

**JUDGMENT : His Honour Judge Humphrey Lloyd : 13 February 2001. TCC**

- 1 The claimant (Glencot) was engaged by the defendant (Barrett) as a sub-sub-contractor for 1200 mild steel wind posts which Barrett had to provide as part of its brickwork subcontract with Sir Robert McAlpine for work on the Excel Building, Docklands, London. The contract was apparently made by Barrett's order dated 8 December 1999 on the basis of Glencot's quotation of about £317,000 and Glencot's acceptance by carrying out the work. It made no express provision for the preliminary resolution of disputes by adjudication so Part I of the Schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998 SI 1998/649 (the Scheme) was incorporated in it as implied terms by virtue of s108 and s114(4) Housing Grants Construction and Regeneration Act 1996 (HGCRA) and para 2 of the Regulations. The latter states: "Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned."
2. On 15 August 2000 Glencot notified Barrett of a dispute about payment of £348,897.02 for which it had applied as the value of its work. On 30 August Mr Peter J Talbot agreed to act as the adjudicator on the joint application of the parties on the proposal of Barrett. In its supporting referral notice Glencot stated how it arrived at the sum claimed, ie in summary a gross valuation of £569,853 less £220,235.98 paid on account = £348,987.02. Barrett's reply stated that the gross valuation was £335,256.70, less 3% discount (£10,057), ie £325,199, and less a set-off (£10,973) to make £314,226 and that £319,130 ie £271,600 plus VAT had been paid. Glencot's reply revised the valuation to £561,105.78, the amount paid to £271,600 plus VAT (ie agreed) and, after some other adjustments, maintained that £329,535.78 (plus VAT) was due.
3. On 28 September Mr Talbot sent out an agenda for a meeting to be held on 29 September in which he listed the many issues that he might have to consider. It was held at the West Lodge Park Hotel, Hadley Wood, Herts. Before the meeting really got down to business there was a break so that Mr B.J. Barrett and Mr Keith Roberts, Glencot's Managing Director could have a discussion. These and the events ensuing are contained in the many witness statements filed and the documents referred to in them. They came from Mr Barrett, Miss Mary Corcoran, the defendant's company secretary, and Mr Clive Beck, a chartered quantity surveyor who acted for the defendant in the adjudication and, for the claimant, from Mr Roberts and Mr Macmillan, a solicitor with Hannah & Mould who acted for the claimant in the adjudication. The general pattern of events is not in dispute but I shall refer to relevant points that cannot at present be established.
4. Mr Roberts and Mr Barrett walked round the hotel grounds and reached agreement on a valuation of £390,000, plus VAT. They had then to draw up the agreement which Mr Roberts accepted was provisional. The adjudicator was told of the agreement and asked what the final figure was. It then appeared that there was no agreement about whether it was subject to a 3% discount which Mr Barrett maintained was contractually required. Mr Talbot was asked to mediate in order to finalise the agreement. According to Mr Roberts Mr Talbot told the parties that it was not unusual for an adjudicator to act as a mediator but that if negotiations broke down he would resume his role as adjudicator. Mr Macmillan, whose statement was in part supported by his notes, gave what is perhaps the most accurate account of that day. He also said that the same occurred and that both parties agreed to this course. Mr Macmillan also said that Mr Talbot said that if a settlement was reached he would require a formal mediation agreement to be signed. Mr Beck's evidence was also that Mr Talbot was requested to mediate and agreed to do so. Mr Beck said that Mr Talbot proceeded to take charge of the mediation.
5. Discussions took place over the next six hours or so. Mr Talbot went to and fro between the parties and saw them individually. They also met together. With the assistance of Mr Talbot agreement was relatively soon reached on the discount. A figure of £384,000 was agreed. However other points had then to be resolved, such as the time for payment, the text of the agreement and whether a copy should be made of it. The negotiations were evidently very difficult and, at times, heated. In the end, at about 6 pm, it became clear that complete agreement on all outstanding points would not be reached. By that time points had risen on the drafting of the agreement and in the light of the fact that Glencot had a solicitor present and, according to Mr Beck, Mr Talbot had also spoken to a partner of Hannah & Mould, Mr Barrett decided that he too needed legal advice on the proposed agreement. Mr Talbot then said that

the adjudication would have to continue and that another day would have to be found for a meeting for that purpose. Since Mr Barrett was due to be in court for most of the following week on a personal matrimonial matter the meeting was provisionally arranged for 9 October, with the possibility of a continuation of the mediation on that day.

6. On 2 October Mr Talbot wrote to the parties confirming the position as he saw it and providing for the future:

- "(1) In the event of settlement negotiations between the parties, the Adjudication meeting has been postponed to a future date to be arranged.*
- (2) At the request of the parties, I remained present throughout these negotiations in order to assist the negotiation process. The parties were, however, advised at the outset that these negotiations and any information provided during them would not be taken into consideration in my role as Adjudicator. During these negotiations no opinion was provided by me as to the merits of either party's position in the dispute.*
- (3) In spite of partial success, the negotiations did not result in an agreement whereby a full settlement was reached.*
- (4) I informed the parties that, in the absence of settlement, the Adjudication would proceed and that a further meeting would need to be arranged, either with both parties present or that I would meet the parties separately, depending on the parties' co-operation in agreeing with me the list of attendees.*
- (5) In order to facilitate these arrangements, the parties have agreed that the date for my Decision has been extended to no later than 23 October 2000.*
- (6) Should the parties wish to continue with negotiations involving my presence, then this would have to be subject to carefully defined ground rules.*
- (7) I request that, if either party considers that my capacity to make an impartial decision has been compromised by my presence at the parties' settlement negotiations, I should be informed immediately in order that I may withdraw from the Adjudication. "*

7. On 4 October after consultation with Mr Roberts and Mr Beck the meeting was re-arranged for 6 October, or, rather meetings, for, as confirmed by Mr Talbot's letter of 4 October, Mr Talbot was to see the parties separately: Glencot in the morning and Barrett in the afternoon. On 5 October Mr Roberts wrote to Mr Talbot to tell him who was coming for Glencot (himself and counsel, Mr Stuart Kennedy). He also asked that Mr Kennedy should sit in but not participate in Mr Talbot's meeting with Barrett. This was not accepted by Mr Talbot - see his letter of 5 October. Mr Roberts also raised a question on the adjudicator's jurisdiction to deal with the Barrett's set-off.

8. On 6 October Mr Talbot saw the claimant's representatives in the morning. Mr Barrett said that, because of his, involvement in the matrimonial proceedings, he had not been able to deal with Mr Talbot's letter of 2 October or be advised by Mr Beck until 6 October and that on arriving at the office he was told by Mr Beck that he thought Mr Talbot's position as adjudicator had been compromised by being involved in the mediation or negotiations. Mr Barrett agreed that further advice should be sought so Mr Beck contacted Mr Franco Mastrandrea who apparently said that Mr Talbot should withdraw. It was decided that Mr Talbot should be told when they met him.

9. Mr Talbot was not informed of Barrett's decision as soon as Mr Barrett & Mr Beck arrived since Mr Beck wished first to get copies of documents that Glencot had given to Mr Talbot. That did not take long. It was therefore not until the copying had been done, ie about 15 minutes after everybody had arrived, that the news was broken to Mr Talbot that Barrett wished him to withdraw. According to Mr Beck and Mr Barrett, Mr Talbot was annoyed and concerned about the time lost that had been spent with Glencot. He did not wish to withdraw. He therefore tried to persuade Barrett to retract its request. There was some discussion about Mr Talbot continuing as mediator but he did not wish to do so. Mr Talbot told Glencot of Barrett's request. The upshot was that Mr Talbot said that he would inform Mr Beck of his decision on Saturday 7 October.

10. The next morning Mr Talbot telephoned Mr Beck to say that he had taken counsel's advice and that he was not going to withdraw. On 9 October Barrett sent a formal notice to Mr Talbot and Glencot: *"Having considered the matter of impartiality extremely carefully and taken appropriate legal advice, we regret to inform you that we consider your capacity to make an impartial decision in the Adjudication has indeed been compromised by your presence at the partners settlement negotiations"*.

Glencot replied on the same day requesting Mr Talbot to continue as adjudicator. On 11 October Mr Talbot wrote to the parties: *"I acknowledge receipt of your letters dated 9 October 2000 and the Applicant's letter dated 10*

October 2000. Further to these letters, the meetings last Friday, and my various telephone conversations with both parties on 7, 9 and 10 October 2000, I confirm the following:

- (1) In response to the Respondents' challenge concerning my impartiality following earlier negotiations in my presence, I confirm that, having given careful consideration to the matter, I do not consider that my Decision will be influenced by my presence at the parties' negotiations. I consider, therefore, that I have the capacity to make an impartial decision. It is, of course, a matter of record that my attendance at the negotiations was at the parties' request.
- (2) I confirm my notification to both parties that I have sought counsel's opinion on the matter and that, based on this advice, I have decided to proceed with the Adjudication. I am prepared to make this advice available to the parties.
- (3) The Adjudication will proceed in accordance with the agreed timetable in accordance with paragraph 5 of my letter dated 2 October 2000."

The letter continued with matters relevant to the continuance of the adjudication. Barrett wrote on October disagreeing, but having made its position clear, participated in the adjudication. Mr Talbot subsequently sent the parties a copy of the advice that he had received on 10 October from Mr Anthony Bingham.

11. On 23 October Mr Talbot issued his decision which included reasons. Mr Talbot devoted a section to an explanation of the circumstances leading to Barrett's objection and of his decision to continue. It included the following:

"15. The underlying basis of [counsel's] Advice is that an adjudicator has a duty of impartiality and a general duty to be fair having regard to the high speed nature of adjudication as a dispute management process. In this case, in the context of the circumstances outlined in paragraph (2) of the letter where it is recorded that the parties specifically asked the Adjudicator to assist them with the negotiations process, Counsel points out that it is tempting and probably right to conclude that the parties elected to proceed on that Friday and cannot later complain about that election.

16. However, to go further, it is important that the Adjudicator asks himself whether a fair process, fair procedure, is still possible and asks this of himself, notwithstanding what the parties asked him to do. Counsel cites *Shannon v. Country Casuals Holding Ltd* where the learned Judge asked himself "will I, in any way consciously or subconsciously, be influenced or prejudiced by what I have learned of the terms of the settlement?". Notwithstanding that this is an Adjudication whereby the Decision is of temporary finality, Counsel nevertheless recommends that the Adjudicator is to ask himself whether there is a possibility of conscious or subconscious prejudice arising in his mind by reason of his knowledge of the negotiations. If the answer is yes, the parties should be informed.

17. I have followed this recommendation and have applied the test accordingly. I do not consider that my knowledge of the negotiations has compromised my capacity to reach an impartial Decision as has been suggested by the Respondent. I have given the matter careful consideration and I informed the parties of my view and my decision to proceed. This was confirmed in my letter dated 11 October 2000."

Mr Talbot decided that the final account valuation should be £431,616.10 (plus VAT) and that, having deducted £271,600 paid on account, Barrett had to pay £160,016.10 (excluding VAT and not subject to discount) plus £6,054.54, being 80% of Mr Talbot's fees and expenses (£7,568.18). Thus the decision requires Barrett to pay more than its answer to the referral notice (and more than it was ready to pay on 29 September).

12. Glencot issued a claim form on 1 November 2000 and on 27 November 2000 (times not apparently having been shortened) applied for summary judgment under Part 24 of the CPR for the amounts due under the decision. This application is resisted on the grounds that Barrett has a defence in that Mr Talbot's participation in the discussions on 29 September meant that in law he was no longer impartial, that he ought to have withdrawn and that as he did not so his decision is invalid. Glencot submit that Barrett has no real prospect of success since, amongst other things, it agreed to Mr Talbot acting as he did on 29 September, that his conduct and knowledge did not mean that he lacked impartiality, that it did not object at the time or thereafter promptly, and that by allowing the adjudication to resume and Glencot to take part in it on 6 October, it waived any right to object and is estopped from claiming that Mr Talbot cannot act or otherwise agreed or assented to him continuing as adjudicator.

13. This is an application under Part 24. CPR 24.2 provides:

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if - (a) it considers that: (i) that claimant has no real prospect of succeeding on a claim or issue; and (b) there is no other reason why the case or issue should be disposed of at a trial."

In *Swain v Hillman* [2001] 1 All ER 91 Lord Woolf Mr said (at page 92): "The words "no real prospect of succeeding" do not need amplification, they speak for themselves. The word "real" distinguishes fanciful

prospects of success or, as Mr Bidder QC, submits, they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success".

This Rule is of course to be read subject to Rule 1.2 and thus to the overriding objective in Rule 1.1 and to Rule 1.4 and is also to be read along with the court's powers of case management in Rule 3.1. An application under Part 24.2 to enforce payment of a amount ordered by a decision of an adjudicator does not mean that the rights of a defendant are less than if the claim had been for another contractual debt that was apparently due, except that the room to question the amount decided to be due is very limited: see, for example, **Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd** [2000] BLR 522. I therefore have to decide whether the defendant has a realistic prospect of success on two principal issues: (1) does the conduct of Mr Talbot mean that in law he is no longer impartial and able to make an enforceable decision; (2) if so, has the conduct of the defendant nevertheless precluded it from so arguing? Mr Raeside rightly did not pursue arguments based on breach of natural justice, with or without reference to Human Rights Act, which concerned only the conduct of the proceedings, as it was accepted that the proceedings had otherwise been conducted fairly.

14. **Impartiality** : At the outset it must be emphasised that no criticism is made of Mr Talbot personally. He has at every stage been meticulous in considering the rights and best interests of the parties.
15. Section 108 of the HGCRA states (in part):  
*"(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.  
For this purpose "dispute" includes any difference.  
(2) The contract shall -  
(e) impose a duty on the adjudicator to act impartially; ...."*

This contract is subject to the Scheme. That provides in paragraph 12:

*The adjudicator shall - (a) act impartially in carrying out his duties .... "*

Obviously the construction contract cannot literally impose such an obligation or duty on an adjudicator who is not a party to it. It means, at the least, that an adjudicator who accepts an appointment to carry out an adjudication required by HGCRA owes an obligation to the parties to be impartial (subject to the limits imposed by s108(4)) as a matter of contract with any party in contract with him and in any event in law.

16. Para 12 is a term of the contract. This has two material consequences. First, it means that each party is entitled to a decision that has been arrived at impartially and, conversely, a decision which has not been arrived at impartially is not binding. The parties have not authorised the adjudicator to be other than impartial. Each has therefore a right to an adjudication to be carried out by someone who is and will remain impartial. Secondly, like any other term of the contract, the term may be varied, modified or waived by a party, although since it is obviously such a fundamental provision of adjudication one would ordinarily expect clear evidence of any abandonment or dilution of such a vital right. Otherwise an adjudicator is not to take account of matters beyond those presented to him by the parties in connection with the dispute referred by the applicant's notice. This is clear from para 20 of the Scheme which prevents consideration of any other matters outside the scope of the adjudication without the consent of the parties, and also from, for example, para 8 of the Scheme which permits the adjudication of more than one dispute or a dispute involving more than the immediately contracting parties only with the consent of the affected parties.
17. The meaning of "impartial" has been considered in a number of recent cases concerning a judge or arbitrator being affected by possible bias, notably **R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte** (No 2) [1999] 2 WLR 272; 1 All ER 577 (the "Pinochet" case"), **Laker Airways Inc v FLS Aerospace Ltd** [1999] 2 Lloyd's Rep. 45, **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] QB 451; 1 All ER 65; **AT & T Corporation v Saudi Cable Co** [2000] 2 Lloyd's Rep 127 (like Laker Airways it too concerned an arbitrator) and **Director General of Fair Trading v Proprietary Association of Great Britain** [2000] All ER (D) 2425, 21 December 2000, Court of Appeal, all of which examined the effect of **R v Gough** [1993] AC 646; 2 All ER 724. It is not necessary for me to look beyond the Fair Trading case as it examined the preceding authorities comprehensively and took into account the impact

of the Human Rights Act 1998. In summary during the course of a case a member of the Restrictive Practices Court had inquired whether she might be employed by a company a director of which had submitted a report in the proceedings and which had been read by the Court and would be evidence. The Court of Appeal considered **Gough**, criticisms of it, **Locabail**, certain Commonwealth and Scottish decisions, and finally the possible effect of the Human Rights Act and decisions of the European Court of Human Rights. The judgment of the court began:

*"The law in relation to bias*

34. *Article 6 of the European Convention on Human Rights provides: "Right to a fair trial 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" Since October 2nd 2000 English Courts have been obliged under the Human Rights Act 1998 to give effect to the right to a fair trial as embodied in Article 6.*
35. *The requirement that the tribunal should be independent and impartial is one that has long been recognised by English common law. An appellate or reviewing Court will set aside a decision affected by bias. The precise test to be applied when determining whether a decision should be set aside on account of bias has, however, given rise to difficulty, reflected in judicial formulations that have appeared in conflict. The House of Lords in **R v Gough** [1993] AC 646 attempted to resolve that conflict. In **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] QB 451 at 476 this Court observed that the test in **Gough** had not commanded universal approval outside this jurisdiction and that Scotland and some Commonwealth countries preferred an alternative test which might be 'more clearly in harmony with the jurisprudence of the European Court of Human Rights'. Since 2nd October the English Courts have been required to take that jurisprudence into account. This then is an occasion to review **Gough** to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence.*
36. *Judicial tribunals come in many forms. We shall refer to 'the Judge' to embrace all forms of judicial tribunal, including juror, lay magistrate and judge of a superior court. For convenience we shall refer to the Judge as 'he' rather than 'he or she'.*
37. *Bias is an attitude of mind which prevents the Judge from making an objective determination of the issues that he has to resolve. A Judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a Judge towards a particular view of the evidence or issues before him.*
38. *The decided cases draw a distinction between 'actual bias' and 'apparent bias'. The phrase 'actual bias' has not been used with great precision and has been applied to the situation*
  - (1) *where a Judge has been influenced by partiality or prejudice in reaching his decision and*
  - (2) *where it has been demonstrated that a Judge is actually prejudiced in favour of or against a party**'Apparent bias' describes the situation where circumstances exist which give rise to a reasonable apprehension that the Judge may have been, or may be, biased.*
39. *Findings of actual bias on the part of a Judge are rare. The more usual issue is whether, having regard to all the material circumstances, a case of apparent bias is made out. We do not propose to refer to more than a few of the many cases that were reviewed in **Gough** and **Locabail**. We believe that two critical and interrelated questions are raised by the authorities, and we propose to focus on the cases which exemplify those questions. The questions are:*
  - (1) *Must the reasonable apprehension of bias be that of the reviewing Court itself, or that which the reviewing Court would attribute to an informed onlooker?*
  - (2) *What are the circumstances that fall to be taken into account when applying the test of bias and how are those circumstances to be determined?"*

**The judgment later continued:**

59. *It appears to us that the House of Lords in **Gough** laid down the following approach to be adopted by a Court reviewing whether a decision of an inferior tribunal should be set aside on the ground of bias:*
  - (1) *The reviewing Court should first identify all the circumstances that are relevant to the issue of bias.*
  - (2) *The reviewing Court should not then consider the effect that those circumstances would have upon a reasonable observer rather*
  - (3) *The reviewing Court should itself decide whether, in the light of the relevant circumstances, there was a real danger that the inferior tribunal was biased.*
60. *The House of Lords indicated that, had this approach been adopted in the **Sussex Justices** case, the decision of the Justices should have been upheld. The Divisional Court should have found as a fact that the Clerk had not intervened in*

the discussion of the Justices and, in the light of that finding, should have ruled that there was no danger that the Justices' decision had been affected by bias. In *Gough* itself, it was common ground that the juror was telling the truth when she said that she had not been aware, until after the verdict, that her next door neighbour was the brother of the defendant. Hence, applying the 'real danger' test, the validity of the verdict was not in doubt. The House of Lords did not have to consider the question of how the reviewing Court should approach evidence given by the inferior tribunal where that evidence was challenged by the application for review.

61. In *R v. Inner West London Coroner, ex pane Dallagio* [1994] 4 All ER 139 at p.162 this Court applied the test in *Gough*, when holding that injudicious remarks made by a Coroner gave rise to a real possibility that the Coroner had unconsciously allowed his decision to be influenced by a feeling of hostility towards the applicant and other members of an action group, with the result that his decision to refuse to continue an inquest should be quashed. In the leading judgment Simon Brown L.J, set out at p.151-2 the following propositions which he derived from *Gough*:

"From *R v. Gough* I derive the following propositions:

- (1) Any court seised of a challenge on the ground of apparent bias must ascertain the relevant circumstances and consider all the evidence for itself so as to reach its own conclusion on the facts.
  - (2) It necessarily follows that the factual position may appear quite differently as between the time when the challenge is launched and the time when it comes to be decided by the court. What may appear at the leave stage to be a strong case of justice 'not manifestly and undoubtedly being seen to be done', may, following the court's investigation, nevertheless fail. Or, of course, although perhaps less probably, the case may have become stronger.
  - (3) In reaching its conclusion the court 'personifies the reasonable man'.
  - (4) The question upon which the court must reach its own factual conclusion is this: is there a real danger of injustice having occurred as a result of bias? By 'real' is meant not without substance. A real danger clearly involves more than a minimal risk, less than a probability. One could, I think, as well speak of a real risk or a real possibility.
  - (5) Injustice will have occurred as a result of bias 'if the decision-maker unfairly regarded with disfavour the case of a party to the issue under consideration by him'. I take 'unfairly regarded with disfavour' to mean 'was pre-disposed or prejudiced against one party's case for reasons unconnected with the merits of the issue'.
  - (6) A decision-maker may have unfairly regarded with disfavour one party's case either consciously or unconsciously. Where, as here, the applicants expressly disavow any suggestion of actual bias, it seems to me that the court must necessarily be asking itself whether there is a real danger that the decision-maker was unconsciously biased.
  - (7) It will be seen, therefore, that by the time the legal challenge comes to be resolved, the court is no longer concerned strictly with the appearance of bias but rather with establishing the possibility that there was actual although unconscious bias."
62. Sir Thomas Bingham, MR, remarked at p. 162 that the effect of the decision in *Gough* was that:  
"The famous aphorism of Lord Hewart C.J. in *R v Sussex Justices, ex p. McCarthy* [1924] 1 KB 256 at 259, [1923] All ER Rep 233 at 234 that 'justice should manifestly and undoubtedly be seen to be done' is no longer, it seems, good law, save of course in the case where the appearance of bias is such as to show a real danger of bias."
63. The decision in *Gough* received critical analysis by the H.Ct of Australia in *Webb v The Queen* (1994) 181 C.L.R. 41. In the leading judgment, Mason C.J. and McHugh J. commented at pp.50-52:  
"In considering the merits of the test to be applied in a case where a juror is alleged to be biased, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done. Of the various tests used to determine an allegation of bias, the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality. The test of 'reasonable likelihood' or 'real danger' of bias tends to emphasise the court's view of the facts. In that context, the trial judge's acceptance of explanations becomes of primary importance. Those two tests tend to place inadequate emphasis on the public perception of the irregular incident. We do not think that it is possible to reconcile the decision in *Gough* with the decisions of this Court. In *Gough*, the House of Lords specifically rejected the reasonable suspicion test and the cases and judgments which had applied it in favour of a modified version of the reasonable likelihood test. In *Watson*, faced with the same conflict in the cases between the two tests, this Court preferred the reasonable suspicion or apprehension test. That test has been applied in this Court on no less than eight subsequent occasions. In the light of the decisions of this Court which hold that the reasonable apprehension or suspicion test is the correct test for determining a case of alleged bias against a judge, it is not possible to use the 'real danger' test as the general test for bias without rejecting the authority of those decisions.
- Moreover, nothing in the two speeches in the House of Lords in *Gough* contains any new insight that makes us think that we should re-examine a principle and a line of cases to which this Court has consistently adhered for the last eighteen years. On the contrary, there is a strong reason why we should continue to prefer the reasoning in our own cases to that of the House of Lords. In *Gough*, the House of Lords rejected the need to take account of the public perception of an incident which raises an issue of bias except in the case of a pecuniary interest. Behind this reasoning is the assumption that public confidence in the administration of justice will be maintained because the public will accept the conclusions of the judge.

*But the premise on which the decisions in this Court are based is that public confidence in the administration of justice is more likely to be maintained if the Court adopts a test that reflects the reaction of the ordinary reasonable member of the public to the irregularity in question. References to the reasonable apprehension of the 'lay observer', the 'fair minded observer', the 'fair-minded, informed lay observer', 'fair-minded people', the 'reasonable or fair-minded observer', the 'parties or the public', and the 'reasonable person' abound in the decisions of this Court and other courts in this country. They indicate that it is the court's view of the public's view, not the court's own view, which is determinative. If public confidence in the administration of justice is to be maintained, the approach that is taken by fair-minded and informed members of the public cannot be ignored. Indeed, as Toohey J. pointed out in Vakauta (1989) 167 C.L.R. at p.585 in considering whether an allegation of bias on the part of a judge has been made out, the public perception of the judiciary is not advanced by attributing to a fair-minded member of the public a knowledge of the law and the judicial process which ordinary experience suggests is not the case. That does not mean that the trial judge's opinions and findings are irrelevant. The fair-minded and informed observer would place great weight on the judge's view of the facts. Indeed, in many cases the fair-minded and informed observer would place great weight on the judge's view of the facts. Indeed, in many cases the fair-minded observer would be bound to evaluate the incident in terms of the judge's findings."*

64. *These comments presuppose that the 'real danger' test may lead the Court to reach a conclusion as to the likelihood of bias which does not reflect the view that the informed observer would form on the same facts? and this because the viewpoint of the Judge may not be the same as that of members of the public. This objection was addressed by this Court in Locabail at p.477:*

*"In the overwhelming majority of cases we judge that application of the two tests would anyway lead to the same outcome. Provided that the court, personifying the reasonable man, takes an approach which is based on broad common sense, without inappropriate reliance on special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary, reasonably well informed member of the public, there should be no risk that the courts will not ensure both that justice is done and that it is perceived by the public to be done."*

65. *We do not find it easy to reconcile this passage with an approach that requires the Court to decide whether there was in fact a real danger that a particular Judge was biased. Once the reviewing Court excludes from consideration matters known to it which would be outside the ken of ordinary, reasonably well informed members of the public, it seems to us that a hypothetical rather than an actual test of the likelihood of bias is being applied.*

66. *A similar conclusion flows from a subsequent passage in the Judgment in Locabail, at p.477*

*"While a reviewing court may receive a written statement from any judge, lay justice or juror specifying what he or she knew at any relevant time, the court is not necessarily bound to accept such statement at its face value. Much will depend on the nature of the fact of which ignorance is asserted, the course of the statement, the effect of any corroborative or contradictory statement, the inherent probabilities and all the circumstances of the case in question. Often the court will have no hesitation in accepting the reliability of such a statement; occasionally, if rarely, it may doubt the reliability of the statement; sometimes, although inclined to accept the statement, it may recognise the possibility of doubt and the likelihood of public scepticism. All will turn on the facts of the particular case. There can, however, be no question of cross-examining or seeking disclosure from the judge. Nor will the reviewing court pay attention to any statement by the judge concerning the impact of any knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision."*

67. *What is the Court to do where, although inclined to accept a statement about what the Judge under review knew at any material time, it recognises the possibility of doubt and the likelihood of public scepticism? It is invidious for the reviewing Court to question the word of the Judge in such circumstances, but less so to say that the objective onlooker might have difficulty in accepting it.*

68. *Such a situation highlights a wider consideration. Jurors are warned by the Judge to put all extraneous considerations and prejudices from their minds and to try the case on the evidence, and are normally expected to achieve this. A professional Judge is adept, by training and experience, at reaching decisions by objective appraisal of the facts. A finding that in a particular case there is a real danger that a particular Judge was biased inevitably carries with it a slur on the Judge in question, albeit that the reviewing Court may take pains to emphasise that the bias may have been unconscious. As Deane J. put it in Webb at p. 71: "One advantage of the test of reasonable apprehension on the part of a fair-minded and informed observer is that it makes plain that an appellate court is not making an adverse finding on the question whether it is possible or likely that the particular judge or juror was in fact affected by disqualifying bias. In contrast, the real danger test is focused upon that very question. Regardless of an appellate court's care to make plain that its finding is only one of possibility of danger, such a finding is likely to be unfairly damaging to the reputation of the person concerned who will commonly not have been a party to the proceedings before the appellate court and whose subjective thought processes will not have been investigated in the appellate court."*

69. *"The problem with the 'real danger' test is particularly acute where a Judge is invited to recuse himself. In such a situation it is invidious to expect a Judge to rule on the danger that he may actually be influenced by partiality. The test of*

*whether the objective onlooker might have a reasonable apprehension of bias is manifestly more satisfactory in such circumstances.*

70. Mr Sumption submitted that the test in *Gough* was no different in reality from the 'reasonable apprehension of bias' test favoured in Scotland and most other common law jurisdictions. He added 'that if it was different, it had to be discarded in favour of the reasonable apprehension test in the light of the Human Rights Act as this was unequivocally the test applied by the Strasbourg Court. This submission received support from Mr Philipson, QC, for the Director-General. We turn to consider the Strasbourg jurisprudence.
18. The Court concluded its review of the possible principles:
- "83. In *Gregory v United Kingdom* (1997) 25 E.H.R.R. 577 the Court recognised that it was possible for risk of prejudice on the part of a jury, to be effectively neutralised by an appropriate direction from the judge. The Court commented at p.595 that the legal principles applied in England corresponded closely to its own case law on the objective requirements of impartiality.
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 must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.
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."

The test of apparent of bias is thus set out in paragraph 86 of the judgment, read with paragraphs 85 & 87.

- 19 First, although I understood these propositions of Mr Raeside to be accepted by Mr Kennedy, I consider that the words "impartial" or "impartially" in HGCR and the Scheme are to be given the same meaning as they have at common law or in Article 6 of the Human Rights Convention, as applied by the Human Rights Act 1998. An adjudicator may not be a classic judicial tribunal but in practice an adjudication will probably be closer to an arbitration rather an expert determination. It may not be in public but it has been instituted by Parliament in order to provide a determination of rights which, albeit the effect of any decision is ultimately reversible, will nonetheless have immediate practical and potentially far-reaching impact. In *Fair Trading* the court drew attention to what had been said in *Gough*:

"57. At the end of his speech Lord Goff summarised his understanding of the law as follows: "In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance



*of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him; though, in a case concerned with bias on the part of a justices' clerk, the court should go on to consider whether the clerk has been invited to give the justices advice and, if so, whether it should infer that there was a real danger of the clerk's bias having infected the views of the justices adversely to the applicant."*

58. In a concurring speech, Lord Woolf summarised his view of the law in the following passage (pp.672-3): "It must be remembered that except in the rare case where actual bias is alleged, the court is not concerned to investigate whether or not bias has been established. Whether it is a judge, a member of the jury, justices or their clerk, who is alleged to be biased, the courts do not regard it as being desirable or useful to inquire into the individual's state of mind. It is not desirable because of the confidential nature of the judicial decision making process. It is not useful because the courts have long recognised that bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect.

It is because the court in the majority of cases does not inquire whether actual bias exists that the maxim that justice must not only be done but seen to be done applies. When considering whether there is a real danger of injustice, the court gives effect to the maxim, but does so by examining all the material available and giving its conclusion on that material. If the court having done so is satisfied there is no danger of the alleged bias having created injustice, then the application to quash the decision should be dismissed. This, therefore, should have been the result in the Sussex Justices case if Lord Hewart C J's remarks are to be taken at face value and are to be treated as a finding, and not merely an assumption, that there was no danger of the justices' decision being contaminated by the possible bias of the clerk."

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: see **Discain Project Services Ltd v Opecprime Development Ltd** [2000] BLR 402. Secondly, in my judgment it was not intended by Parliament the words should have anything other their usual meaning, and, in so far as the parties are to be treated as having adopted the wording as a matter of their contract, then contractually they are to bear the same meaning. Thirdly, and similarly, if the concept of impartiality or lack of bias were to be restated or redefined in the light of new legislation, such as the Human Right Act, then the latest meaning, as it were, applies, obviously in law and as a matter of contract. Otherwise in relation to each of these reasons the words might bear one meaning in general and another meaning by contract or under the HGCRA, which to my mind would be verging on the absurd and is not correct.
21. Accordingly is Mr Talbot's conduct such as to be regarded not "impartial"?. It must be emphasised that there is no question of actual bias. It is a case of "apparent bias". Mr Talbot's personal impartiality is presumed. In Gough Lord Woolf reiterated that "bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect". Hence there is a need for an objective test. The views of the person involved are either irrelevant or not determinative. The test is whether the "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".
22. In my judgment the defendant has shown that it has real prospects of success in establishing that Mr Talbot was no longer impartial as a result of what took place over most of 29 September. First, Mr Talbot's own appreciation of those events led him to write his letter of 2 October and, in paragraph 7, to ask the parties to decide whether they wished him to continue. I am sure that he was right. Even if he had not so acted he ought to have done so. Mr Kennedy suggested that in paragraph 7 Mr Talbot was not agreeing to withdraw if there was an objection as he said "I may withdraw". I do not read the letter in that way. I am sure that Mr Talbot, whose actions demonstrate sensitivity, did not then wish to be responsible for continuing with an adjudication in face of an objection and thus risk wasting the parties' expense. "I may withdraw" is no more than "I may be permitted to withdraw". However I accept that there are two ways of reading this paragraph and that Mr Talbot may also be taken as intending not to withdraw if the objection was not rational.

23. It may be inaccurate to describe what took place on 29 September as a mediation. Mediation is a necessarily a flexible concept and like most forms of alternative dispute resolution it will be or should be tailored to suit the needs and interests of the parties. In contrast to the role of an adjudicator, arbitrator or judge, which is primarily to decide the facts and to apply the law (in the case of an adjudicator, the law of the contract), a third party (whether called a mediator, conciliator or neutral, the terms are sometimes interchangeable - the function is what counts) may well not be required to make any decision or express any view, still less a binding one. The role is understood to be more to assist the parties to arrive at their own binding agreement. The third party's views are not given unless jointly sought. The process will also be concerned with the commercial interests of the parties which may not be synonymous with their legal rights and obligations. Thus such a person will or may have to listen to arguments and hear things which may be completely irrelevant to the dispute in the adjudication but which might be prejudicial to its determination. Discussions or a mediation of the kind which apparently took place on 29 September are or may be at variance with adjudication. Thus Mr Talbot was correct in making it clear to parties that what he might be doing was a departure from adjudication and in getting their agreement to it. Such agreement was essential. Of course an agreement in advance, even if a formal written agreement, may not be effective in depriving a party of its right to question a later decision on the grounds of apparent or actual bias. There are clearly risks to all when an adjudicator steps down from that role and enters a different arena and is to perform a different function. If a binding settlement of the whole or part of the dispute results, then the risk will prove to be worth taking.
24. In this case Mr Kennedy submitted that there was no evidence that anything emerged in the discussions that might have affected Mr Talbot's decision or approach. That very submission effectively makes the defendant's case. Whilst in an adjudication it is permissible to make inquiries and receive evidence and submissions from one party alone there is a clear obligation on the adjudicator to give any absent party a complete and accurate account of what has taken place. Mr Talbot went to and fro between the parties. We do not know what he heard or learned. He was under no obligation to report it, nor given that the content was "without prejudice" and confidential ought there to be any inquiry as to what happened. Those private discussions could have conveyed material or impressions which subsequently influenced his decision. On the evidence he was or may have been instrumental in resolving the issue about the 3% discount which was one of the matters that he later had to decide (in the event against the defendant). Of much more consequence in my view is the fact that the discussions on 29 September were heated so that it would have been only understandable if some view had been formed about some people or a party. In the adjudication Mr Talbot was asked to decide certain points about which there was no documentary evidence, in other words to form a view about the credibility of the applicant's case. These are areas where unconscious or insidious bias may well be present. Mr Talbot's action in writing the letter of 2 October tellingly suggests that he was concerned about an outsider might reasonably think about what had taken place.
25. Accordingly and taking account of Mr Talbot's commendable openness and explanations which I shall accept as accurate I have nevertheless reached the conclusion any fair-minded and informed observer would conclude that Mr Talbot's participation in the lengthy discussions on 29 September that there was a real possibility of him being biased. In my judgment Mr Talbot was absolutely right to have written as he did in paragraph 7 of his letter of 2 October. Had he not done so and had the decision stood alone it would not in my judgment have been an enforceable decision, or at least an immediately enforceable decision. It would have been a decision affected by apparent bias and not the decision of an impartial adjudicator. It would not therefore have been a decision, authorised by the terms of the contract and therefore as unenforceable as any other decision made without jurisdiction.
26. After Barrett had made its position clear Mr Talbot reviewed his position and decided to continue. He acted on the advice of counsel. Unfortunately it does not seem that Mr Talbot was told of the objective test as it appears from his later decision that he applied what would ordinarily be regarded as a subjective one. Strangely Mr Bingham's advice did not refer to any of the recent cases - the **Pinochet** case, **Laker Airways**, **Locabail** or **AT & T** (two of which concerned an arbitrator). (The Fair Trading case arose after October 2000). Mr Talbot was instead referred to the decision of the Court of Appeal in **Shannon v Country Casuals Holdings plc**, 23 October 1997, unreported, in which **R v Gough** was also

considered. The Court of Appeal upheld the decision of Garland J to continue a trial when just before closing speeches were to be made the judge was shown a proposed Tomlin order with terms of settlement which were apt to cover a wide variety of matters and disputes not before the court. He decided to continue. Potter LJ (with whom Aldous LJ agreed) considered that Garland J in referring to the question before him as being "a subjective matter to the judge in a civil case" or using language such as that quoted by Mr Bingham, "was doing no more than reject the view, as it was rejected in Gough that the matter is to be resolved by application of some objective standard or touchstone based on how the matter would appear to a reasonable man, ignorant of the precise considerations and nuances of the case. He did so by way of introduction to the questions he proceeded to ask himself, acknowledging that the matter was one for his own careful investigation as the trial judge, bearing in mind the possibility of conscious or sub-conscious prejudice arising in his own mind by reason of his knowledge of the settlement.

In the context of the judgment and bearing in mind the authorities and arguments which had been placed before him, the judge's words were no more than a recognition of the fact that the objective test of "real danger" as developed and applied by appellate courts in respect of inferior tribunals falls, in the case of the judge in a civil trial, to be applied by him to his own thought processes, and in that sense it is bound to be subjective. I consider that the judge was doing no more than proceeding, as the judge apprised of all the issues, conscientiously to examine and answer the questions which he properly asked himself".

The Court concluded that in reality the judge had directed himself properly and that, as the reviewing court, they were in any event satisfied that he had arrived at the right conclusion, since no real danger of bias existed. Mr Bingham's advice did not refer the adjudicator to the whole of the reasoning of Garland J. Amongst other things he said: "I have no hesitation in expressing the view that I can conclude this trial without any prejudice, either conscious or indirect. I have heard the evidence. It would be quite different if we were in the early stages of the trial, but we are not. All that remain are final speeches. ..."

The emphasis is mine. It appears that this highly experienced judge would not (or would not necessarily) have reached the same conclusion as he actually arrived at after he had heard and weighed up in his mind the evidence and, subject to final speeches, its probable effect. Mr Kennedy also referred to **How Engineering Services Ltd v Lindner Ceiling Floors Partitions** (1999) 64 Con LR 67 in which Dyson J declined to treat as a procedural error an unsuccessful attempt by an arbitrator to set up a "without prejudice" meeting of expert witnesses from which the parties and their lawyers were to be excluded by his direction. The meeting never took place. I do not find it relevant. It is very much a case on its own somewhat unusual facts. Dyson J did not apparently have to consider what might have happened had the arbitrator held the meeting and had been informed of matters of which a party remained ignorant.

27. Whether or not Mr Talbot applied the right test is ultimately irrelevant since I have to apply the objective test and to decide whether the defendant has a defence which has no real prospect of being successful. Whilst I therefore take fully into account the factors which influenced Mr Talbot in my judgment the defendant has made out a substantial case on the first issue and that far from having no real prospect of success, it has, on the present evidence, very good prospects. Moreover issues such as these should not be decided on a summary application. Although Mr Kennedy submitted that all the facts were before the court I do not consider that they are or that it should be assumed that they are, for as I have indicated, little is known (and it may never be known) about what actually took place between the adjudicator and each party separately on 29 September. It would not fair to either party (or to the adjudicator, although strictly his interests are irrelevant) to decide such a issue on an application under Part 24.
28. "**Waiver**": Mr Kennedy is on somewhat firmer ground on the second issue. The adjudicator had powers under paragraph 13 of the Scheme to:  
"(f) obtain and consider such representations and submissions as he requires  
(g) give directions as to the timetable for the adjudication, any deadlines, ... and  
(h) issue other directions relating to the conduct of the adjudication".

He was thus entitled to give directions concerning the resumption of the adjudication as set out in his letter of 2 October 2000. He was in my judgment entitled to require both parties to notify him "immediately" if it was thought that his position had been compromised, as set out in paragraph 7. Non-compliance with that direction could not however reverse the effect of what had happened and deprive a party of its right to say that the adjudicator was no longer able to carry out his duties impartially, as impartiality is an indispensable part of authority conferred on the adjudicator to make a decision and underpins his jurisdiction. The adjudicator could not impose deemed acceptance of his jurisdiction, notwithstanding lack of impartiality, as a sanction for non-compliance with paragraph 7 (nor was it suggested). Barrett's failure to respond to that paragraph is however a factor to be taken into account. Of more moment is Barrett's participation in the arrangements for the resumption of the meeting. It is not suggested that Barrett did so reserving its rights or indicating that, because Mr Barrett was not readily available, no answer could be given to paragraph 7. The letter was addressed to Mr Beck who was handling the adjudication for Barrett. In addition no such indication or warning was given to Glencot which had therefore no reason to think that the adjudication was not under way again. It therefore prepared for Friday 6 October and spent significant time and effort for and at the meeting.

29. Mr Kennedy therefore submitted that in the circumstances it was no longer open to Barrett to challenge Mr Talbot's authority. It had led Glencot to believe that Mr Talbot's position as an impartial adjudicator was not compromised. Barrett was therefore estopped from advancing its proposed defence or had waived its rights or in some other undefined way had no realistic prospects of success. Mr Raeside submitted that it was known that Mr Barrett was pre-occupied that week. The decision had to be taken by him and could not have taken earlier than it was (although he accepted that some prior notice might have been given on the morning of 6 October). The arrangements made were administrative only and did not provide evidence of intention to waive its rights.
30. I have considerable difficulties in accepting Barrett's case. Mr Beck appreciated the significance of paragraph 7 of Mr Talbot's letter of 2 October. Although there was some late evidence that Mr Barrett was in fact not tied up for the whole week I cannot accept it on a summary application, not least because Barrett is entitled to reply to it and because it requires investigation. On the other hand I do not understand why it was not possible for Mr Beck to leave a message for Mr Barrett and, above all, to tell Mr Talbot and Glencot that no answer could be given as Mr Barrett was not available (although his probable non-availability was known to all). Taking into account the whole history of this adjudication and the events leading up to it, including what I know of or infer from of the events of 29 September, I am left with the distinct impression that Barrett was determined to be as awkward as possible. On the other hand a decision to challenge an adjudicator for apparent bias is a serious step and although Barrett was under an obligation to comply with Mr Talbot's request and did not do so it would be extreme to elevate that breach into an affirmation of jurisdiction or to treat it as a representation to found an estoppel or an act which might constitute a waiver of such a fundamental right (leaving aside all other difficulties in treating the act as effective in law as a waiver, such as communication). Similarly I do not consider it right on a Part 24 application to characterise what appear to be no more than otherwise routine telephone calls as affirmations of jurisdiction, estoppels or waivers which preclude Barrett from its proposed defence, at least without further evidence.
31. In principle therefore Barrett has established that it has some real prospects of success. However I consider that its case on the second issue is not good. It goes against the grain that Glencot should get nothing until its claim is properly determined, especially since Barrett participated in the adjudication, and since not all Mr Talbot's reasoning could be affected by any unconscious bias. It is clear to me that it should be paid substantially more than £271,600 and, on Barrett's own case, £384,000 was a reasonable figure for its final account. In addition I doubt if all the balance could be affected by any supposed bias. In my view an order or a conditional order should be made in favour of Glencot. Rule 1.1 of the CPR requires a case to be dealt with in a way which will save expense and which will have regard to the financial position of the parties. Rule 1.4 requires the active management of cases, including dealing with as many aspects of the case as possible. Rule 3.1 continues those wide powers and in Rule 3.1(3) empowers a court to make an order subject to conditions. Paragraph 5 of the Practice Direction to Part 24 sets out the orders which a court may make on a Part 24 application. Rules 25.6 and 25.7 make

provision for interim payments. Having regard to Rule 25.7(1)(c) and subject to further submissions it seems to me that even if parts of Mr Talbot's decision was affected by bias Glencot is still likely to recover a substantial part of the amount which the adjudicator decided was due, such as the difference between the amount paid on account and £384,000 which was agreed on 29 September. (I draw Barrett's attention to Rule 25.8.) Bearing these provisions in mind but subject to further submissions I am therefore minded to make orders to the following effect:

1. Judgment for any amount above the sum paid on account [£271,600] which Barrett admitted as due in its written submissions in the adjudication;
2. An interim payment of the difference between the amount paid on account and £384,000, ie less any amount adjudged due under 1 above.
3. Payment of any sums ordered to be paid within 7 days, failing which judgment for the amounts claimed in these proceedings.
4. Directions towards a trial of Glencot's claim, to take place within a matter of months, (thus treating the application as a CMC).

[After further argument]

32. In the course of the further submissions Mr Raeside argued, principally, (1) that all that could be done was to dismiss (or allow) a Part 24 application of this nature; (2) that Barrett had not come prepared for dispositions of the kinds indicated; (3) that I had no power to order an interim payment without a further application by Glencot; (4) that Barrett would need time to prepare its case on such an application as there would be evidence to show that orders of the kind that I had suggested would not be appropriate. Mr Kennedy submitted that I had power to act as indicated and that I should do so.
33. I did not accept Mr Raeside's first argument. It is of course right that the claim form was expressed simply and referred only to the adjudicator's decision for justification. However an adjudicator's decision does not create a cause of action as such; it is merely an expression as to liability and quantum about the dispute that has arisen under the contract. Whatever similarities adjudication may have with arbitration the decision has only temporary effect and validity, unlike, for example an arbitral award (see *A. Cameron Ltd v John Mowlem & Co plc* (1990) 52 BLR). Under the Act and the Scheme that decision cannot be challenged if it is within the jurisdiction of the adjudicator as the parties are taken to have agreed to be bound by it and cannot in law question the decision if it is valid. The cause of action (or chose in action) remains the original claim (if upheld) and is not the decision of the adjudicator, but the amount recoverable is the amount which the adjudicator decides is due. In simple terms Glencot's claim was for the amounts due for which it had submitted invoices (plus the claim for 80% of Mr Talbot's fees and expenses due pursuant to the incorporation of the Scheme as terms of the contract). The principal claim to the extent that it was upheld by Mr Talbot was the claim for which the action and the Part 24 proceedings were launched. Since the adjudicator's decision was invalid and unenforceable Glencot could no longer rely on it to defeat any defence which Barrett might have had to that claim. However that reverse did not mean that the claim failed; the action was brought to recover some of the amounts due under the contract. If Barrett thought its victory on the enforceability of the decision was the end of the claim, at least for the time being, it was in my judgment mistaken and had not appreciated the nature of the process. Removal of the apparently binding nature of the decision was just the first step (and disposed of the claim for Mr Talbot's fees and expenses); Barrett had still to show that it had real prospects of success in defeating Glencot's claim for £160,016.10 on the merits.
34. On the other hand I considered that Mr Raeside was right in his submission that a court has no power on a Part 24 application to make an order for an interim payment. Mr Kennedy persuasively went through the many powers open to the court under the CPR (to which I referred above) which on the face of it would justify a court getting to grips with the realities of a case without untoward regard to procedural niceties and without a legalistic approach and thereby dealing justly with it. However there were two reasons why I preferred the arguments of Mr Raeside to those of Mr Kennedy. First, paragraphs 5.1 and 5.2 of the Practice Direction to Part 24 are specific:  
"5.1 . The orders which a court may make on an application include:  
(1) judgment on the claim,  
(2) the striking out or dismissal of the claim.

(3) the dismissal of the application, .

(4) a conditional order.

5.2 A conditional order is an order which requires a party

(1) to pay a sum of money into court,

(2) to take a specified step in relation to his claim or defence, as the case may be, and provides that that party's claim will be dismissed or his statement of case will be struck out if he does not comply. (Note - the court will not follow its former practice of granting leave to a defendant to defend a claim, whether conditionally or unconditionally.)

This is not one of the places where the CPR and the Practice Directions are unclear. If it had been intended that the court could make an order for an interim payment, the PD would have so stated. The previous practice would have required it: "Order 14/29" applications as they were commonly known. Even allowing for Rule 1.3 I do not think that I could permissibly construe "include" as permitting something so obvious, or read "conditional order" as covering making any interim payment, especially since PD 5.2 (1) refers to a payment into court. If an interim payment had been envisaged then the wording would have continued "or to make an interim payment". In addition, for the purposes of the next sub-paragraph, such a payment would not be a step in relation to a defence.

35. The second reason is that it would not be just to a defendant to make an interim payment order without proper notice of the application: Rule 25.6 sets out the steps which must be taken. Thus it is clear why PD 5.1 does not refer to an interim payment: a party must make a specific application. In practice this means that a party ought to make two applications in its application notice: for summary judgment and in the alternative for an interim payment if summary judgment is not given for the whole amount sought, ie the customary double banking. However the timetables in Rule 24.5 and 25.6 are not quite the same, although normally the evidence in support of a monetary claim under Part 24 will be the same as the evidence for an application under Rule 25.6. There appears to be a strong case for clarifying Part 24 or its PD either to provide expressly for a power to make an interim payment order an alternative to summary judgment for a sum or to include in para 5.1 of the PD a specific reference to an interim payment order or to say somewhere that an interim payment can only be made if an application has been made under Rule 25.6.
36. Since Barrett had not come prepared to demonstrate that it had real prospects of success on the merits of the present claim nor to deal with an application for an interim payment, I adjourned the application for a week and gave directions for further statements to be filed. Mr Raeside sensibly agreed that the intimation given in the earlier part of this judgment when issued in draft (ie that I intended to make an interim payment order) would then also serve for the purposes of Rule 3.3, despite its imperfections and despite lack of an intention to use that Rule. The alternative would have been for Glencot to have made a formal application under Rule 25.6 in respect of which I would have shortened the relevant times to enable the application to be heard within a week, following the practice which is now adopted in this court in a number of instances, not confined to adjudication cases, where both parties are legally represented and are not prejudiced.
37. Barrett therefore filed a further statement from Mr Beck which put forward a claim for some £57,836 in respect of delay caused by lack of resources and inefficiency by Glencot in January and February 2000 which led to costs being incurred by Barrett in March and April 2000, despite acceleration by Glencot (for which Glencot had made a claim in the adjudication). Glencot filed a further statement from Mr Roberts maintaining that any delay was the responsibility of Barrett and that the claim for acceleration was ultimately not pursued as such and thus was not decided by the adjudicator.
38. Mr Kennedy submitted
- (1) that I should give judgment under Part 24 for £42,626, being the difference between (a) £314,226 being the net total of Barrett's Final Account Valuation in its initial response in the adjudication (which already took into account some £10,000 for a set off for Barrett's additional costs of working engendered by Glencot's supposed delay in the period in question, plus the disputed discount of 3% ) and (b) £271,600 i.e. the amount paid on account and

(2) that I should make an interim payment order for £69,774, being the difference between (a) £384,000 Le the amount that had been agreed on 29 September between Mr Barrett and Mr Roberts in settlement of all claims by either party and (b) £314,226. (A.11 the figures are exclusive of VAT.)

Glencot's case was that Barrett's latest claim had been concocted by it over the weekend, that it had never been made before, that it conflicted with an apparent exoneration by Barrett (in a fax of 15 February 2000 it was said that "due to the complicated nature of the initial part of this contract you were not enabled to work as effectively as we both would have liked"), and that in any event it was inconceivable that a claim as large as £57,000 would not have been taken into account by Mr Barrett in arriving at £384,000 on 29 September 2000 which was agreed in settlement of all disputes whether or not referred to adjudication.

39. Mr Raeside submitted that the amount agreed was for the purposes of the adjudication, that it took into account the need to avoid possible threats of action to Mr Reed, a former employee of Glencot who was apparently intending to help Barrett in the adjudication; that it did not represent an admission binding on Barrett; if it was an admission then on the reasoning in *Gale v Superdrug Stores plc* [1996] 1 WLR 1089 (per Millett LJ at pages 1098-1100) Barrett was entitled to withdraw it; that the adjudication did not deal with Barrett's claims for delay etc as a notice of withholding had not been given in respect of them; and that Barrett was nevertheless now entitled to raise them as a defence and as a reason why no interim payment should be made.
40. For present purposes there is no need to draw any distinction between Part 24 & Rule 25.7 which provides:
- "(1) The court may make an order for an interim payment only if -*
- (a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;*
  - (b) the claimant has obtained judgment against that [sic] defendant for damages to be assessed or for a sum of money (other than costs) to be assessed; except where paragraph (3) applies, it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for interim payment ; or*
- (4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment."*
- 5 The court must take into account -*
- (a) contributory negligence; (b) any relevant set-off or counterclaim"*

Each requires the court to be satisfied that either the defendant has realistic prospects of success or that the claimant has realistic prospects of obtaining a substantial sum (to use paragraph (c) above).

41. In my judgment Glencot is entitled to rely on Barrett's evaluation of its entitlement in the response document as an admission of the items in the final account which were then considered. Since Barrett made no valuation of any item which related to delay or disruption the question of withdrawing an admission does not arise. If it had made an admission then on the principles set out by Millett LJ in *Gale v Superdrug* Barrett could not have been held to it unless Glencot had suffered or would suffer some irreparable prejudice. On the other hand Barrett has established that there was a bona fide dispute about liability for the delay in installing the wind posts. That cannot be resolved on these applications: Glencot made its claim; Barrett made a claim for £10,973 in its letter of 23 August 2000 and now makes the present claim for £57,836, which is for less than the amount for which orders are sought. The issue is whether Barrett has realistic prospects of success of reducing Glencot's claim by such an amount, or, put another way, whether there are similar prospects of Glencot recovering the whole of its claim. In my judgment care has to be taken before judgment is given under Part 24 in favour of a claimant if to do so would preclude a defendant from questioning at a later stage any amount included in it. The proper course would be to consider making an interim payment order. On the face of it to give judgment for the unpaid balance of Barrett's version of the final account presented in the adjudication would not affect it. However some of the figures in it are assessments and, taking at face value (albeit with a pinch of salt), Mr Beck's evidence of Barrett's intention to be reasonable it would not in my judgment right to take a step which would probably only lead to further argument about its effect. But for this factor (and subject to the new claim for £57,836) there would have been judgment for £42,626. I do not consider that the fact

that the admission was made in an adjudication makes it any the less effective; it was clearly intended to signal that the Barrett did not contest liability for such an amount. It is not necessary to consider Part 14 of the CPR. That Part is not the exclusive way of obtaining a judgment or order based on an admission. It merely continues the previous policy of the County Court Rules of providing a convenient way to encourage a party to make an admission formally, precisely and as early as possible.

43. However from Barrett's response and from Mr Barrett's agreement with Mr Roberts I am satisfied
- (1) for the purposes of Rule 25.7 (1)(a) that Barrett has admitted liability to pay Glencot £42,626 since the reservations which I have expressed do not affect the total amount admitted in the response;
  - (2) for the purposes of Rule 27 (1)(c) that Glencot is likely to obtain judgment for £112,400;
  - (3) for the purposes of Rule 27(4) that a reasonable proportion to be paid to it by Barrett as an interim payment would be 95% , i.e £106,780.
44. First, in my judgment, I am sure that Barrett would have registered a claim against Glencot if it was really thought that it had incurred significant costs for which Glencot was liable. Indeed it did so in its letter of 23 August but only for £10,973. By that time Mr Barrett had been very concerned about Glencot's applications and in July 2000 had stopped payments for Glencot's work. Frankly I find it incredible that Barrett would not have made some sort of claim for the losses of the kind now suggested by Mr Beck if they had been incurred. It is equally incredible that the facts giving rise to it (as now set out by, Mr Beck) would not have featured in Barrett's response (itself drafted by Mr Beck who on his evidence had not only considered all the claims but had been prompted by Mr Talbot to make sure that Barrett submitted everything) as they would have furnished Barrett with its defence to Glencot's acceleration claim (which at that stage had not been withdrawn and re-presented). Furthermore I am sure that Mr Barrett would have been well aware if his company had suffered losses of that order. The discussions on 29 September were intended to settle not just the disputes referred to adjudication, (which included the acceleration claim, i.e. the counterpart of Barrett's present claim) but all other disputes (such as the set-off for £10,973). Thus either the losses were not really incurred (I bear in mind that they are obviously estimates prepared in a limited time and are also not comprehensive) or they were not truly Glencot's responsibility or they were taken fully into account by Mr Barrett in arriving at the figure of £384,000. It is pertinent that Mr Barrett did not file an additional witness statement to say that it was known that the settlement excluded his company's additional losses. Before adjustment for the discount that figure had been £390,000 which, according to Mr Barrett, was splitting the difference between Mr Barrett's offer of £370,000 and Mr Robert's figure of £410,000 (to be compared with £569,853 claimed by Glencot in the adjudication). For these reasons I consider that Glencot is likely to obtain judgment for a sum equivalent to the amount of the settlement, less what has already been paid. Glencot will be entitled in the action to maintain its claim to be paid more than the amount of the settlement. It would not be right to assume that it will succeed.
45. By Rule 27(4) the order must not be more than a reasonable proportion of the likely judgment. In plain English this means that one cannot make an order for 100% since even if it is thought that in a contract a proportion may be nil the words in the CPR must mean less than 100%. In my view only a nominal reduction is called for; 5% is in the circumstances generous. Necessarily it does not contain any element for the possibility that the amount might be recovered, as provided by Rule 25.8 (for reasons which I gave in *Harmon v House of Commons* (No 2), 29 June 2000, (unreported).
46. Accordingly Barrett is to make an interim payment to Glencot of £106,780 by 4 pm on 19 February 2001, the sanction being that, if the payment is not so made, Glencot has permission to enter judgment for £112,399 and the costs of the action. On Glencot's application for summary judgment there will be no order other than its dismissal in so far as it relates to Mr Talbot's fees and expenses of £6,054 plus VAT.

**END NOTE**

1. At the outset of the hearing I informed the parties that I knew Mr Talbot, primarily as he is a member of a body of which I am the Chairman (the CIMAR Review Body). Neither party raised any objection.

2. Not cited.

3. Not cited.

Stuart V Kennedy appeared for the claimant, instructed by Hannah & Mould.

Mark Raeside appeared for the defendant, instructed by Herbert Smith.