JUDGMENT : HIS HONOUR JUDGE SEYMOUR: QBD. 27th July 2004.

1. In this action the claimant, A&S Enterprises Ltd, seeks to enforce against the defendant, Kema Holdings Ltd, the decision of an Adjudicator, Mr Julian Owen, dated 16 June of this year, which was to the effect that the defendant should pay to the claimant a sum totalling £89,475.86.

2. The claimant carries on business as a building contractor, and the defendant seems to be a single purpose vehicle formed for the purpose of developing a site at No. 1, Swanwick Road, Leabrooks, Alfreton, Derbyshire.

3. The claimant and the defendant entered into a building contract dated 22 July 2003. The building contract was in the Joint Contracts Tribunal standard form of building contract with Contractors' Design, 1998 edition, incorporating amendments 1, 2, 3 and 4. It appears that various of the matters requiring to be dealt with if that form of contract was to be used successfully were not dealt with, in particular no option as between Option A and Option B was selected in relation to the basis upon which payments were to be made under the contract.

4. What in fact seems to have happened is that an architect, Ernest Austin, was involved in the project, initially at least, on behalf of the defendant. Mr Austin during the course of the carrying out of the works at site issued a number of certificates. The first five of those certificates seem to have been paid by the defendant without raising any issue concerning them. The sixth certificate issued by Mr Austin had the effect, if it was to be paid by the defendant to the claimant, of taking the sum which had been paid in total in respect of the works which were the subject of the contract, to a figure in excess of the original contract price.

5. The defendant did not pay the certificate, and in those circumstances notice of adjudication was given by the claimant to the defendant, that initiated the process by which Mr Julian Owen was appointed as Adjudicator, and following going through a process - to which I need to refer in more detail in a moment - Mr Owen produced his decision in relation to the matters referred to him dated 16 June of this year.

6. In the course of the adjudication an issue which arose was as to the role from time to time of Mr Austin. In particular it seems that there was an issue as to whether at various times which were thought to be material Mr Austin had been acting on behalf of the claimant, or acting on behalf of the defendant. Mr Austin, it seems, received an application for an interim payment from the claimant, which prompted him in due course to issue his certificate Number 6. In the adjudication the basic position initially adopted on behalf of the claimant was that it was entitled to be paid the sum which Mr Austin had certified. The principal ground of resistance to the claim on behalf of the defendant were that the form of contract made between the claimant and defendant contained no provision for the issue of a certificate. The consequence of that in the particular circumstances of the case as a matter of law were said to be that the provisions for payment in the Scheme for Construction Contracts applied.

7. It was contended on behalf of the defendant that what those provisions required was that. there should be an application for payment, and, secondly, that the sum applied for should be shown in the adjudication to be due. The defendant's position was that there had been no application for payment made to it, because the application which had prompted Mr Austin to issue his certificate Number 6 was only made to him and not to it. Secondly it was contended that in the adjudication no sufficient material had been produced to support the amount of the application which had been made for payment.

8. The first relevant step taken by Mr Owen, once the reference to adjudication had been made and he had been appointed Adjudicator, was to write a letter dated 11 May of this year to the representatives of the claimant and the defendant respectively. The claimant was represented by a firm called Schofield Lothian and in particular by Mr William Green of that firm. The defendant was represented by a company called Blake Newport Associates Limited, and the individual particularly involved was Mr Chris Hughes.

9. In the letter of 11 May 2004 Mr Owen wrote, so far as is presently material, that: "At this stage the outline timetable I would like to follow is set out below."

10. There were various dates set out, of which that which is relevant for present purposes was 27 May of this year, which was described as having this significance in the timetable: *"IF (that word appearing in*

capital letters) required, provisional date for a site visit. and/or a meeting (am or pm).” and Mr Owen said, *”I would be grateful if both parties would adhere to this programme, or let me know of any objections now. It will be reviewed regularly in the light of developments, and I will notify the parties of any modifications to the timetable if they become necessary.”*

11. The next relevant step was the writing on 21 May by Mr Green of a letter to Mr Owen. By this stage there had been an exchange of statements of case in the adjudication. So far as is material Mr Green said in his letter of 21 May: *”May we kindly request, that should you deem it necessary to call a meeting of the representatives of the parties, the dates set aside should be either Tuesday 25th May 2004 or Wednesday 26th May 2004. This is at variance with your outline timetable, (date shown Thursday 27 May 2004) but we feel it important that the Managing Director of A&S Enterprises Limited, Mr A Sulin, should attend any meeting. He will, however, be unavailable on Thursday 27th May 2004. We would be eager and pleased to attend any meeting you may wish to convene at a venue and time as advised by you.”*

12. Mr Owen responded to that letter in a letter of the same date sent to the representatives of the claimant and the defendant. He confirmed that he had received submissions from both parties in accordance with his timetable, and he made the following comments:

    ”1. If either party feels that a meeting would be useful I am happy to consider any requests for one. At this stage, feel that a meeting would be useful if Mr Austin would be prepared to attend and give his account of the events leading up to the dispute. Alternatively, I would accept a written statement from him, provided that it was supplied in good time for a considered response by the other party.

    2. The referring party have asked for an alternative date for a meeting. Unfortunately, I am not available on the suggested dates. The next dates that I am available are” -

    and he indicated some dates in June. Then at numbered paragraph 3 Mr Owen said: *”Regardless of the above, I have given notice of the possible meeting date well in advance and may have to ask both parties to keep to it. I would also restrict the number of people who could attend any meeting to the minimum I considered necessary.”*

13. Mr Hughes then wrote a letter to Mr Owen on 25 May. In his letter Mr Hughes said, so far as is relevant, this:

    ”In order to restrict the costs of both parties where possible, the Respondent Party does not feel that a meeting would add anything more to the resolution of the dispute as it stands. We are, of course open to your directions on the issue.

    We do however fully agree with you that it would be beneficial to you that the Referring Party submit a statement from Mr Austin, although we believe that we have correctly stated his role under Contract, particularly in light of the significant comments below. If a statement is submitted, we would ask your permission and would reserve our right to respond.”

14. The letter of 25 May was evidently sent by facsimile transmission because there were a number of communications between the parties, presumably also by fax, on the same date. Mr Green next sent a letter on 25 May; so far as is relevant what he said commenting on Mr Hughes' letter is this:

    ”We reiterate that further to the Referring Party’s letter dated 24th May 2004 to your good self, we are eager to attend a meeting and that this is especially in the case of Mr Ernest Austin, who would be pleased to answer any questions you may wish to ask him.

    The Referring Party believes that by the honesty and sincerity of those representing the Referring Party at a meeting you may convene will add greatly to the resolution of the dispute. We therefore await your directions concerning a meeting, all in accordance with our request and your outline timetable as advised to both parties on 11th May.”

15. Mr Owen then responded to both Mr Green and Mr Hughes in a letter again dated 25 May. He said:

    ”In view of the very short time available, and since the referring party have not agreed to an extension, I feel that a meeting attended by Mr Austin and both parties would be helpful to me. The main aim of the meeting will be to hear from Mr Austin and take comments from both parties, and not to debate the legal issues raised so far. I have provisionally booked a room at the Renaissance Hotel, Derby, and propose that we meet there at 2.00 p.m. for a meeting that will last a maximum of 2 hours. The cost of the room hire and refreshments will be approximately £250. The referring party have already stated who will attend. The responding party’s team should consist of no more than one legal representative and two others.

I would be grateful if both parties would confirm that they are able to attend as soon as possible. In view of the short time available, I will accept messages to me by telephone, but not any discussion."

16. Mr Owen sent a second letter on 25 May to the representatives of both parties. So far as is relevant what he said in that letter was this:
"I wish to give both parties the opportunity to make considered responses following the meeting, and these would have been due by 2nd June at the latest. I wish to accept the offer made by the referring party and to shift the decision date to 16th June, allowing until 4th June for responses to the meeting. This will also give me sufficient time to request answers to any additional questions that I may have of the parties."

17. The final letter which is relevant for the purposes of this judgment is a letter which was sent by facsimile transmission on 26 May to Mr Owen by Mr Hughes. Mr Hughes on behalf of the defendant acknowledged receipt of Mr Owen's two facsimiles of the previous day, and noted his firm request for a meeting to be held `tomorrow', which was 27 May, in Derby to hear from Mr Austin.
"Unfortunately as the requirement for a meeting is at such short notice Mr Joss Overend of Kema Holdings is unable to attend due to a prior commitment. Also, as we have stated in previous correspondence, the Respondent Party has concerns about the inevitable and significant increase in cost as well as inconvenience in calling its professional representatives from a considerable distance to participate, given that we believe we have correctly and accurately stated in our correspondence Mr Austin's role as authorised under the contract.
We note and appreciate the fact that the Adjudicator would wish to meet with Mr Austin at this stage of the proceedings. Despite this, we regard the proposed arrangements as being very far from satisfactory, given the lack of the notice and the absence of Mr Overend. The requirements of the Adjudicator will place the Respondent in practical difficulty, which is a matter that we wish to put on record. The only way it would appear possible for the Respondent Party to take part in the meeting is if a conference call was arranged whereby the Adjudicator and the Referring Party would physically meet in Derby and the Respondent Party would `dial in' to the meeting from their various locations.We understand that the cost of the teleconference facility is £75 per hour plus value added tax.
I can confirm that I have spoken with the Referring Party's representative, Mr Green, and he would have no objection to the above.
Please note that our participation in the above arrangements is under protest. We reserve the Respondent's position as to the possible consequences of any prejudice that may arise as a result of this meeting being required."

18. What in the event then happened was that a meeting did take place on 27 May of this year at the Renaissance Hotel in Derby. Those who were physically present were Mr Owen the Adjudicator, Mr Green on behalf of the claimant, and Mr Austin. Those who participated by telephone were Mr Hughes and the solicitor acting on behalf of the defendant, Mr Adrian Bingham of Hextalls. Witness statements were put before me from Mr Bingham, Mr Green, Mr Austin and Mr Owen concerning what was said at the meeting. It was apparent that there was a dispute between the parties as to whether anything was said about Mr Overend and his participation or not. In general terms the position adopted by Mr Bingham was that nothing material was said about Mr Overend and whether he should or should not have been participating. The evidence in the witness statements of Mr Green and Mr Austin and Mr Owen was to the effect that there had been some comment made about the non-participation of Mr Overend.

19. For present purposes it is perhaps convenient simply to refer to the witness statement of Mr Owen the Adjudicator. Mr Owen in his witness statement said in terms:
"I do not wish to be drawn into any further explanation of the decision that I have made beyond the decision document that I have already issued." He was however "prepared to confirm the following in connection with the arrangements and procedures for the meeting that I called.
    1. *I wished to hear Mr Austin's explanation of events and also the response to this of the Respondent Party, in person. Having made it clear to both parties why the meeting was being held, and requested Mr Austin (who was not a direct party to the adjudication) to attend, I did not prescribe who should attend on behalf of either party, but limited attendance to one legal representative and two others. I assumed that Mr Overend would attend, since he was integrally involved in the dealings with Mr Austin. My understanding of the correspondence was that the Responding Party's legal representative felt in a similar way.*

2. *Once I learned, at very short notice, that Mr Overend in fact was not able to attend in person, I went to some trouble to ensure that a telephone conferencing link was arranged by the hotel providing the meeting room.*
   My primary reason for wanting the link was so that Mr Overend could participate. My interpretation of the Responding Party's fax to me of 26 May 2004 was that Mr Overend's inability to attend in person was also their main reason for a telephone conference being required. The telephone link was not ideal but I believed it was better than proceeding without hearing directly from Mr Overend at all.
3. *I held a short telephone conversation with Mr Hughes of Biake Newport on 26.05.04, the content of which I noted in my fax to both parties on the same day. During the course of the conversation, there was no doubt in my mind that Mr Hughes understood and shared my keenness for Mr Overend to participate in the meeting. I do not recollect Mr Hughes suggesting that Mr Overend might not be able to participate. Certainly, I would have appreciated the significance if Mr Hughes had expressed this risk with the clarity he implies. At the commencement of the meeting, I was confidently expecting Mr Overend to be taking part via the telephone link. Although I suggested 2.05 p.m. for the conference call to be placed, I would have considered some adjustment to this time if requested, to allow Mr Overend to take part. No such request was made by the Responding Party.*
4. *I was surprised to be told at the start of the conference call that Mr Overend was not able to take part. My clear recollection is that I did ask why, but no explanation was forthcoming. No explanation was given to me subsequent to the meeting. I assumed that the Responding Party's legal representative would have made Mr Overend aware of how unhelpful this was. I believe I made my view of this clear to both parties at the time. Since the meeting had been convened at some trouble and expense, and I had given every possible opportunity to the responding party to be adequately represented, I decided to proceed with the meeting."*

20. That account of Mr Owen, which is broadly similar in terms to the accounts of Mr Austin and Mr Green, is not in my judgment altogether consistent with the relevant correspondence to which I have already referred. In particular the correspondence does not make any suggestion at all that the purpose of the telephone conferencing link was so that Mr Overend specifically should be able to participate in the meeting.

21. Following the meeting and the provision of an opportunity as indicated by Mr Owen for reactions to the meeting to be submitted on behalf of the parties, he produced his decision. The effect of the decision in cash terms I have already noted. The material parts of the decision for present purposes are these: paragraph 1.9 under the heading Procedure:
   "During the course of the adjudication I decided that it was essential for me to put some important questions directly to Mr Austin of Perfect Place Ltd, whose role in the contract was disputed. I proposed a meeting on the date that I had previously suggested, 27th May 2004.
   1.10 The responding party objected to the meeting. After some correspondence they notified me on 26th May that Mr Overend of Kema Holding Ltd would not be able to attend but would take part by telephone.
   I proceeded with the meeting, and at the request of the Responding Party arranged a telephone conference so that Mr Overend could participate, at an extra cost of £88.13 (inc VAT). The total cost of the meeting room arrangements including the conferencing was £305.83 (inc VAT).
   1.11 The Referring Party's representatives and Mr Austin attended the meeting in person, and the Responding Party's representatives used the telephone conferencing system to monitor and comment on the discussions. However, Mr Overend chose not to make himself available by telephone and therefore played no part in the meeting. No proper explanation was offered as to why. Mr Overend played a crucial role in the events leading to the dispute. His failure to take part in the meeting was very unhelpful, and I view the Responding Party's submissions and the arguments that they have put forward in this light."

22. The next section of the decision was entitled Background and I need make no reference to it. The third section of the decision was called Points of Dispute. The only remaining section of the decision was numbered 4 and entitled The Decision and set out in summary the sums which Mr Owen found that the defendant was to pay to the claimant. The material parts of the third section, that headed Points of Dispute, for present purposes are these:
   *" **3.1.1.1 The role of Mr Austin***

In spite of his own misunderstanding of his role, the written contracts must take precedent and therefore Mr Austin had no authority under the contract to certify.

If Mr Austin had no such authority, it follows that the application for payment was made when Kema received it, not Mr Austin. The Referring Party's Response to the meeting of 27.05.04 states that payment application No. 6 and supporting documentation was handed over on 5th February 2004 to Mr Overend by Mr Austin. I accept Mr Austin's account of this meeting.

3.1.1.2 Application for payment

I therefore consider 5th February 2004 to be the true date of the application for payment and the due date under Part II(4.b) of the Scheme. The application was provided with supporting information indicating how it was calculated and was a valid application for payment. Therefore the final date for making payment is 17 days after this, 22nd February 2004, and the withholding notice would have to be served at least seven days before this, i.e. 15th February."

23. The grounds upon which enforcement of the decision of Mr Owen are resisted on behalf of the defendant are conveniently set out in the written skeleton argument of Mr Richard Coplin, who has appeared before me on behalf of the defendant. Those grounds in summary are: first, the appearance of bias on the part of Mr Owen in his decision; second, the breach of the requirement of natural justice, that the defendant should have been put on notice that an oral contribution from Mr Overend was required in the process of the adjudication if the defendant was not to be disadvantaged; and third, that the Adjudicator Mr Owen failed to take account of the defendant's submissions.

24. The way in which those points were developed in Mr Coplin's written skeleton argument were these: At paragraph 2l

"The test to be applied is whether a fair-minded and informed observer. would conclude that there was a real possibility of bias on the part of the Adjudicator,"

and reference was made to the decision of this court in **Amec Capital Projects Ltd-vWhitefriars City Estates** [2004] EWHC 393 paragraph 22.

"There are two matters which would lead a fair-minded and informed observer to conclude that there was a real possibility of bias on the part of the Adjudicator.

22.1 At paragraph 1.11 of the decision the Adjudicator appears to have taken an adverse view as to the defendant's legal submissions as a result of the non-attendance of a witness. A fair-minded observer would not consider that, even if there was a valid complaint about the non-attendance of an individual at a meeting, such a matter should have any bearing on an Adjudicator's decision. He would therefore conclude that there was a real possibility of bias.

22.2 Paragraph 1.11 of the decision also reveals that the Adjudicator formed an adverse view of the defendant's factual submissions because of the nonattendance of a witness at a meeting. Whilst an Adjudicator is entitled to give weight to the non-attendance of a witness in circumstances where he has failed to attend a meeting and/or failed to provide a proper explanation for his non-attendance, he ought not to do so unless he has asked for that witness to attend and/or asked for an explanation as to the non-attendance.

23. In circumstances where the Adjudicator formed the view that oral answers to oral questions from Mr Overend was to be an important factor in reaching his decision, the Adjudicator should have adopted a procedure which allowed the defendant a fair opportunity to respond orally to oral questions and/or to have a fair opportunity to respond to criticisms of Mr Overend's failure to attend the meeting on 27 May 2004."

25. In this regard the defendant relies in particular on **Woods Hardwick Ltd-v-Chiltern Air Conditioning** [2001] BLR 23, and refers to paragraph 23 of the judgment of His Honour Judge Anthony Thornton QC. In that paragraph Judge Thornton said:

"Clearly, the adjudicator was entitled to form his own views about Chiltern's capabilities to perform the contract and about the professional competence and reliability of Chiltern's representatives but, if these views were adverse to Chiltern from an early stage in the adjudication process, he had to ensure that the procedure he adopted allowed Chiltern a fair opportunity to make its case and seek to present its point of view in relation to such views as the Adjudicator had provisionally formed in the early stages of the adjudication."

26. Then under the heading `Failed to take account of the defendant's submissions', at paragraph 25 Mr Coplin submitted:

"As a result of the breaches of natural justice and/or bias referred to above, and/or in any event, the adjudicator failed to take proper account of the defendant's submissions that the claimant should substantiate the amount that it was claiming was in fact due in circumstances where he found that the certificate was not valid."

27. In this regard the defendant relies upon **Buxton Building-v-The Governors of Durand Primary School** [2004] CILL 2117.

28. It was not in dispute between Mr Coplin and Mr Matthew Holt, who appeared on behalf of the claimant before me, that an Adjudicator such as Mr Owen is under a duty to act impartially, and that the requirements of natural justice do apply to the process of adjudication. Mr Holt in his very helpful skeleton argument reminded me at paragraph 28 of a comment of my own in the case of **Dean & Dyball Construction Limited-v-Kenneth Grubb Associates Limited** [2003] CILL 2045 at paragraph 53, where I said:
"Once one gets beyond the fundamentals of knowing the case one has to meet and having a proper opportunity to meet it, and having a proper opportunity to deploy any positive case one may wish to make, what natural justice and fairness require is likely to depend on the facts of the particular case."

29. So far as any question of bias is concerned, it was common ground between Mr Coplin and Mr Holt that the test to be applied was that summarised by Mr Coplin in paragraph 21 of his skeleton argument, and repeated by Mr Holt rather more fully at paragraph 26 of his skeleton argument, where he quoted from paragraph 85 of the judgment of the Master of the Rolls, Lord Phillips of Worth Matravers in **In Re Medicaments and Related Classes of Goods Number 2** reported at [2001] 1 WLR 700. The material passage is at page 727 of the report and is to this effect:
"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."

30. So far as the question of affording an adequate opportunity to each party to put its case is concerned, again there was not, as I understood it, any difference between Mr Coplin and Mr Holt as to the applicable principle. It is elementary, and again is not in dispute between Mr Coplin and Mr Holt, that the procedure adopted by the Adjudicator should afford an adequate opportunity to each party to deploy the case which it wanted to make, and moreover elementary that the Adjudicator should consider properly the case which each party wanted to advance.

31. Where the submissions of Mr Coplin and Mr Holt diverged was as to whether in the circumstances of this case Mr Owen had observed the requirements of natural justice, whether he did appear, in particular from his comments in paragraph 1.11 of the decision, to have been biased, whether he did afford an adequate opportunity to the defendant to put before him, if he thought it was important, the oral evidence of Mr Overend, and whether Mr Owen did in fact consider the case which the defendant wished to deploy before him. Mr Coplin made his oral submissions in reverse order to the order in which they are set out in his skeleton argument, and it is convenient certainly to deal first in this judgment with the last of his points - whether the Adjudicator Mr Owen failed to take proper account of the defendant's submissions that the claimant should substantiate the amount that it was claiming was in fact due.

32. I remind myself that it is no part of my function, in considering a claim of the present kind, to consider whether the Adjudicator was correct in the findings of fact which he made or was correct in the conclusions of law which he drew. It is clear in my judgment from what Mr Owen said in paragraphs 3.1.1.1 and 3.1.1.2 of his decision that he did find as a fact that an application for payment as required under the Scheme for Construction Contracts had been delivered to the defendant; that supporting documentation had been provided; and that he, Mr Owen, concluded that the supporting documentation then provided justified a payment in the sum for which application was made. He may have been right in that, he may have been wrong in that; for present purposes I am not concerned to go behind his decision, I am satisfied that his decision on the point is clear.

33. I come, then, to the two points which Mr Coplin urged upon me in relation to the terms of paragraph 1.11 of the decision. Mr Coplin urged those points upon me, as I have said, in two slightly different ways. The first point was that the comment of Mr Owen, specifically this part:

> *"Mr Overend chose not to make himself available by telephone and therefore played no part in the meeting. No proper explanation was offered as to why. Mr Overend played a crucial role in the events leading to the dispute. His failure to take part in the meeting was very unhelpful, and I view the Responding Party's submissions and the arguments that they have put forward in this light."*

indicated that there was a real possibility of bias on his part. As Mr Coplin put it in his oral submissions, what Mr Owen was there doing was indicating that he was going to mark down the defendant because Mr Overend did not attend. At another stage in his oral submissions Mr Coplin submitted that in the passage which I have just read Mr Owen indicated that he was annoyed.

34. The second aspect of the allegation of bias relating to questions of fact rather merges into, as Mr Holt submitted, the separate complaint about the procedure followed, and it may be that there is no particular advantage in considering what is essentially the same matter in two different contexts.

35. The submissions that Mr Holt made concerning paragraph 1.11 of Mr Owen's decision were to the effect that every comment upon which Mr Coplin relied was, in the circumstances of the case, justified and that the view which I should take of the specific observation by Mr Owen *"I view the responding party's submissions and the arguments they have put forward in this light"* was that it related only to conclusions as to facts. Mr Holt submitted that Mr Owen's comment *"Mr Overend chose not to make himself available by telephone"* was correct - he did not make himself available by telephone. Mr Holt went on to submit that the conclusion that Mr Owen drew from that *"therefore played no part in the meeting" was also literally correct. Mr Holt submitted that indeed Mr Owen was right in saying "No proper explanation was offered as to why".* Mr Holt submitted that the comment "Mr Overend played a crucial role in the events leading to the dispute" was also correct, as was Mr Owen's comment "His" - that is Mr Overend's - failure to take part in the meeting was very unhelpful". So, breaking down the passage complained of, what Mr Holt submitted was that no proper exception could be taken to anything which was said, because everything which was said was literally correct.

36. In my judgment it is not appropriate in considering an issue of alleged bias as raised in the present case to adopt the approach which Mr Holt urged upon me, of looking clause by clause at each sentence in the passage complained of, and to consider on an individual basis whether what was stated was literally true or not. It is necessary in my judgment to take a broader view, to consider the whole of the passage complained of, and to reach a conclusion as a fair-minded and informed observer as to whether there was a real possibility looking at the passage as a whole, against the background of the relevant facts, that the tribunal - in this case Mr Owen - was biased.

37. I have come to the conclusion that that is demonstrated by the passage about which complaint is made. It would have been possible if Mr Owen was confining his attention to the facts which he had to find in order to reach a decision on the matters referred to him, simply to record that he had not heard any oral evidence from Mr Overend. Mr Owen chose to describe the fact that he had not heard from Mr Overend in this way: *"Mr Overend chose not to make himself available by telephone"*. The use of the expression "chose" in that clause indicates in my judgment that that was considered by Mr Owen to be a matter of criticism, his view being that Mr Overend had a free choice in the matter and therefore it was a deliberate decision uninfluenced by any factor other than a desire not to be of assistance. It was not necessary, if Mr Owen was confining his attention to the evidence which he had heard and his ability to reach conclusions of fact, to express any view as to whether Mr Overend had a good, bad or indifferent reason for not providing an oral contribution. It would have been sufficient simply for him to say that he had not heard from Mr Overend, but Mr Owen thought it right to say that no proper explanation was offered as to why he had not heard from Mr Overend.

38. Mr Owen recorded in his decision in paragraph 1.11 that *"Mr Overend played a crucial role in the events leading to the dispute"*. That was not a view which he had expressed provisionally prior to the meeting of 27 May. In none of his communications did Mr Owen indicate that he was expecting to hear from Mr Overend. So far as the written communications are concerned, there is simply no reference to Mr

Overend at all. Not only that, but the written communications made clear that what Mr Owen was expecting to derive from the meeting principally was to hear from Mr Austin, and beyond that his interest was in receiving comments from the parties on what it was that Mr Austin had to say. There was no indication in the communications prior to the meeting that Mr Owen was envisaging something like a confrontation between Mr Austin and Mr Overend, if and insofar as their accounts of events differed. Mr Owen's comment that the failure of Mr Overend to take part in the meeting "was very unhelpful" seems to me to be a comment which perhaps was justified with the benefit of hindsight but difficult to consider ought to have been how matters would turn out, when what Mr Owen signalled as being what he was seeking to derive from the meeting was to hear from Mr Austin.

39. One comes then to the phrase *"I view the responding party's submissions and the arguments that they have put forward in this light"*. It seems to me impossible to draw any conclusion as to what Mr Owen meant in that expression, in the light of what had preceded it, other than that he was going to take a dim view of the defendant's submissions and arguments simply because Mr Overend had not made himself available for oral questioning. There is in my judgment no warrant for accepting the submission of Mr Holt that where Mr Owen referred to "submissions" and "arguments" he was meaning to include, and include only, submissions and arguments in relation to facts. Indeed, in a quasi-legal context the expression *"submissions and arguments"* more naturally encompasses submissions and arguments of law as well as submissions as to what findings of fact should be made. Indeed so far as the word *"arguments"* is concerned, in a quasi-legal context that seems to me primarily to describe arguments of law, because arguments as to facts do not normally feature. If and insofar as there is a dispute as to facts, what generally happens is that submissions are made as to what evidence ought to be preferred.

40. In my judgment, the complaint made by Mr Coplin on behalf of the defendant, that there is a real possibility of bias on the part of the Adjudicator, is made out. I also find that the second limb of Mr Coplin's complaint, which merges into his second ground, is made out. If, following the meeting of 27 May and in the light of what Mr Austin said, and the view which provisionally Mr Owen might have been inclined to form concerning what Mr Austin said, he felt it was important for him to hear orally from Mr Overend, that is something that he ought to have made clear. He ought in my judgment to have given the defendant an opportunity to make Mr Overend available for oral questioning. Without making clear that he would be influenced in a significant degree by whether he had or had not heard from Mr Overend, when there was no suggestion prior to the meeting of 27 May that that was at all an important matter, it seems to me that Mr Owen has failed to comply with the requirements of natural justice.

41. So, for those two reasons I find that the decision of Mr Owen is vitiated. The application which is before the court is in fact an application under Part 24 of the Civil Procedure Rules for summary judgment. It follows in the light of my conclusions that the application for summary judgment itself fails, but I think logically, subject to hearing further submissions from counsel, it follows that the action itself cannot succeed, and the appropriate order is therefore likely to be that the action should be dismissed.

MR COPLIN: *My Lord, absolutely - or indeed summary judgment for the defendant is the other way around it. I think the action dismissed is the clearest way.*

MR HOLT: *I think that must follow, my Lord, yes.*

HHJ SEYMOUR QC: *All right, then I will dismiss the application and the action.*

Mr M Holt Appeared on behalf of the applicant
Mr R Coplin Appeared on behalf of the respondent