedings are heard in public cannot be a part of the test whether Article 6 applies to the proceedings: rather whether there is a hearing in public goes to the question whether there is a breach of Article 6.

43. The next question then is, if I am wrong in finding that the Convention does not apply to the decision of an adjudicator, Has this adjudicator acted in a way incompatible with a Convention right?

44. In answer to that question, the defendants first rely on **Dombo Beheer B.V. v. The Netherlands** (1993) EHRR 213. In that case, the court said, at page 230: *"The Court agrees with the Commission that as regards litigation involving opposing parties private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case including his evidence under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."*

But it is most significant that having said that, the Court then continued, *"It is left to the national authorities to ensure in each individual case that the requirements of a 'fair hearing' are met."*

It follows in my view, that the decision of **Dombo Beheer B.V. v. The Netherlands** is not an authority for questioning primary or secondary legislation of the United Kingdom in this regard. In particular, it is not an authority for questioning the procedure required by the 1996 Act.

45. If the criticism of the adjudicator is limited to the criticism that he has applied the statutory 28 day time limit for his decision so that only a short time was made available for the defendants to make their response to the referral, then I find that sub-section 6(2)(a) of the HRA applies so as to remove the stigma of unlawfulness from the acts done by the adjudicator. As a result of provisions of primary legislation, the adjudicator could not have done differently. It is not disputed that the time limits he set, though tight, were necessary in order for him to comply with the 28 day time limit for his decision imposed by statute.

46. Turning to the complaint now made of the lack of publicity, I consider section 7 of the HRA. I have quoted that section in paragraph 21 of this judgment. By reason of that section the defendant can rely on the Convention rights in legal proceedings (if contrary to my decision those rights do apply here) "but only if he is (or would be) a victim of the unlawful act". So far as lack of publicity goes, is the defendant a "victim"? The defendant has not behaved like a victim in this regard. The defendant could have, but did not, ask the adjudicator at the outset or at any time before his decision for a public hearing and public pronouncement of the decision.

47. Mr. Letman on behalf of the defendants submits that his clients did ask for a hearing. He says that maybe his clients did waive their rights to a public hearing but not to a hearing. Mr. Letman relies on the last paragraph of a letter dated 1 December, 2000 from Mr. Scott to the adjudicator in which he said: *"In conclusion it seems to me that the best way forward would be for you to chair a meeting between the Referring Party and their adviser and the Respondent Party and myself to see if we can reach a reasonable financial settlement of this matter. I repeat that based upon last April's discussion we are not far apart on figures and it should be possible to settle the matter."*

48. That was not a request for a hearing of the matters in dispute. It was a request for the adjudicator to take on another role, as conciliator or mediator to help the parties reach a settlement. It was not a request for him to have a hearing to help him reach a decision. It was no part of the role of the adjudicator to take on the role of conciliator or mediator and I do not read that letter as a request for a hearing.

49. Following the decisions in **In Schuler-Zagren v. Switzerland** 28 May, 1993, to which I have already referred and the Hakanson and Sturesson v. Sweden judgment of 21 February, 1999, I find that the defendants did waive any right to a public or private hearing (if any existed) by failing to ask for a hearing.

50. It is interesting that the decision of **Schuler-Zagren** was based partly on a ground of expediency that may well apply to adjudications (though I have heard no evidence to that effect). It was said at paragraph 57 that the number of judgments in the Federal Insurance Court, approximately 1,200 per year, would drop dramatically if public oral hearings were to be the rule and in such an event the lengthening of the proceedings would seriously jeopardise access to the Supreme Court.

51. The defendant did not complain of the lack of publicity until the second day of the hearing before me, prompted, I suspect, by my pointing out that if Article 6 applied there might have been a breach of the Article in that regard. It might well be demonstrated hereafter that there is a public interest in public hearings or at least in public promulgation of the decision. A number of people, including the judges, would be helped if they could find out more about what was happening in adjudications generally. Equally, there may be a conflicting public interest that there should be an absence of publicity. But in any event, I do not think that it is open to someone involved in an adjudication who has not asked for publicity to wait until he has lost and then complain of the lack of publicity.

52. Accordingly, there are four reasons why the defendant cannot complain of the lack of publicity:
- Article 6 does not apply;
- If Article 6 does apply, when considering the whole process including the court hearing there is no breach of the Article;
- If there is a breach with regard to publicity, the defendant is not a "victim" and cannot rely on the Convention right in legal proceedings.
- The defendant has waived any right to a hearing that existed.

53. I turn from general considerations to the particular facts of this case. The defendant complains in the Defence:
"By fax and letter dated 09.11.00 the Adjudicator confirmed that he had been formally nominated to Act as Adjudicator and required the Claimant to issue its Referral Notice on or before 10.11.00.
By fax and letter dated 10.11.00 the Adjudicator recorded that he had received the Referral Notice and required the Defendant to serve its Response on or before 17.11.00. The Referral Notice comprised 2 substantial lever arch files of documentation running to in excess of 500 pages.
By letter dated 16.11.00 the Defendant by its surveyor Michael Scott FRICS served an outline Response to the Referral Notice.
By letter dated 21.11.00 the Adjudicator required the Defendant to serve a detailed breakdown of their Final Account assessment by 24.11.00.
By letter dated 22.11.00 the Defendant by Mr Scott protested that there was insufficient time for a full and adequate response to the assessment and requested an extension of time to 01.12.00.
The Claimant did not consent to the requested extension and by fax and letter dated 23.11.00 the Adjudicator refused the request for further time and thereafter purported to decide the matter without more."

54. What is said in that Defence is factually correct, but certain facts are omitted. The two lever arch files sent with the referral notice contained documents that had been in the possession of the defendants long before their delivery and during the ordinary process of the contract. Moreover, the draft Final Account had been delivered long before the referral, on 8 March, 2000. 9 months passed between the delivery of the draft Final Account and the Referral Notice to adjudication. During all those months, the defendants had ample opportunity to prepare comments on the draft Final Account and to make their own assessment of the Final Account. This was not a case of an ambush by the referring party.

55. The adjudicator having asked for a response by 17 November, 2000, received a response on 16 November dealing mainly with alleged defects. The response did not respond to the draft Final Account, nor did it include the contract administrator's own assessment of the Final Account which should have been in existence by this time. So far from preventing the defendants from putting their case, on 21 November, the adjudicator asked the defendants for more information: he asked for their Final Account assessment by 24 November. That was a short time limit, but he was not asking them to do the work in that time, he was asking to be given the product of work that he reasonably assumed would have been done long since. On 22 November, 2000, the contract administrator asked for an extension of time until 1 December, 2000. If the adjudicator had granted that extension, it is unlikely that the adjudicator would have been able to produce his decision in the time required by statute and the contract and he said as much in his reply by letter of 23 November, 2000. But the adjudicator still tried to make progress. Since he plainly was not going to get what he had asked for, he asked for something else that might reasonably have been forthcoming. In his letter of 23 November, 2000, the adjudicator wrote: *"Under clause 8.1 (D5.3) of the contract I am required to make a decision within 28 days of the Referral. If I were to agree to the request of Mr. Scott I would be severely restricting the time available to me*

to fully assess the document in order to make my decision. Therefore I feel I cannot agree to extend the time as requested. In order that some progress can be made I request that Buckland send me their build up to the last payment, on 31 January, 2000. I will then decide how to proceed with my decision."

56. That effort by the adjudicator, taken entirely properly to try to get some information, was also fruitless. But the defendants did have the last word in the adjudication. By letter dated 1 December, 2000, the date to which he had asked for an extension, Mr. Michael Scott on behalf of the defendants made a long statement of the defendants' complaints. On receipt of that letter, the adjudicator at last had a long statement of case from the defendant. It did not include the information for which he had been pressing, but that was by no means his fault.

57. On the particular facts of this case, I find that there is no sustainable complaint upon the allegations against the adjudicator that he has breached Article 6 of the Convention on Human Rights (even supposing that that Article were to apply at all or without qualification) or failed to comply with the well-known rules of natural justice.

58. I should make it plain that although in my view Article 6 of the Convention on Human Rights does not apply to the acts and decisions of adjudicators in construction contracts, adjudicators are required expressly by section 108(2)(e) of the Act of 1996 to act impartially. Where the Statutory Scheme under the 1996 Act applies, paragraph 12 of the Scheme sets out the duty to act impartially in more detailed terms, and paragraph 17 requires that *"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"*.

59. I may be at fault in this regard, and if I am my error will be speedily pointed out (one of the advantages of public promulgation of decisions), but I do not see in the JCT form on which the parties contracted any term corresponding to paragraph 17 of the Scheme. If there is no such term, then in my view there is a requirement of natural justice under the common law to the same effect.

60. It has been argued in other cases that the rules of natural justice do not apply to adjudications. I believe that the rules of natural justice do apply to adjudications subject to limitations.

61. It has been suggested in other cases that Dyson J. decided in **Macob Civil Engineering v. Morrison Construction Limited** (1999) that breaches of natural justice by an adjudicator did not invalidate his decision. I do not believe that that is a fair summary of the decision of Dyson J., as I explain in my judgment in the case of **Discain Project Services Limited v Opecprime Development Limited**. I refer not to my judgment on the application for summary judgment in that case but to my judgment at the trial.

62. Two of the rules of natural justice were re-stated by the Privy Council in Kanda v. Government of Malaya [1962] AC 332. Lord Denning put the rules in two words, impartiality and fairness. He also put them in two Latin maxims, Nemo judex in causa sua, and Audi alteram partem. It is the later maxim that is said to have been offended in the present case. That decision of 1962 should be read in conjunction with the decision of the Court of Appeal in **Director General of Fair Trading v. Proprietary Association of Great Britain** [2000] All ER (D) 2425.

63. In practice, I would think that adjudications are governed by rules of natural justice that are not very far different from Article 6 of the Convention except for the requirement of a public hearing and public pronouncement of the decision. The time limits that are under attack in this application are also subject to the rules of natural justice, but there is no question of an Act of Parliament being attacked in the courts as being in breach of the rules of natural justice. In our democracy, Parliament is still regarded in the Courts as supreme. The adjudicator was constrained by Act of Parliament to impose the time limits that he did, so he cannot be criticised for breaching the rules of natural justice. I agree with the statement of His Honour Judge Humphrey Lloyd Q.C. in **Glencot Development and Design Co. Ltd. v. Ben Barrett & Son (Contractors) Limited** Unreported 13 February, 2001 that, *"It is accepted that the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit"*.

64. For all those reasons, I find that the decision of the adjudicator should be enforced by summary judgment of this court. I therefore give judgment for the claimants (taking into account a subsequent payment) for £50,412.08 plus interest and VAT in a sum to be assessed if not agreed. I invite argument as to costs.

The defendants' application on the counterclaim:

65. The defendants apply for summary judgment on their counterclaim.

66. The first response of the claimants was to apply for an order that the counterclaim be stayed to arbitration. By Article 7A of the contract, it was provided that the parties agreed to submit to arbitration "any dispute or difference as to any matter or thing of whatsoever nature arising under this Agreement or in connection therewith except in connection with the enforcement of any decision of an Adjudicator appointed to determine a dispute or difference arising thereunder". Unfortunately, and in my view unnecessarily, Article 7B contained an express submission of disputes to the court. Unless parties entering into a contract on this form cross out either Article 7A or 7B (as required by a note to the form) they make a contract in which two articles are in direct conflict. That was the starting point of the consideration of the evidence that led to my finding that there was no agreement for arbitration in this case. I emphasise that that was only the starting point. There was more for me to consider than that and I repeat that I am not going to repeat the reasons given orally. I made my ruling on that point early on the first day of the hearing, 16 March, 2001. I heard submissions on that point as a discrete point and gave judgment orally ex tempore.

67. I quote Article 7A only to show that the claimants, if successful in their submissions, could have obtained both a judgment to enforce the decision of the adjudicator and an order that the counterclaim (upon which they say the adjudicator had pronounced) be stayed to be heard by an arbitrator. In that event, the claimants would have had a money judgment against the defendants with no judgment against themselves.

68. Having failed to obtain a stay to arbitration on the counterclaim, the claimants submitted on 20 March, 2001 that the fact that the adjudicator had ruled against the defendants on the issues the subject of the counterclaim showed that there was an issue to be tried.

69. On 20 March, I adjourned the matter so that I might consider my judgment.

70. On 27 March, 2001, I heard an application from the claimants for leave to put in further evidence in response to the defendants' application for summary judgment on the counterclaim. Mr. Clay said that he made the application "*out of an abundance of caution*".

71. Having heard argument, and it being accepted that I have a discretion in the matter, I gave permission for the further evidence to be put in. Counsel for both parties agreed that it would be better to defer consideration of the defendant's application for judgment on the counterclaim in the light of that evidence until after delivery of my judgment on the other issues in these applications. To consider the whole of the evidence submitted would take a considerable time.

72. I invite submissions for directions as to the disposal of this action generally including the counterclaim. It may be that one of the directions applied for will be a stay of execution on the judgment that I have made until after I have heard in full the application for summary judgment on the counterclaim. In saying that, I am not in any way prejudging the decision whether or not to grant a stay.

73. I am extremely grateful to counsel for their most helpful submissions and for the time and cost involved in providing me with copies of many helpful authorities.

For the claimant: Robert Clay (Prince Evans, solicitors)

For the defendant: Paul Letman (Amery-Parkes, solicitors)