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

1. This action is brought by the claimant to enforce an order made by an adjudicator pursuant to the Housing Grants Construction and Regeneration Act, 1996 (the 1996 Act).

2. On 19 October, 1998, the claimant entered into a contract with the defendant to design, manufacture and erect steel balconies at Davy House, Lyon Road, Harrow, London.

3. A dispute arose about payment and on 1 June, 2000 the claimant sent to the defendant a notice of adjudication under the 1996 Act.

4. The contract between the parties made no provision for adjudication and accordingly by reason of section 108 of the 1996 Act, the Scheme for Construction Contracts (England and Wales) Regulations 1998 applied.

5. The Royal Institute of Chartered Surveyors appointed Mr. Roy Sutcliffe of 25 Belltrees Grove, London SW16 as the adjudicator.

6. Mr. Sutcliffe on 6 July, 2000 ordered that the defendants should pay to the claimants £65,274.19 plus interest.

7. This action was brought to enforce compliance with that order. The action was begun on 17 July, 2000. On 9 August, 2000, the matter came before me on the hearing of an application for summary judgment. I gave leave to the claimant to amend the claim to add a further claim for £2,643.75 inclusive of VAT and I gave the defendants leave to defend the action.

8. I found against the defendants on two points raised in respect of the jurisdiction of the adjudicator. The first point was whether there can be a dispute about payment before the date for payment had arrived. The second point on jurisdiction was whether there was a dispute at all because letters indicating that there was a dispute came from a sister company of the defendants, Miltonland Limited. It was submitted that the adjudicator had made conflicting findings that (a) as regards the existence of a dispute the parties would have regarded those letters as being written on the defendants' behalf, but that (b) regarding the notice of intention to withhold payment under section 111 of the Act the letters did not constitute good notice because the Act does not allow a notice to be given by a party not a party to the contract. I found against the defendants at the hearing of the application for summary judgment and they are not now in issue except as part of the context of the issues at this trial of the action. Both the defendants and Miltonland are part of the Comer Group of companies. It is no part of my function to decide whether the adjudicator was or was not right about that matter.

9. I gave leave to defend because it appeared to me that there were three triable issues:
   a. Did the rules of natural justice apply to the hearing before the adjudicator?
   b. If so, were there one or more breaches of those rules?
   c. If so, ought the court on account of that breach or those breaches decline to enforce the adjudicator's decision?

10. I gave judgment ex tempore on Friday, 9 August, 2001 and refused leave to appeal. Thereafter I received a typed note of my judgment agreed between counsel. Thinking that the note was for the purpose of applying for leave to appeal, I made a number of amendments to that note and returned it to counsel with an addendum to my reasons. I have been surprised to learn that counsel's note of my judgment has been reported in Building Law Reports without the amendments that I made though with the addendum. The amendments were important and it is a matter for regret that the note of my remarks was reported without them.

11. After a considerable delay, there having been no further activity from the parties, on 15 January, 2001, I directed that the matter come before me again for directions on 5 February, 2001. On 15 January, 2001, my clerk also gave notice to Mr. Sutcliffe of the date of the Case Management Conference and gave him an opportunity to be joined as a party to the action. By letter dated 30 January, 2001, Mr. Sutcliffe indicated that he did not wish to be joined as a party to the action but stated that he was willing to give evidence.

12. On 5 February, 2001, I directed that the trial of the action should be heard on 19 March, 2001. On that occasion I also made the following orders:
"It is recorded that the adjudicator, Mr Roy Sutcliffe, has declined an invitation to apply to be made a Defendant. Mr Sutcliffe is given permission to file and serve on the parties evidence by Affidavit or witness statement by 7 March 2001. Mr Sutcliffe is to be subject to cross-examination on such evidence on notice served by either party 10 days before trial. Mr Sutcliffe is also given permission to make written or oral representations without evidence to the Court on notice to the parties.
All pleadings and other documents in this action to be served on Mr Sutcliffe."

13. Mr. Sutcliffe was both willing and anxious to give evidence. He gave every assistance that he could to the court. I am most grateful to him. He provided a written witness statement and written submissions. He appeared voluntarily at the trial. In the interest of even-handedness, he was called by the court so that he could be cross-examined by counsel for both parties. I invited him to give further evidence by way of re-examination and I asked some questions that I thought might have been asked by counsel in re-examination had Mr. Sutcliffe been examined in chief by counsel. Mr. Sutcliffe declined an invitation from me to make oral submissions supplementing his written submissions.

14. Mr. Sutcliffe has, understandably, been upset by what has been said about him in this case. In the light of evidence in this and other cases, it seems to me that it is much more difficult for an adjudicator than for a judge or arbitrator to conduct himself without criticism. While he did not say so in so many words, it was clear from his evidence that he accepted that he was pressured on the telephone to have conversations that he would have preferred not to have taken place. His natural courtesy prevented him from cutting the conversations as short as he would in retrospect have desired. The hard experience of this adjudication will make him an even better adjudicator in the future. He is obviously highly regarded. He told me that since the 1996 Act came into force about 35 adjudications have been referred to him on which he has made about 25 decisions. I would be very sorry indeed if this action had an adverse effect on Mr. Sutcliffe's professional reputation.

15. I do not decide this case on the burden of proof. I consider it sufficiently clear to decide without considering the burden of proof, but I do cite the rather obvious statement of the Commission in **Bramelid and anr v Sweden** 8 EHHR page 118 at paragraph 34, "The arbitrators must be presumed impartial until there is proof to the contrary". The same must apply to adjudicators. However, it is important to remember that on an application for summary judgment, usually, the only issue is whether there is a serious issue to be tried.

16. Not surprisingly, the issues pleaded after the Case Management Conference differed from the issues raised at the hearing of the application for summary judgment.

17. By the Defence, pleaded after the Case Management Conference on 14 February, 2001, the Defendants relied on statutory duties imposed on the adjudicator:

    Section 108(1)(e) and paragraph 12 of the Scheme require the adjudicator to act impartially in carrying out his duties.

    Paragraph 17 of the scheme 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."*

    The Defence also alleges that the adjudicator *"was obliged to carry out his duties in accordance with or substantially in accordance with the rules of natural justice."*

    It is not contended in this case that Article 6 of the European Convention on Human Rights applies to adjudicators.

18. The complaint made about the adjudicator's conduct formulated in the written Defence served after I had given leave to defend related to certain telephone conversations. The Defence reads:
    "(i) By fax dated 23 June 2000 the Adjudicator notified the parties (at paragraph 5(d)) that it was his view that he did not have the power to decide matters such as the corporate structure of the Corner Group (of which both Miltonland and the Defendant were members).

(ii) As indicated by the Adjudicator's fax to the parties of 27 June 2000, the Adjudicator had a private telephone conversation with the representative of the Claimant concerning the matters set out at paragraph 5(d) of the fax of 23 June 2000.

(iii) The Adjudicator stated in the fax of 27 June 2000 (at paragraph 3)

"Mr Hackett rang with regard to the matters referred to in my fax message nr6 (sic) paragraph 5(d). Having discussed this with him, I believe that he is now content that I confine my Decision to the dispute of the money claim.

I have reviewed the materials submitted to me and I am now in a position to draft the decision. It may be necessary for me to revert to the representatives for information on points of detail, if so I shall raise a query by fax."

(iv) As indicated by the Claimant's fax to the Adjudicator dated 29 June 2000 the Adjudicator had a further private conversation with the Claimant's representative on 28 June 2000. The main points of that conversation were, apparently at the Adjudicator's request, recorded in the Claimant's fax of 29 June 2000. As is apparent from that fax the points discussed between the Claimant's representative and the Adjudicator included:

a. the validity of the notices under section 111 of the Act; and

b. whether at any time the Claimant had knowingly entered into correspondence with any other trading company other than the Defendant (paragraph 5).

(v) By fax dated 30 June 2000 timed at 8.42am the Adjudicator wrote to the parties in response to previous correspondence. At paragraph 3 (d) of that fax and in response to paragraph 5 of the Claimant's fax of 29 June 2000 the Adjudicator stated that :

"my recollection of our discussion [ie between the Adjudicator and the Claimant's representative] on correspondence with other trading companies was that I said that I thought that this was not a fundamental issue as the other companies seemed to be acting for and on behalf of Opeeprime"

(vi) By fax dated 30 June 2000 timed at 9.48am the Claimant's representative wrote to the Adjudicator in response to the Adjudicator's fax of 30 June and stated, inter alia, that it was his view that the point referred to at paragraph 3(d) of the Adjudicator's fax of 30 June 2000 "cannot be more fundamental to the outcome of this dispute".

vii) As is apparent from the Claimant's second fax to the Adjudicator of 30 June timed at 5.36pm the Adjudicator had a private conversation with the representative of the Claimant on the afternoon of 30 June 2000 "on the specific issue in that fax of whether any Comer Group Company other than Opecprime Development Limited is to be considered relevant to this dispute".

(viii) The Claimant's representative further stated in that fax that "on the understanding that you regard the contract to be purely between Discain and Opecprime Development Ltd and that it is not necessary for me to put in a further submission via lawyers dealing with the relevance or otherwise of Miltonland Ltd I am now happy on behalf of my client that you should proceed to decision".

(ix) The Defendant was at no time informed of or invited to comment upon the details of the conversation referred to in the Claimant's second fax or the "understanding" referred to in the Claimant's second fax or the reasons for such understanding having been reached."

19. The conclusions drawn by the defendant from those alleged facts, and the basis for submitting that I should not give judgment in favour of the claimant were that the adjudicator:

"(i) Failed to act impartially and/or failed to act in a way that did not lead to a perception of partiality; and/or

(ii) Failed to make available to the Defendant relevant information submitted to the Adjudicator by the Claimant which was to be taken into account and/or which appears to have been taken into account in reaching his decision; and/or

(iii) Failed to consult with the Defendant on important submissions made by the Claimant and/or reached a decision on such submissions without inviting and/or affording the Defendant the opportunity of replying to such submissions; and/or

(iv) Entered into a number of private telephones conversations with the representative of the Claimant in respect of a vital issue in the Adjudication without fully informing the Defendant of the nature, content and conclusions of such conversations and in particular entered into such a conversation on 30 June 2000 without fully informing the Defendant of the nature, content and conclusion of the said conversation."

Mr. Sutcliffe objects to the description of his telephone conversations as *"private"* since he had no intention of having any conversation that was hidden from one party to the adjudication.

20. Mr. Sutcliffe does accept that he had the telephone conversations referred to in the Defence but not in the terms alleged.

21. There is no reason in law why an adjudicator should not have telephone conversations with individual parties to the adjudication. It would make life a great deal easier for him if he declined to do so. In his first faxed communication with the parties on 6 June, 2000, the adjudicator said *"Except for bulky documents, the normal means of communication in this adjudication shall be by fax."* If he had managed to make the parties stick to that direction, there would probably have been no court proceedings. But of course, in the very tight timescale allowed by the statute of 28 days between referral and decision, telephone calls may be required to get the work done. Section 108(2)(f) of the Act and paragraph 13 of the Scheme permit him to take the initiative in ascertaining the facts and the law. In some cases, the freedom of the adjudicator to act inquisitorially may involve him in making telephone calls. But acting inquisitorially does not mean acting unfairly, as paragraph 17 of the Scheme makes plain. Moreover, there is a difference between telephone calls of a purely administrative nature (such as a call asking for a legible copy of a document) and calls that convey or elicit "*relevant information*". If the adjudicator receives "*relevant information*" by telephone (as by any other means) he is required by paragraph 17 of the Scheme and by ordinary courtesy, or natural justice, to pass that information to the other party for comment. Doing that may be very time-consuming. Communicating by telephone may be much more time-consuming and more dangerous than communicating by fax. It requires taking a careful note of the telephone conversation and then sending a letter or fax to both parties summarising the conversation. It may then be that the party to the telephone conversation disputes the summary of the conversation, and it may also be that the party who did not take part in the telephone conversation is suspicious of what has been said. Judges are careful to have telephone calls of an administrative nature made by a clerk. It would be sensible for adjudicators to have such calls made by a secretary and to make other calls with great caution. If the parties live at a distance from each other and a hearing is required, it may be convenient to have a conference telephone call. Practice Direction 23PD-6.5 supplementing the Civil Procedure Rules, 1998 gives guidance to the courts on the conduct of applications by telephone conference. Adjudicators might find that Practice Direction helpful, though it is in no way binding on them, and if thought inappropriate should be disregarded.

22. However, I should make it plain that in this case, the adjudicator is not being criticised for the use or misuse of inquisitorial powers. In the present case, the telephone calls complained of were for the most part not initiated by the adjudicator: he was approached against his will. The criticism is that he failed so to use his powers to control the conduct of the proceedings as to prevent one party approaching him in a way that he, the adjudicator, thought improper. There was, however, an important telephone call that he did initiate in which he failed to be sufficiently explicit to rectify what had gone wrong before.

23. On 16 June, 2000, the adjudicator directed that the adjudication would be on a documents only basis, meaning that there would be no hearing and no view of the property.

24. Before considering the facts of this particular case in more detail, I shall consider the duties of the adjudicator.

25. The duties alleged and relied on by the defendants are summarised in paragraph 17 of this judgment.

26. The duty imposed by Section 108(1)(e) of the 1996 Act and paragraph 12 of the Scheme that the adjudicator should act impartially in carrying out his duties at first sight may appear clear, but it may

not always be clear whether an adjudicator has been in breach of that duty, and if he has been in breach, what are the consequences.

27. Paragraph 17 of the scheme requiring 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" is particularly apposite to the present case but similar questions about breach and consequence of breach arise.

28. The allegation in the Defence that the adjudicator "was obliged to carry out his duties in accordance with or substantially in accordance with the rules of natural justice" itself, by use of the qualifying word "substantially", suggests a recognition that either the adjudicator does not have to comply in all respects with the rules of natural justice, or, more probably, that not every breach of the rules of natural justice will invalidate the adjudicator's decision.

29. Mr. Nissen on behalf of the claimant submits that the beyond the requirements of impartiality and transmission of information required by section 108 of the 1996 Act and paragraphs 12 and 17 of the Scheme, the rules of natural justice do not apply. He submits that having regard to the fast track requirement of the adjudication process, Parliament prescribed two central requirements and no others apply.

30. Mr. Nissen submitted that in **Macob v. Morrison** [1999] BLR 93 Dyson J. held that procedural breaches of natural justice do not affect the decision. I am not sure what is meant by the word "procedural" in that sentence. I certainly reject any submission that Dyson J. held that the rules of natural justice do not apply to adjudication. In that case, the claimant applied for summary judgment to enforce a decision of an adjudicator. A defence was mounted on the ground that the adjudicator had acted in breach of the rules of natural justice.

31. At page 98 of the report in Building Law Reports, Dyson J. said:
" For all these reasons, I ought to view with considerable care the suggestion that the word "decision" where it appears in section 108(3) of the Act. paragraph 23(2) of Part 1 of the Scheme and clause 27 of the contract, means only a decision whose validity is not under challenge. The present case shows how easy it is to mount a challenge based on an alleged breach of natural justice. I formed the strong provisional view that the challenge is hopeless. But the fact is that the challenge has been made, and a dispute therefore exists between the parties in relation to it. Thus on Mr Furst's argument, the party who is unsuccessful before the adjudicator has to do no more than assert a breach of the rules of natural justice, or allege that the adjudicator acted partially, and he will be able to say that there has been no "decision"."

32. The first answer to the argument put forward by Mr. Furst to Dyson J. is that on an application for summary judgment, the court will give judgment for the claimant if it considers that the defendant has no real prospect of successfully defending the claim or issue: CPR 24.2. There must be a real live triable issue between the parties for the defendant to be allowed to defend the claim: **Swain v. Hillman** [2001] 1 All ER 91 at 92 per Lord Woolf. Is there a realistic as opposed to a fanciful prospect of success? This is not new law. It is what the Queens Bench Masters have been saying with varying degrees of emphasis in numerous cases raising different and difficult issues ever since I was called to the Bar in the middle of the last century. It is not enough for the defendant simply to raise the banner of *"breach of the rules of natural justice"* to defeat the application to enforce the decision of the adjudicator. The defendant must show that the plea has some force and relevance in accordance with principles that I shall discuss later. In the paragraph of his judgment that I have just quoted, I do not think that Dyson J. was saying any more than I have just said.

33. I am not sure how far Dyson J. intended to go in the next paragraph of his judgment:
"At first sight, it is difficult to see why a decision purportedly made by an adjudicator on the dispute that has been referred to him should not be a binding decision within the meaning of section 108(3) of the Act, paragraph 23(1) of the Scheme and clause 27 of the contract. If it had been intended to qualify the word "decision" in some way, then this could have been done. Why not give the word its plain and ordinary meaning? I confess that I can think of no good reason for not so doing, and none was suggested to me in argument. If his decision on the issue referred to him is wrong, whether because he erred on the facts or the law, or because in reaching his decision he

made a procedural error which invalidates the decision, it is still a decision on the issue. Different considerations may well apply if he purports to decide a dispute which was not referred to him at all."

34. The reference in that paragraph to a "procedural error" has been read as meaning that breaches of natural justice are to be regarded as "procedural errors" and to be disregarded when considering whether decisions of adjudicators should be enforced. One can test that proposition by thinking the unthinkable, going to an extreme and asking what would be the approach if it were shown that an adjudicator refused to read the written submissions of one party because they were typed with single rather than double spacing. It would never happen. But if it did, his decision would not be enforced. So there must be some breaches of natural justice that would persuade the court not to enforce the decision of an adjudicator. How is the line to be drawn?

35. In an article in the Construction Law Journal (2000) 16 Const. L.J. 102, Mr. Ian Duncan Wallace Q.C., who has achieved the remarkable position of being a controversialist in the dry area of construction law, also considered the decision of Dyson J. in Macob. He said:
"It is respectfully submitted that the words "a procedural error which invalidates the decision" in this passage go too far if they mean, as Dyson J. (probably obiter) states, that enforcement of an award arrived at in breach of the principles of natural justice cannot be resisted on those grounds in summary proceedings at all.

On the other hand, with all respect, it is a startling proposition that an adjudicator's decision, if arrived at in serious breach of a principle of natural justice, must as a matter of law nevertheless be enforced in circumstances where payment under an invalid decision could easily turn out to be irretrievable and precipitate the insolvency of the party affected (particularly where, as here, there had not even been a decision by the adjudicator on the merits, but only a procedural one shutting out consideration of any defence or cross-claim). Even given the inherent and obvious pro-producer and anti-customer and anti- paymaster bias of the HGCRA's statutory adjudication proposals, it is submitted that, in the absence of express wording, Parliament can only have intended adjudicators' decisions validly arrived at on the merits or law of a properly referred dispute to be binding on the parties for the comparatively lengthy period which could be involved before final judgment or award and almost inconceivable that Parliament intended to accord to adjudicators' decisions or conduct an immunity and enforceability not accorded by the law to arbitrators and their awards or even to the judiciary and their judgments."

36. There is much to be said in support of what Mr. Ian Duncan Wallace there writes.

37. Dyson J. made somewhat similar comments to those in **Macob** in **The Project Consultancy Group v. The Trustees of the Gray Trust** [1999] BLR 377. In **Homer Burgess Ltd. v. Chirex (Annan) Limited** [2000] BLR 124, Lord Macfadyen in the Outer House of the Scottish Court of Session expressed doubts about Dyson J.'s views. At page 134, Lord Macfadyen said:
*"In coming to that conclusion I also derive support from the views expressed by Dyson J in **The Project Consultancy Group v The Trustees of the Gray Trust**. The respect in which the adjudicator's decision in that case was beyond the proper scope of his jurisdiction was somewhat different, but the passage which I have quoted above from paragraph 6 of Dyson J's judgment figures an example which is close to the circumstances of the present case. I would add, however, that I wish to reserve my opinion as to the soundness of the distinction which Dyson J drew between the effect of an assertion that the decision of the adjudicator was one which he was not empowered to make, and the effect of an assertion that the decision of the adjudicator was invalid on some other ground such as breach of the rules of natural justice. Although that point does not bear directly on the matter which I have to decide, I have some difficulty in reconciling Dyson J.'s distinction with what was said in **Anisminic**, for example by Lord Reid at 171C."*

In **Glencot Development and Design Co. Ltd. v. Ben Barrett & Son (Contractors) Ltd**. (Unreported) 13 February, 2001, His Honour Judge Humphrey Lloyd Q.C. said at paragraph 20, *"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"*. I agree with that statement made by Judge Humphrey Lloyd.

38. In the same case, Judge Humphrey Lloyd reviewed authorities on the meaning of *"bias"*, in particular the decision of the Court of Appeal in **Director General of Fair Trading v. Proprietary Association of Great Britain** [2000] All ER (D) 2425. Mr. Collings on behalf of the defendant relied on the older Privy

Council decision of **Kanda v. Government of Malaya** [1962] AC 322, but the more recent decision of the Court of Appeal in **Director General of Fair Trading v. Proprietary Association of Great Britain**, based as it is on all the more recent authorities including the Strasbourg jurisprudence, is to be preferred. In the latter case, the Court said,

"84. We would summarise the principles to be derived from this line of cases as follows:

(1) If a Judge is shown to have been influenced by actual bias, his decision must be set aside.

(2) Where actual bias has not been established the personal impartiality of the Judge is to be presumed.

(3) The Court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the Judge might not have been impartial. If they do the decision of the Judge must be set aside.

(4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the Court.

(5) An important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice.

85. This approach comes close to that in Gough. The difference is that when the Strasbourg Court considers whether the material circumstances give rise to a reasonable apprehension of bias, it makes it plain that it is applying an objective test to the circumstances, not passing judgment on the likelihood that the particular tribunal under review was in fact biased.

86. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in Gough is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It rnust 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.

87. 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. Thus in Gough, had the truth of the juror's explanation not been accepted by the defendant, the Court of Appeal would correctly have approached the question of bias on the premise that the fair-minded onlooker would not necessarily find the juror's explanation credible."

While the Arbitration Act, 1996 does not apply to adjudications, some help may be obtained from that Act by way of analogy. As a result of that Act, serious irregularity on the part of the arbitrator (including failure to act fairly and impartially as between the parties) is not a sufficient ground for the court to interfere in an arbitrator's decision unless the court is satisfied that the irregularity *"has caused or will cause substantial injustice to the applicant":* see **Egmatra AG v. Marco Trading Corporation** [1999] 1 Lloyd's Rep. 862, 865.

40. The telephone calls of which complaint is made in this action took place between Mr. Sutcliffe and the claimants' surveyor, Mr. Jeremy Hackett, who represented the claimants in the adjudication. At the trial I received oral and written evidence from Mr. Sutcliffe and from Mr. Bernard Cordell, a solicitor acting for the defendants. Mr. Hackett did not give evidence though a number of documents from his file were produced.

41. It was not put to Mr. Sutcliffe in cross-examination on behalf of the defendant that he in fact failed to act impartially. When, by way of re-examination, I read to him the allegation in the Defence that he had failed to act impartially, he denied it and I accept that his answer was given honestly and sincerely. I entirely accept that there was no actual bias on the part of Mr. Sutcliffe: indeed he reduced the claimants' claim by 30% and made a costs order against Mr. Hackett because of his time-wasting submissions. The questions are whether there was an appearance of bias and if so, what should be the result.

42. I turn to consider the matters complained of and to apply to my findings the tests laid down by the Court of Appeal in **Director General of Fair Trading v. Proprietary Association of Great Britain.**

43. After the adjudicator's appointment, there were some communications between him and Mr. Cordell and Mr. Hackett with copies to each of them, in the main dealing with administrative matters but also dealing in part with matters in issue. Then Mr. Hackett sent on 20 June a long fax setting out the claimant's reply to the Defendants' response to the Referral Notice.

44. On the morning of 23 June, 2000, Mr. Sutcliffe received on his answerphone a message from Mr. Hackett about the ownership of the site. Mr. Sutcliffe acknowledged that message by leaving a message of acknowledgement on Mr. Hackett's answerphone. In oral evidence, Mr. Sutcliffe said that he did not mention the telephone calls of 23 June in his fax of 23 June because there was nothing to report about them. But it would have been better to have replied by fax, not telephone (with a copy to Mr. Cordell) requiring Mr. Hackett to make all representations in writing in accordance with the previous direction. Mr. Hackett later put his point about ownership of the site in his long fax.

45. On 23 June, 2000, Mr. Sutcliffe wrote to Mr. Hackett the fax referred to in the Defence at paragraph 10(i). In that fax, Mr. Sutcliffe wrote that he had telephoned Mr. Hackett on 19 June and told him that he could have an extra 24 hours as requested to provide certain information. No complaint is made of that telephone call because, as I understand it, the call was accepted as being merely administrative. In that fax, Mr.Sutcliffe referred to some of the points made by Mr. Hackett in his long fax. In particular, at paragaph 5d of his fax, Mr. Sutcliffe said that he did not think he had power to decide on "matters such as the parties' costs, ownership of the land, Nolan Davis v. Caton issues, or the corporate structure of the Comer Group". Those matters became known as "the 5d issues".

46. Mr. Hackett rang Mr. Sutcliffe on 26 June, 2000. As reported to both representatives by fax dated 27 June, 2000, the impression was given that that telephone call was only about the 5d issues. In the fax of 27 June, Mr. Sutcliffe said:
"Mr. Hackett rang with regard to the matters referred to in my fax message nr6 paragraph 5d. Having discussed this with him, I believe that he is now content that I confine my decision to the dispute over the money claim."

47. Had the telephone conversation in fact been limited to the 5d matters, no harm would have been done other than the possibility of the sowing of some seeds of disquiet in the mind of the defendants. By persuading Mr. Hackett to drop the 5d matters, Mr. Sutcliffe simplified the adjudication to the benefit of all concerned. In Mr. Sutcliffe's view, the claim was simply a money claim on invoices. But he agreed with counsel for the defendants that there were also issues on defects, and there was an issue which might be abatement or counterclaim and a further issue on the validity of the section 111 notice.

48. Mr. Sutcliffe openly admits that other things were mentioned, but he says they were not discussed, *"because discussion involves things going back and forth".* He said in cross-examination that this was the first time Mr. Hackett had made this kind of telephone call and, *"I took it leniently and let him say his piece: I did not have a discussion".* I believe that Mr. Sutcliffe recognises that it was a mistake to let Mr. Hackett say his piece. It would have been very easy to tell him to put what he wanted to say into writing and send it by fax to both himself and Mr. Cordell. The urgency of the matter did not require any greater speed than would have been involved in sending a fax. He made brief notes during the telephone conversation but the notes were no more than headings. He says that the only matter of importance was the 5d matters. His note of that was, *"Seemed happy to return to narrow issues"*. His note also mentioned section 111: "*workmanship-separate issue":* and invoices withdrawn. A note taken by Mr. Hackett of the same conversation was before me. The note is more in the form of a narrative but still in note form. In cross-examination, Mr. Sutcliffe agreed that on 23 June he had an open mind about defects and workmanship and that on 26 June he made up his mind that it was a dead letter. In his fax dated 23 June he had said that what happened on site may be of interest to him to the extent that bad or uncompleted work is relevant to the dispute. In his decision, Mr. Sutcliffe decided that the question of defects (as opposed to the value of the work) was not something he was entitled to consider in the context of the dispute.

49. I take the view that what was said about workmanship (whether or not it was a discussion) ought to have been reported to Mr. Cordell for his consideration at the same time as the report of the 5d matters. In cross-examination, Mr. Sutcliffe said that on 27 June he had not decided that defects were no longer an issue, but he added, Mr. Hackett was seeking to persuade him that defects were no longer an issue. In other words, he heard submissions from Mr. Hackett on an important matter that he did not report to Mr. Cordell. The matter of withdrawal of invoices also ought to have been reported because it was relevant to the giving of notice by Miltonland: that was why Mr Hackett mentioned it. Mr. Sutcliffe honestly believes that he reported the only matter of importance in that telephone call, but in my view he is wrong in that belief. It is said that Mr. Cordell made no complaint until after the adjudicator published his decision, but he could not complain about things being discussed that he did not know about.

50. By fax dated 27 June, Mr.Cordell commented succinctly to Mr. Sutcliffe (with a copy to Mr. Hackett) upon Mr. Hackett's long fax of 20 June.

51. At about 7 p.m. on 28 June, 2000, Mr. Sutcliffe received a telephone call from Mr. Hackett. Mr. Sutcliffe said he was "uncomfortable" to receive that call. He said in his written statement that he was unwilling to go into details so he did no more than jot down a note and say that if he wanted to pursue any further matters then he had to put them in writing by fax. The note made by Mr. Sutcliffe read:
"Call from Mr. Hackett
Not happy over my last fax
Further reference to solicitor.
New evidence
I will admit but with time implications if needed
He to fax me."

52. There is no note of that telephone conversation from Mr. Hackett.

53. In cross-examination by counsel for the defendant, Mr. Sutcliffe went further. He said that he was uncomfortable on receiving the telephone call on 26th but became more uncomfortable with each call. He said:
"*I brought the call to an end. After a while I became impatient and said I would not hear more. These things should have been put in writing and time was marching on. My discomfort was primarily with the impropriety of trying to pursue a case by telephone."*

54. By fax of 29 June, Mr. Hackett responded to Mr. Cordell's fax of 27 June. Later on the same day, he wrote a second fax to the adjudicator, with a copy to Mr. Cordell. In that fax he referred to the telephone calls of both 26th and 28th. He wrote that on 26th Mr. Sutcliffe had agreed to look at what he called the adequate payment mechanism point *"and also whether at any time Discain had knowingly entered into any other trading company other than Opecprime"*. On his copy of the fax, Mr. Sutcliffe wrote *"No"* against that statement. He denies that he agreed to get involved in correspondence from Discain with any other companies other than Opecprime. Mr. Hackett protested that the 28 day period was not up until 6th July and said that it was premature for the adjudicator to be getting on with his decision. He added that "in view of the legal points now emerging" he was referring to a solicitor for advice on a jurisdictional point.

55. On the evening of 29 June, Mr. Sutcliffe drafted a fax to Mr. Hackett and Mr. Cordell which he sent at 8.39 a.m. on 30 June. Mr. Sutcliffe there mentioned various fax messages that had passed and again referred to the telephone call of 26 June. In connection with that telephone message he mentioned only the 5d matters. In relation to the paragraph against which he had written *"No"* on his copy of Mr. Hackett's previous fax, Mr. Sutcliffe wrote:
"My recollection of our discussion on correspondence with other trading companies was that I said that I thought that this was not a fundamental issue as the other companies seemed to be acting for and on behalf of Opecprime".

So the adjudicator was there accepting that there was a discussion of the matter, but denying that he made the agreement alleged by Mr. Hackett. For the defendant, it is submitted that Mr. Cordell reasonably understood the statement I have just quoted as an acceptance by the Adjudicator that the Notice of Withholding need not be on the letterhead of Opecprime. His eventual decision, which carried with it exclusion of a very large claim, was quite the contrary. Mr. Nissen says that on the contrary, the words I have quoted from Mr. Sutcliffe could not have been reasonably relied on by Mr. Cordell as a binding decision as it does not use the word "notices" or refer to section 111. While it was not expressed as a binding decision, it seems to me that Mr. Cordell could reasonably have read those words as an indication that he had no need to make further submissions on the section 111 point. Mr. Cordell did have a further week in which he could have made submissions before the decision was issued. He did not make those submissions, and the real cause of his grievance, submits Mr. Nissen, was not what was said in the telephone calls but that he thought the adjudicator had made a ruling on section 111 in his fax of 30 June and had then changed his mind. Mr. Cordell was told the two versions of what had been said on this point. However, the manner in which it was done was not a satisfactory method of compliance with the requirement of paragraph 17 of the Statutory Scheme. In the circumstance of the later decision on section 111, I do not regard it as a fair compliance with the duty under paragraph 17 of the Scheme or a compliance with the rules of natural justice to say, in effect, I have received these submissions but rejected them, which is, I think, one reasonable interpretation of what Mr. Sutcliffe wrote, though in the light of his evidence I think it was not what he intended.

56. An hour after receiving Mr. Sutcliffe's fax of 30 June, Mr. Hackett responded by fax. He indicated that (like Mr. Cordell) he for his part had read Mr. Sutcliffe's fax as an indication that Mr. Sutcliffe had formed a view contrary to the claimants on the section 111 point. On that point he wanted to take advice from solicitors before making further submissions. He said that it was within the 'gift' of the Referring Party to accede to an adjudicator's request to extend time beyond the basic 28 days for decision and argued that it would not be natural justice to insist on giving a decision in the 28 days shutting out further arguments on two important issues *"one of jurisdiction and one of law"*. With that fax, which was copied to Mr. Cordell, Mr. Hackett enclosed some written submissions.

57. At 11.00 a.m. on 30 June, Mr. Sutcliffe telephoned Mr. Cordell. Mr. Sutcliffe's note of that conversation is simply *"Nothing to add to his previous submission"*. Mr. Cordell did not make a note of that telephone call, though Mr. Cordell accepts that there was a telephone call and he says that he has a clear recollection of it. The evidence of that telephone call illustrates the dangers of doing important business like this on the telephone. Two honest professional men have different recollections of what was said in an important telephone call. Mr. Cordell said that when telephoned by Mr. Sutcliffe, he had not read the recent fax from Mr. Hackett and was looking at it while speaking with Mr. Sutcliffe. The important difference between the evidence of the two men was that Mr. Sutcliffe said that he asked Mr. Cordell whether he wanted to put in further submissions and Mr. Cordell said No, whereas Mr. Cordell said that he was not asked if he wanted to put in further submissions. I think that the difference between them is one of interpretation and different understandings of what was said. In his written statement, Mr. Cordell wrote:
"Mr. Sutcliffe initiated the call and did not specifically ask me whether I had read Mr. Hackett's fax of that morning but he began to talk about it. I had not read that fax before our conversation began and I read it as we talked. He asked me as a lawyer what further matters might be put in once Mr. Hackett had seen his lawyers and after a little humming and hawing I said that I did not know. Mr Sutcliffe then made reference to Mr. Hackett's comment that extending time was a "gift" in a derisory manner and seemed to be inviting me to agree with him that the wording used was inappropriate and by inference to criticise Mr. Hackett. I felt that the conversation was improper in the absence of Mr. Hackett and I brought it to an end. There was no direct request or invitation to me to comment on or respond to Mr. Hackett's fax and it was not conveyed to me that Mr. Sutcliffe had just grasped the fact that the issue to be decided was that Miltonland Limited could not give a Section 111 Notice. Had Mr. Sutcliffe made me aware that he had only just understood the issue relating to the Section 111 Notice I would certainly have wanted the opportunity to address him further on such point. However in view of the fax that Mr. Sutcliffe had sent earlier that day and in view of his failure to invite any comments relating to Section 111 Notices during our telephone conversation as far as I was concerned his fax of 8.42 am had indicated

acceptance that the letters relied on by Opecprime did not need to be on Opecprime paper. As far as I was concerned the Adjudicator had indicated that the issue had gone. I am confident that there was no discussion whatsoever as to me serving any further response. The way that the conversation ended was with both of us agreeing that there was nothing further to say and that we would have to await Mr. Hackett's further submissions following his visit to his solicitor. I did not re-read Mr. Hackett's fax following my telephone conversation with Mr. Sutcliffe. During our conversation I had not had a proper opportunity to consider Mr. Hackett's 3 pages of notes but my recollection of my conversation with Mr. Sutcliffe is that as there would be further representations made following his visit to his client's solicitor it would be at that stage that we would have to give consideration to such further representations."

58. I can understand that whatever was said that was interpreted by Mr. Cordell as, *"He asked me as a lawyer what further matters might be put in once Mr. Hackett had seen his lawyers and after a little humming and hawing I said that I did not know"* might have been intended by Mr. Sutcliffe to be an invitation to make further representations. However, on the evidence of Mr. Cordell, I accept that it was reasonable for him to understand that nothing was being said to him to remove the impression previously given that the section 111 point had been removed in a previous conversation with Mr. Hackett. I accept the evidence of Mr. Cordell that it was reasonable for him to take the view that there was no need for him to make any further submissions on the point unless and until he received further submissions from Mr. Hackett.

59. Later on 30 June, Mr. Sutcliffe received a telephone call from Mr. Hackett. In cross-examination by counsel for the defendants, Mr. Sutcliffe said that he let him go on for too long. He, Mr.Sutcliffe, was rather angry at the time. He said he was not listening properly to Mr. Hackett as he was going over old ground. He said that he did give an indication that the relevant parties were Discain and Opecprime. He said that he gave an indication of what he would do because he wanted an end to the conversation.

60. Later on 30 June, Mr. Hackett wrote another fax to Mr. Sutcliffe with a copy to Mr. Cordell in the following terms:
"I refer to my fax of earlier to-day and our telephone conversation of this afternoon on the specific issue put in that fax of whether any Comer Group Company other than Opecprime Development Ltd. is to be considered relevant to this dispute.
On the understanding that you regard the contract to be purely between Discain and Opecprime Development Ltd., and that it is not necessary for me to put in a further submission via lawyers dealing with the relevance or otherwise of Miltonland Ltd. I am now happy on behalf of my client that you should proceed to a decision.
I trust this finalises the matter and look forward to your decision early next week."

61. Mr.Sutcliffe said that that fax was not accurate in that there had been no *"understanding"*. He did not reply to correct him. Since it stated Mr. Hackett's position "too favourably" he thought it was safe to leave it to Mr. Cordell to react if he wished to do so. He added, *"Had I spoken to Mr. Cordell or asked him to make further submissions, there was nothing he could have said or done that would have improved his position. Mr. Hackett's last telephone call was effectively a non-issue"*. By that last statement I took him to mean that he had made up his mind earlier and his mind had not been affected by what Mr. Hackett had said in the last telephone conversation. However, Mr.Cordell was not to know that, and he commented in a letter to Mr. Sutcliffe after the event, on 30 January, 2001, *"It is difficult not to conclude that you changed your mind as a result of that conversation"*. However, in cross-examination, Mr.Sutcliffe said that this meant that even if he had decided the section 111 issue differently it would not have made any difference to the sum that the defendants would have had to pay. I find it difficult to understand that answer since paragraph 5.5.2 of his decision indicated that he had not decided any matter in connection with the withholding of payment to which Opecprime considered it might have been entitled if a good notice had been served under section 111. Opecprime's case was that money was due to them rather than the other way round.

62. It is not clear to me why Mr.Cordell did not protest after he had received the second fax of 30 June and ask that the decision be deferred so that he could make further representations. Perhaps he thought

the position was hopeless. He certainly thought that what had been happening was unfair and he was justified in forming that opinion.

63. Applying the test set out in Director General of Fair Trading v. Proprietary Association of Great Britain, on the facts as I have found them, I hold that although Mr. Sutcliffe was not biased, those facts would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger that he was biased.

64. Mr. Nissen submitted that if there was any apparent unfairness it had no effect. It is unnecessary to rule on whether that submission is well founded in law. The section 111 point in particular went to the root of the adjudication. I express no opinion as to whether Mr. Sutcliffe's ruling on that was right or wrong: in the context of the present case, the important matter is that it was arrived at in the wrong way.

65. What is the effect of all this?

66. Section 108(3) of the 1996 Act provides:
"The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement".

Paragraph 23(2) of the Scheme does make such a provision repeating substantially those words.

67. So the parties have entered into a compulsory agreement that the decision of the adjudicator is binding until the dispute is *"finally determined"* by legal proceedings etc. Although I have heard a trial of an action, I have not "*finally determined"* the dispute that was before the adjudicator. This action is brought only to enforce the decision of the adjudicator and there has been no examination of the merits of what lay behind that decision. On the face of the Act and the Scheme, therefore, the decision is still binding on the parties. However, just as the court will decline to enforce contracts tainted by illegality, so I do not think it right that the court should enforce a decision reached after substantial breach of the rules of natural justice. I stress that an unsuccessful party in a case of this sort must do more than merely assert a breach of the rules of natural justice to defeat the claim. Any breach proved must be substantial and relevant. I also repeat the words of Judge Humphrey Lloyd Q.C., "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". The qualification in the latter part of that sentence is important.

68. In my view, the adjudicator did not act in accordance with the rules of natural justice nor, in the words of Judge Humphrey Lloyd Q.C did he conduct the proceedings *"as fairly as the limitations imposed by Parliament permit"*. The limitations imposed by Parliament did not require the telephone conversations of which complaint is made.

69. Accordingly, I decline to enforce the decision of the Adjudicator and I give judgment for the defendants.

For the claimant: Alexander Nissen (Shadbolt & Co., solicitors)
For the defendant: Nicholas Collings (Priti Shah & Co., solicitors