JUDGMENT : HIS HONOUR JUDGE TOULMIN. TCC. 27th February 2004.

1. This is an application by Amec Capital Projects Limited ("Amec") under Part *8* of the CPR to enforce an adjudication award dated the *17*th December *2003* made pursuant to section *108(5)* of the Housing Grants Construction and Regeneration Act *1996*, in which the adjudicator, Mr. Michael Biscoe, decided that the Defendant, Whitefriars City Estates Limited ("Whitefriars") should pay Amec the sum of *£508,401.52*, plus V.A.T. of *£88,970.26*, making a total of *£597,371.78.*

2. Mr. Biscoe also decided that Whitefriars should pay his fees and expenses, including the fees of the solicitors, Clyde & Co., who assisted him in resolving jurisdictional issues at the outset of the adjudication. This is the second adjudication between the parties relating to substantially the same subject matter, which was conducted by the same adjudicator.

3. Amec commenced the first adjudication by a referral notice dated the *7*th May *2003*. In the first adjudication Amec also claimed the sum of *£ 508,401.52*. By a decision dated the *5*th June *2003*, Mr. Biscoe ordered Whitefriars to pay Amec *£508,401.52*, plus V.A.T. of *£88,970.26*. The only difference between the order made on the first adjudication and that of the second adjudication related to the sum awarded for interest.

4. Amec had sought to enforce the first award. A number of issues were raised by Whitefriars in opposition but, on the 19th September 2003, His Honour Judge Lloyd QC only needed to decide two of them. He refused to grant a stay of the adjudication and he refused to enforce Mr. Biscoe's decision. He concluded that the award was made without jurisdiction since, under the terms of the contract as he found it, Mr. George Ashworth (the person named in the Schedule of Amendments to the standard form contract) was the designated adjudicator. Mr. Biscoe, therefore, had no jurisdiction to act.

5. On subsequent investigation, Amec discovered that the only Mr. Ashworth at the firm identified in the contract (Davies Langdon & Everest) was a Mr. Geoffrey Ashworth, not the person named in the contractual documents, who was a Mr. George Ashworth. Mr. Geoffrey Ashworth died on the 13th October 2003.

6. Amec then started the second adjudication. Whitefriars objected to the re-nomination of Mr. Biscoe.

7. On the 17th December 2003, Mr. Biscoe reached his decision. This second decision is challenged in these proceedings on a number of grounds. As a result, Whitefriars say that the Court should not enforce Mr. Biscoe's award.

8. I should observe in passing that, even if Amec is successful, it will only have a preliminary decision in its favour, which can be superseded by a court or an arbitrator after a hearing on the facts. This adjudication decision does not address important issues raised by Whitefriars.

9. I am told that the costs of the two adjudications and the hearings before His Honour Judge Lloyd QC and before me have already amounted to an estimated £277,000 (excluding V.A.T.). I also observe that if either arbitration or court proceedings in this court had been commenced in May 2003, which itself is long after the events which gave rise to the claim, the parties would probably by now have had a hearing and even a decision on the merits.

Contentions of the Parties

10. It is convenient to consider the facts with the outline of the rival contentions in mind. Whitefriars say that Mr. Biscoe's second adjudication should not be enforced because:

    1) Mr. Biscoe is not the adjudicator named or identified in the contract. The adjudicator who should have been nominated after the death of Mr. Geoffrey Ashworth was the person nominated by the person who was the Managing Partner or Director of Davies Langdon & Everest at the date of the referral to adjudication.

    2) Mr. Biscoe's decision was reached in breach of the rules of natural justice. A fair-minded and informed observer would conclude that there was a real possibility that the adjudicator was biased in that:

a) On the findings made by Mr. Biscoe, the dispute referred to him on the second occasion was treated by him as in essence the same as that on which he had already given a decision;

b) An important part of the decision on the second adjudication related to the contractual requirements on Whitefriars in relation to the giving of notices. Mr. Biscoe had obtained legal advice on this issue in the first adjudication, which he had not disclosed to the parties in the first adjudication, but which he had carried forward into the second adjudication. An important part of the second decision relied, therefore, on outside legal advice on which Whitefriars had not had an opportunity to comment. This amounts to a defect of natural justice as well as evidence of bias;

c) In relation to his decision that he had jurisdiction to act as adjudicator in the second adjudication, Mr. Biscoe only disclosed the outside legal advice from Clyde & Co. after he had taken the decision that he had jurisdiction. Whitefriars, therefore, had no opportunity to comment on the advice before Mr. Biscoe made his decision. This also amounts to a defect of natural justice, as well as evidence of bias.

d) Mr. Biscoe had a telephone conversation with Mr. Cassidy, the Partner at Masons, acting for Amec, which went beyond merely administrative matters and may have led the fair-minded and informed observer to conclude that (no doubt inadvertently) there was a real risk that the adjudicator may have been influenced improperly.

e) There was a real risk that the adjudicator would be biased by reason of the fact that Whitefriars had notified Mr. Biscoe that, in the event that Amec did not pay the sums due, they would be looking to him to reimburse them for the costs of the first adjudication.

3) The adjudicator failed to answer the question referred to him, namely that he should determine the reasonable and proper costs incurred after termination of the contract. Instead, he determined the award on the basis of the interim payments which were due to Amec.

11. Amec disputes these claims on the following grounds:

1) The specific provisions under the contract which identified as the designated adjudicator Mr. George Ashworth, or the person nominated by the Managing Partner or Director of Davies Langdon & Everest failed either because:

a) there was no Mr. George Ashworth at Davies Langdon & Everest, or

b) the provisions did not apply after the death of Mr. Geoffrey Ashworth. Amec was entitled to apply to the RIBA for the appointment of an adjudicator.

2. a) Mr. Biscoe's appointment in the first aborted adjudication did not prevent him from coming to the second adjudication with an open mind. Although the notice of adjudication was the same in the two proceedings, the reasoning in the two awards is different, not least because Whitefriars raised objections under different clauses in the contract. In the first adjudication Whitefriars raised points under Clause 27 - interim payment provisions, and, in the second adjudication they raised points under Clause 30 - the post-termination provisions.

b) Once the first adjudication was declared a nullity, a line was drawn under it. There is no reason to believe that anything that happened in the first adjudication had any bearing on Mr. Biscoe's decision in the second adjudication.

c) The legal advice obtained on the jurisdiction issue was disclosed to Whitefriars. Their solicitors commented on it before the award was made. In any event, since the decision went to Mr. Biscoe's jurisdiction, it was only provisional since, ultimately, the decision would be made by the court.

d) It is not disputed that the adjudicator had a discussion with Mr. Cassidy. Amec says that such a discussion was purely a matter of administration and could not raise any issue of bias or breach of natural justice.

e) There was no risk that Mr. Biscoe would be biased by reason of the threat that he might be sued in relation to his conduct in the previous adjudication proceedings.

3. The adjudicator answered precisely the questions referred to him. Whether he came to the right or to the wrong conclusion is irrelevant to the enforcement of adjudication proceedings.

The Facts

12. Amec was engaged by Whitefriars to carry out certain preconstruction works and the procurement of a second stage tender in connection with the building development in Tudor Street, London, EC4. The contract took the form of a Letter of Intent dated the 18th October 2000. It was held by His Honour Judge Lloyd QC, on the 19th September 2003, that the contract incorporated the JCT standard form of building contract, with Contractors Design 1998 Edition with amendments, which accompanied the tender documents.

13. Instead of the default nominating mechanism provided for under the standard form, the contract provided that the adjudicator was to be "George Ashworth of Davies Langdon & Everest or, in the event of his unavailability, the person nominated by him".

14. Amec carried out the pre-construction services and, on the 1St May 2001, was given possession of the site. Three months later, on the 31 St July 2001, Whitefriars determined Amec's contract because the parties could not agree on the second-stage tender.

15. Amec was informed of Whitefriars' decision by letter and was advised to make arrangements to agree with Whitefriars the appropriate payments in respect of its involvement to that date. Amec had submitted the following invoices - invoice dated the 26th March 2001 for the sum of £204,000, which had been paid, and invoices dated the 17th April 2001 for the sum of £97,000 and the 18 th June 2001 for the sum of £414,629.41, which had not been paid.

16. Amec submitted a draft final account on the 10th October 2001 for the sum of £712,401.52. After deduction of £ 204,000, one arrives at the sum of £508,401.52, which is claimed by Amec in this adjudication.

17. This adjudication therefore relates to events in 2001 in relation to a claim which crystallised two-and-a-half years ago.

18. By a letter dated the 23rd April 2003, Amec's solicitors gave notice of adjudication pursuant to Clause 39(a) of the Standard Form for the wrongful withholding of moneys due to it in the sum of £508,401.52, plus V.A.T., plus interest.

19. Mr. Biscoe was nominated by the RIBA and gave a decision in favour of Amec on the 5th June 2003. Whitefriars failed to comply with the decision. On the 19th August 2003 Amec served enforcement proceedings. Whitefriars resisted these proceedings on five grounds, including the two grounds on which His Honour Judge Lloyd QC reached his decision. Another ground was the allegation that Mr. Biscoe's award was made in breach of natural justice.

20. It is not disputed that, in his judgment on the 19th September 2003, His Honour Judge Lloyd QC refused to stay the adjudication and decided that the named adjudicator under the contract was Mr. George Ashworth, that Mr. Biscoe was not validly appointed and that he had no jurisdiction to make the award.

21. On the 2nd October 2003 Masons, as Amec's solicitors, wrote to Whitefriars that they had been instructed to commence a further adjudication, having established from Davies Langdon & Everest that the firm did not have a Mr. George Ashworth.

22. On the 3rd October 2003 Mr. Ingram, of the Osborne Group, of which Whitefriars is a part, wrote to Masons in relation to the proposed new adjudication:

"I am advised I need to give you clear notice of our intention to withhold and set off against any moneys that may be or may come due to you all the costs we have incurred in relation to this matter prior to the service of a further adjudication notice".

23. The letter set out the calculation and went on:

"Your entitlement to this payment is governed by the terms of contract between the parties, namely the Letter of Intent dated the 18th October 2000 and the schedule of amendments. As we are dealing with a termination situation, your entitlement is really governed by Clause 27 of the contract. Clause 27.6 sets out the rights and duties of the parties following a determination of the contractors' employment. The situation, put shortly, is that a contractor is not entitled to any further payment until the works are completed by another contractor. The contractor is then entitled to the difference, if any, between what would have been earned by completing the contract and what the breach has cost the employer (the expenses incurred in completion plus any direct loss and/or damage. . .".

24. In a separate paragraph the letter states that:

"As Amec are fully aware, Whitefriars have a substantial counterclaim, details of which were sent on the 1st May 2003".

The letter then summarises the main points of the counterclaim. The amount of the counterclaim is £1,225,000.

25. Amec replied on the 9th October 2003. They refuted allegations that they were in repudiatory breach of the pre-construction contract. They said that Amec's final account was submitted in October 2001 and that, in the absence of any response and/or valid withholding notice, the account became payable.

"This remains Amec's position as supported by the decision in the first adjudication; the outcome in the forthcoming adjudication will be no different".

The letter goes on to reject the counterclaim in its totality.

26. Kingsley Napley, solicitors for Whitefriars, replied to Masons letter of the 2nd October 2003, saying that the arrangements for appointing another adjudicator seemed to be fundamentally flawed and not in accordance with the terms of the contract. They gave notice that they would be raising the same jurisdictional challenges as in the first adjudication.

27. On the 31st October 2003 Masons notified Kingsley Napley that they had that day commenced fresh adjudication proceedings against Whitefriars. They sent Whitefriars a further notice of adjudication. The letter to Whitefriars identified the dispute as follows:

"The dispute which our client intends to refer to adjudication arises under the contract formed between the parties on or about the 18th October 2000, the terms of which are contained in the letter to Amec of the 24 th August 2000, which details the pre-construction services required, and in the letter to Amec of the 18th October 2000, which incorporates the said JCT contract ("the contract") together with a schedule of amendments thereto. In accordance with the contract, Amec carried out the pre-construction services until the engagement was terminated by you on the 3rd August 2001, and you are wrongfully withholding moneys properly due to Amec for the services carried out by it under the contract.

"The sum properly due and owing to Amec is £508,401.52 (having taken into account the payment of £204,000 made to Amec by you on the 26th March 2001). These sums are exclusive of V.A.T. Amec seeks recovery of the sum of £508,401.52 plus V.A.T. of £88,970.27 and interest".

28. In relation to the nominated adjudicator, the letter said:

"The only Mr. Ashworth who could be identified at Davies Langdon & Everest was a Geoffrey Ashworth, who sadly died a few weeks ago. In the circumstances, as a result of section 108(5) of the Act, the adjudication conditions of the contract are void and, therefore, the adjudication provisions of the Scheme for Construction Contracts (England and Wales) Regulations 1999 ("The Scheme") apply. Pursuant to paragraph 2(c) of The Scheme, and in compliance with section 108(2) of the Act, we hereby inform you that we will be applying forthwith to the President of the Royal Institute of British Architects (RIBA) to nominate the adjudicator".

29. There is no dispute that if the adjudication provisions of the contract have failed, Amec was entitled to apply to the RIBA for nomination of an adjudicator. There is, of course, a dispute over the validity of the re-appointment of Mr. Biscoe by the RIBA.

30. Also on the 31 st October 2003, Amec wrote to the RIBA. The letter recalled that Amec had previously made an application to the RIBA on the 28th April 2003 for a nomination of a person to resolve the dispute. It explained the history of the first adjudication, including the fact that Mr. Biscoe delivered his decision on the 5th June 2003, and the reasons why the Court held that Mr. Biscoe had not been validly appointed under the contract.

31. The letter went on to explain that since Amec was informed, in preparing for the fresh adjudication, that there was no George Ashworth at Davies Langdon & Everest, the whole adjudication clause in the contract was void. Amec was therefore applying for a nomination under section 108(5) of the Act and the Regulations. 32. The letter went on:

*"Given that **our** present application is in relation to the same dispute, and bearing in mind that the **RIBA nominated** Mr. Biscoe as adjudicator, and he made a decision thereon, we suggest that, in the interests of saving time and costs, it makes sense that Mr. Biscoe be nominated again".*

33. This letter from Masons to the RIBA was copied to Whitefriars, but not to Kingsley Napley as their solicitors.

34. The letter was accompanied by an RIBA Form of Application. Under the heading "Brief Outline of the Matter in Dispute", the application form said:

"Whitefriars City Estate Limited has unjustifiably and unreasonably withheld fees due to Amec Capital Projects Limited for services performed by it in accordance with the terms of the contract".

This form was signed by Mr. Cassidy, the relevant Partner at Masons.

35. On the 5th November 2003 the RIBA notified Whitefriars by fax that Mr. Biscoe had again been appointed as adjudicator. The letter enclosed the application form.

36. On the 7th November 2003 Masons served on Whitefriars the notice of referral of adjudication and supporting documents. It amplified the claim set out in the letter of the 31St October 2003. The letter set out Amec's case under the following headings - "The Parties", "Background to the Dispute", "The Contract", "The Adjudication Agreement", "The Provision of Services and Termination", "The Payment for Services" and "The Claim". It claimed that the adjudication mechanism in the JCT contract had failed, and that Mr. Biscoe was properly nominated. In paragraphs 24-26, the referral notice set out under " Payment for Services" how the sum of £508,401.52 is made up.

37. The claim needs to be set out in full.

"27. Accordingly, Amec requests that the adjudicator awards payment of the sum owing to them in the amount of £508,401.52 (together with V.A.T.) with interest at the rate of 5% above the Bank of England base rate, pursuant to Clause 30.3.7 of the JCT contract from (but not including) the final date of payment of the outstanding invoices until payment of the sums due by Whitefriars".

38. Clause 30 of the JCT contract deals with interim payments to be made by the employer to the contractor in accordance with Clauses 30.1 to 30.4.

39. Paragraph 28 asked that Whitefriars pay all the adjudicator's fees and expenses, and all Amec's costs associated with the reference.

40. On the 7 th November 2003 Masons wrote to Mr. Biscoe enclosing relevant documents.

41. On the 10th November 2003 Mr. Biscoe wrote to Mr. Janney of Kingsley Napley confirming that he had been formally notified of his appointment. He asked for the response to the referral notice by midday on Monday, 17th November 2003, noting that he could have required it by the 14th November 2003, ". . . but because I shall be out of London I have conceded you the additional weekend."

42. He also copied a letter that he had faxed to Mr. Cassidy, also dated the 10 th November 2003. The letter reads as follows:

"I acknowledge receipt of your referral notice received on Friday of last week (7th November). As I explained on the telephone, I shall not be able to do a great deal this week, but you may assume that my directions will be very much as before.

"I am not entirely convinced at present that the correct procedure is 'The Scheme', and would be looking into this as soon as practicable. I may require legal advice on this point and, if I decide to take such advice, I do not expect the cost to exceed £2,000.

"Should I find that for any reason I cannot hear this adjudication for legal reasons, please confirm that your clients will meet my reasonable fees and expenses up to that point".

43. On the 12th November 2003 Kingsley Napley replied to Masons various letters. They confirmed that they were instructed in the matter. The letter took exception to the fact that Masons had had a discussion with the adjudicator.

44. The letter went on:

"Whilst our clients fully reserve all their rights in this matter, we require . a full account of precisely what was said and when between yourselves and the adjudicator . a full account of why we and/or our clients were not informed of your discussions and/or were not invited to participate and contribute".

45. Surprisingly, Masons did not reply to this request either in correspondence or in a witness statement in these proceedings. I have to decide this case without the assistance of any account other than the correspondence which is set out in this judgment.

46. Kingsley Napley's letter went on to challenge the contention that the mechanism provided under the contract was no longer applicable. It asserted that any appointment under the scheme would be invalid. It expressed concern about Mr. Biscoe's ability to act impartially and in an unbiased manner, and said that there was a real possibility of bias.

It noted that Whitefriars was holding both Amec and Mr. Biscoe liable for wasted costs in relation to the first adjudication.

47. The letter concluded by inviting Amec no longer to proceed with the adjudication.

48. At an earlier stage of the argument before me, Amec noted the delay between Whitefriars' knowledge of Mr. Biscoe's re-appointment and the objection raised in this letter. Later they agreed that it did not amount to a waiver. I do not consider the matter any further.

49. On the 12th November 2003 Kingsley Napley also wrote to the RIBA and to Mr. Biscoe. The letter to the RIBA invited it to withdraw Mr. Biscoe's nomination on the basis that there was a real possibility that he would be prejudiced. The letter to Mr. Biscoe from Kingsley Napley referred to Mr. Biscoe's fax to Mr. Cassidy on the 10th November 2003, referring to the telephone call between Mr. Biscoe and Mr. Cassidy. The letter also made reference to alleged earlier discussions between them. This allegation is not being pursued.

50. The letter dealt with the argument in relation to Mr. Ashworth. It then turned to why Whitefriars contended that it was wrong of the RIBA to re-appoint Mr. Biscoe. The reasons can be summarised as follows:

1. Amec did not follow the correct contractual procedures.

2. In the first adjudication Mr. Biscoe continued his original invalid appointment, despite jurisdictional challenges, and made a decision which was unenforceable by the courts. He should not be in a position to do so again.

3. Whitefriars incurred approximately £100,000 in legal costs in fighting an invalid adjudication, which they are claiming from Amec and which will form part of a counterclaim in any future adjudication.

4. Similar claims will be made in relation to the £28,000 costs in the court hearing in front of His Honour Judge Lloyd QC.

5. To the extent that the costs are not recovered from Amec, they will be claimed against Mr. Biscoe personally.

51. The letter went on:

"Your ability to act impartially and unbiased in this matter has been compromised in view of your past involvement and the decision you reached in the first invalid adjudication, and also because you may be liable for some of our client's costs. An adjudicator must be, and must be seen to be, disinterested, unbiased and impartial. Our clients believe that there is a real possibility that you will be prejudiced, biased and partial against them". 52. Whitefriars asked Mr. Biscoe to withdraw from the adjudication. 53. I note that if Whitefriars was taking such a stance, it was bound to make its objections clearly at this stage.

54. On Monday, 17th November 2003, Mr. Biscoe sent a fax to both parties. In it he copied his note of his conversation with Mr. Cassidy. It read as follows:

"I had a telephone conversation with Mr. P. Cassidy of Masons on Friday, 7 th November 2003. 1 confirm that I had already heard from the RIBA regarding an adjudication I had decided a few months ago concerning Amec and Whitefriars. I understood that I would be receiving papers shortly. Mr. Cassidy wished to know to which office he should send them. I informed them that he should send them to Collier House.

"I enquired why the matter had been referred to me again, and Mr. Cassidy explained that his client had taken enforcement proceedings following the issue of my decision and the Judge had not enforced the decision. This was to do with a named adjudicator being in the appendix to the contract attached to the Letter of Intent. He reminded me that the question of whether the contents of the appendix were agreed or not agreed, had been an issue between the parties. The Judge had found that the named adjudicator should have heard the adjudication. Since the named adjudicator, Mr. George Ashworth (but actually Mr. Geoffrey Ashworth) of DLE has since sadly died, the matter was now open again and that his clients were referring the matter back to me, as I would see from the documents when I received them. The reason for coming straight to me was that my familiarity with the facts would save time and cost.

"I mentioned that I had already heard from the RIBA and would respond appropriately when I received the papers. I further mentioned that I had a very full diary for the week beginning the 10th November, and that I would not be able to deal with the matter until the following week".

55. Mr. Biscoe said that his interpretation of the phone call was that it was of an administrative nature and did not prejudice either party. 56. Paragraph 5 of the fax is relevant.

"5. The issue here is to establish the correct procedure and the correct person to adjudicate in the dispute between the parties. Both parties may be assured that I shall act in this case if I consider the correct course is for me to do so. I shall act impartially and in accordance with the correct procedure. I shall not be deterred from discharging my duties as an adjudicator and I find it most improper that solicitors representing the Respondent should attempt to deter me from acting by threats of action for damages and accusations of bias, which are without substance".

Mr. Biscoe was clearly annoyed at Whitefriars questioning his impartiality.

57. Amec point out that Whitefriars had an opportunity to comment further on this letter, and did so.

58. On the 19th November 2003 Kingsley Napley replied to Mr. Biscoe saying that the whole situation relating to the telephone call was highly irregular, as Whitefriars did not know what was really discussed with Mr. Cassidy. In particular, Whitefriars claimed that Mr. Cassidy had put his own gloss on His Honour Judge Lloyd QC's judgment. The letter expressed concern that the reason for returning to Mr. Biscoe was that his familiarity with the facts would save time and costs. This might give rise to the inference that all Mr. Biscoe had to do was to replicate his earlier decision.

59. On the 20th November 2003 Masons replied to Mr. Biscoe's letter of the 17th November 2003 and Kingsley Napley's letter of the 12th November 2003, commenting on the impossibility of using the mechanism for the appointment of the adjudicator set out in the contract. The letter ended by asking whether or not Mr. Biscoe had identified the firm from which he intended to take legal advice.

60. Also on the 20th November 2003, Kingsley Napley set out briefly to Mr. Biscoe why they contended that the contractual machinery for appointing the adjudicator still applied.

61. On the 21" November 2003 Mr. Biscoe gave his decision on the question of jurisdiction.

"I have now taken legal advice and all the issues raised by the parties have been carefully considered. I have concluded that I have been correctly nominated and appointed, and that I should proceed with this adjudication."

62. He gave this decision before he had disclosed the advice which he had received from Clyde & Co. and, it follows, before Whitefriars had had an opportunity to comment on it.

63. On the 24th November 2003 Mr. Biscoe wrote to the parties:

"The parties will be aware that I have already considered a dispute between the same parties and I am advised by the referring party that the current dispute is essentially the same. The Respondent, on the other hand, has mentioned that time has passed and that other issues will now have to be considered . . . ".

64. The letter deals with the advice which Mr. Biscoe says he received from Clyde & Co. on the jurisdictional issues. It said:

' 1. Pursuant to Clause 39A.2, given that the parties have not executed a JCT

adjudication agreement with any individual, that the individual named as the adjudicator in Appendix I, being Mr. George Ashworth, did not exist, and that no individual capable of being appointed pursuant to Clause 39A.3, the mechanism for the appointment of an adjudicator under the terms set out in the contract is not valid and cannot apply.

'2. The procedure set out in Clause 39A.3 would fail in any event, even if the adjudicator had been properly named as Mr. Geoffrey Ashworth and not Mr. George Ashworth. Clause 39A.3 relates to an adjudicator who 'dies or becomes ill or is unavailable ... and is thus unable to adjudicate on a dispute or difference referred to him. . . '.

"It is submitted that a dispute or difference cannot be referred to someone who is deceased. The only reasonable interpretation of the Clause is that, for the procedure to be activated, the dispute or difference must have been referred to the adjudicator before his death".

65. Kingsley Napley replied to Mr. Biscoe on the 28th November 2003, excluding their client's response document. The letter emphasised the difference between the two adjudications, noting in paragraph 19:

"The position concerning withholding notices and any set off and counterclaim is very different both following termination and also taking into account the correspondence that has taken place between the parties since April 2003".

66. The Response Documents emphasised that Whitefriars was taking part in the adjudication under duress. It went through the referral document. It made complaint that Amec failed to procure the works properly, failed to meet budget, failed to co-ordinate and manage the design process and was guilty of poor programming. It set out what it claimed was the correct financial position.

67. Under the heading 'The Claim', it said:

'66. In relation to paragraph 27 Whitefriars contend that Amec is not entitled to payment of the sum of £508,401.52, or any other sum they are claiming.

'67. Furthermore, Whitefriars should be repaid the sum of £204,000, which has already been paid to Amec for services provided, or such other sum as the adjudicator may decide upon'."

68. Whitefriars then attempted to mount a set-off and counterclaim amounting to £l,344,825.75. Whereas Clause 30 of the contract dealt with interim payments, Clause 27 dealt with the consequences of the employer's determination under the contract.

69. Thereafter, Masons filed a Reply to the Response to the Referral and Kingsley Napley filed the Response to the Reply to the Response to the Referral.

70. Kingsley Napley asked for an oral hearing. This was refused by Mr. Biscoe because, as he said in his decision, "I am confident that I have a clear understanding of Whitefriars' case from the documents." 71. On the 17th December 2003, Mr. Biscoe gave his decision. This decision is evidently not a copy, or even a simple re-working of the previous decision. In paragraph 2.7 Mr. Biscoe referred to the Letter

of Intent and set out how the sum of £ 508,401.52 claimed by Amec is made up. The decision then went through the history of the earlier adjudication and the unsuccessful enforcement proceedings. It reproduced the advice of Clyde & Co. on the issue of jurisdiction in identical terms to those set out in the letter of the 24 th November 2003. Mr. Biscoe then reviewed Amec's case, which he categorised as ". . . a straightforward claim for the payments of amounts due." (para 4.1).

72. He then reviewed Whitefriars' case, which he summarised in paragraph 5.2.

"In summary, Whitefriars contend that Amec failed to meet the commitments under the Letter of Intent and caused Whitefriars to incur unnecessary additional expense in terms of having to change contractor and substantial costs associated with late completion and late handover to Gouldens".

73. In paragraph 6 Mr. Biscoe explained why he refused Whitefriars' request for a meeting with the parties. In paragraph 7.2 Mr. Biscoe said:

"My task is to apply the terms of the contract to the facts of this dispute. It is clear that whatever Whitefriars' complaints against Amec may have been, when presented with a valid application for payment it failed to follow the terms of the Letter of Intent and the draft amended JCT contract that it had drawn up with such care. It did not at any time serve a withholding notice, which it had to do if it was to avoid the obligation of (sic) meet each application in full. This oversight, which I assume it to have been, occurred twice and inevitably means it must meet the invoices in full".

74. The Defendants say that this finding is essentially the same as that set out in paragraph 6.7 of the first adjudication. It is based on legal advice given in the first adjudication by Clyde & Co., but not disclosed to the parties. On Amec's case, this is relevant because Amec has put the case on the basis that the issues of substance are identical to those in the first adjudication. Amec says that the advice given by Clyde & Co. in the first adjudication is not relevant, because the Defendants raised different issues in the second adjudication.

75. In paragraph 7.3 Mr. Biscoe rejected Whitefriars' counterclaim and set-off, saying that it was a separate and independent claim and, therefore, outside Mr. Biscoe's present jurisdiction.

76. In paragraph 8.1 Mr. Biscoe decided that Whitefriars should pay Amec the sum of £508,401.52 plus V.A.T. as claimed.

77. On the 23rd December 2003 Masons demanded payment on behalf of their clients.

78. On the 5 th January 2004 Kingsley Napley gave notice that their clients would not be paying the sums found to be due in the second adjudication.

Adjudication

79. The original concept of adjudication was to provide a quick and interim decision in the course of a construction contract in advance of what was likely to be complex and expensive disputes. It would have the advantage that it provided a mechanism for resolving disputes in the course of a contract, and thus allowing the contract to continue. As Lord Ackner said at the Report stage of the Bill in the House of Lords:

"What I have always understood to be required by the adjudication process was a quick enforceable interim decision which lasted until practical completion when, if not acceptable, it would be the subject of arbitration or litigation. That is a highly satisfactory process. It came under the rubric of 'pay now, argue later', which was a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up the completion of important contracts".

80. Quickly, the construction industry realised that Parliament had introduced a procedure which could also be used as an intervening provisional stage in the dispute resolution process where the contract had come to an end.

81. Dyson J. put it in ***Macob Civil Engineering Limited v Morrison Construction Limited*** [1999] BLR 93 at 97: *"Crucially it has made it clear that decisions of adjudicator are binding and are to be complied with until the dispute is finally resolved".*

82. As very complex disputes are referred to adjudicators, often years after the events which constitute the dispute, and adjudicators are expected to give decisions in such matters within a very tight timeframe, it is hardly surprising that increasing numbers of awards are being challenged for a wide variety of reasons.

83. The Court is, of course, bound faithfully to apply the legislation in accordance with the jurisprudence which has been built up since the Housing Grants Construction and Regeneration Act 1996 came into force. The broad approach to be taken to such challenges is apparent from the many court decisions since the legislation came into force.

The general principles must be applied to the individual cases.

84. In this case there are the following challenges:
a) The adjudicator is not the one provided for by the contract and, therefore, had no jurisdiction to make the award.
b) The adjudicator's decision was made in circumstances which would lead a fair-minded and informed observer to conclude that there was a real possibility that the adjudicator was biased and/or the adjudicator's decision was made contrary to natural justice.
c) The adjudicator did not decide the dispute referred to him.

85. **The adjudicator is not the one provided for by the contract.**

86. Clause 39A.2 provides:

"39A.2 The Adjudicator to decide the dispute or difference shall be, on the application of either Party, either the individual with whom the parties have executed'the JCT Adjudication Agreement for an Adjudicator Named in a Contract' (being the individual named as the adjudicator in Appendix I or a person nominated by him) or where no such agreement has been executed the individual named as the Adjudicator in Appendix I or, in the event of his unavailability, a person nominated by him, or the individual with whom the Parties have executed an Adjudication Agreement pursuant to Clause 39A.3, provided that

.2.1 Where either party has given notice of his intention to refer a dispute to adjudication, then any application to the person named as the Adjudicator in Appendix I, or any agreement or nomination under Clause 39A.3 must be made with the object of securing the appointment of and the referral of the dispute or difference within seven days of the date of the notice of intention to refer.

.2.2 Upon the receipt by the Parties from the individual named as the Adjudicator in Appendix I of confirmation of his availability or of the name of the person nominated by him, the Parties shall thereupon execute with that individual, or that person, as the case may be, the 'JCT Agreement for an Adjudicator Named in a Contract'.

87. Clause 39A.3.

"If the Adjudicator dies or becomes ill or is unavailable for some other cause, and is thus unable to adjudicate on a dispute or difference referred to him then

.l either party may apply to the individual named as the Adjudicator in Appendix I to replace the Adjudicator to adjudicate that dispute or difference, save that

.2 If the individual named as the Adjudicator in Appendix I is unavailable then either Party may apply to the partner or director who is managing (for the time being) the practice of such named individual

And the Parties shall execute the JCT Adjudication Agreement with the replacement Adjudicator. Provided that if the Adjudicator has executed with the Parties the JCT Agreement for an Adjudicator Named in a Contract' and he is unable, by reason of illness or other cause, to adjudicate on a dispute or difference referred to him, any appointment under Clause 39A.3 shall not terminate the Adjudication Agreement of that individual with the Parties.

Under Clause 39A.2 Adjudication, Appendix I states that 'The Adjudicator will be George Ashworth of Davies Langdon & Everest or, in the event of his unavailability, a person nominated by him".

88. Amec says that the provisions in the contract fail because the nominated adjudicator did not exist. There never was a George Ashworth at Davies Langdon & Everest. Whitefriars say the person

intended to be identified was Geoffrey Ashworth, and the name "Geoffrey" can be substituted for "George".

89. In ***Nittan v Solent Steel*** [1981] 1 Lloyds Rep. 633 at 637, Lord Denning MR set out and explained the test.

"In this Court we are very used to dealing with misnomers. We do not allow people to take advantage of a misnomer when everyone knows what was intended. I will only refer to one authority, ***Whittam v W. J. Daniel & Co. Ltd****. [1962] 1 QB 271 at 277, where Donovan LJ cited the words of Devlin LJ:*

'I think that the test must be: how would a reasonable person receiving the document take it? In all the circumstances of the case, and looking at the document as a whole, he would say to himself, "Of course it must mean me, but they have got my name wrong", then there is a case of mere misnomer'."

90. Since this is an application under Part 8, the Court has to decide whether, as Whitefriars claim, this is a case of misnomer. It seems to me, on the facts before me, applying the test of Devlin LJ, that this is a clear case of misnomer. I therefore reject Amec's submissions on this point.

91. The second point taken by Amec is that, on a proper construction of Clauses 39A.2 and 39A.3, since Mr. Geoffrey Ashworth died before the matter was referred to the adjudicator for a second time, there was no machinery under the contract for appointing an adjudicator. In particular, since one cannot refer a dispute to a person who is already dead, it is evident that this provision only comes into play when the adjudicator dies after the dispute has been referred to him.

92. Amec also argues that, since paragraph 2(i)(b) of the Scheme applies "if no person is named in the contract, or the person named has already indicated that he is unwilling or unable to act", the alternative in this paragraph can only apply where the named individual has given such an indication.

93. Whitefriars argues that the word "unavailable" in Clause 39A.3.2 is intended to refer back to the general provision at the start of Clause 39A.3 and encompasses death and illness as well as unavailability. In these circumstances either party may apply to the partner managing Mr. Ashworth' s practice to obtain the nomination of a replacement adjudicator. Thus it is argued that the contractual machinery has not broken down and Mr. Biscoe's adjudication was again made without jurisdiction.

94. The parties made other submissions in relation to the Clauses 39A.2 and 39A.3. I take them into account, but do not need to rehearse them in this judgment.

95. It seems to me that the purpose of the Clauses is to nominate the adjudicator chosen by the parties, to make provision for alternatives if the nominated adjudicator should be unable to act both before and after a referral, and to ensure that the nomination was made and accepted within the very tight timetable laid down for adjudication. 96. The designated adjudicator set out in Appendix I is Mr. George (Geoffrey) Ashworth or, in the event of his unavailability, a person nominated by him. The reference in Appendix I is to Clause 39A.2. 97. The proviso in Clause 39A.2, namely Clauses 39A.2.1 and.2, provide the machinery for ensuring the timely appointment of, and the referral of, the dispute to the nominated adjudicator within seven days of the notice of intention to refer, and to ensure the execution of the "JCT Agreement for an Adjudicator Named in a Contract" with the nominated adjudicator.

98. The other provisions in Clause 39A.2 give a number of alternatives of possible adjudicators to decide the dispute or difference. They are:
a) *The individual with whom the parties have executed the "JCT Adjudication Agreement Named in a Contract", or*
b) Where no such agreement has been executed the individual named in Appendix I, or
c) In the event of his unavailability a person nominated by him, or
d) The individual with whom the parties have executed an Adjudication Agreement pursuant to Clause 39A.3, i.e. the person qualified under Clause 39A.3.

99. It is "d)" which is relevant here. Does it apply to circumstances where the person named in Appendix I is unable to make the nomination or only where the person has either started the adjudication himself,

or it has been started by the person nominated, and that person has been unable to complete the adjudication?

100. Clause 39A.3 has a general rubric which states that:

"If the Adjudicator dies or becomes ill, or becomes unavailable, and is thus unable to adjudicate on a dispute or difference referred to him, then there is a procedure for finding a replacement Adjudicator".

101. As a matter of definition, Amec's construction of the Clause depends on the words "referred to him" being construed as a dispute which has already been referred to him. Whitefriars' construction depends on the words being construed as including "disputes which are to be referred to him".

102. In relation to Clause 39A.3.2, Amec says that I should construe the term " unavailable" as applying to a person who is alive only at the time of referral. Whitefriars says that it is a catch-all intended to apply to cases where the adjudicator nominated in Appendix I dies or becomes ill, or is unavailable for some other cause.

103. I conclude that Clause 39A.2 sets out the categories of person to whom a dispute may be referred. The proviso requires the dispute to be referred to someone who is able to deal with it within the stringent time limits set for adjudication.

104. Clause 39A.3 deals with a case where someone to whom a dispute has been referred has died or become ill or is unavailable and is thus unable to complete the adjudication.

105. As the general part of the subsection refers specifically to a person ". . . who is unable to adjudicate on a dispute or difference referred to him" , these words must be given their normal meaning. In such circumstances the parties may apply to the individual nominated or, if he is not available, the partner or director who is managing the practice of the named individual to nominate a substitute where a dispute has been referred to a person and that person is then unable to complete the adjudication.

106. Since Mr. Ashworth died before the matter was referred, there is no one who is qualified, under Clause 39A.2 a)-c. Equally, since the dispute had not been referred to an adjudicator, Clause 39A.3 does not apply and, therefore, Clause 39A.2 d) does not apply.

107. If I make these findings it is agreed that the Scheme applies. 108. My interpretation is reinforced by the fact that both JCT Forms have sections dealing specifically with the position where a nominated adjudicator is unable to complete the adjudication (paragraph 4 in each case).

109. I therefore find in favour of Amec on this issue.

Bias and Natural Justice

110. I next consider the objections to Mr. Biscoe which relate to bias and breach of natural justice. The evidence must be looked at both in relation to the individual complaints and the overall effect of the evidence. Within the test of bias it is important to note that there may be single acts of a failure to act fairly, e.g. by failing to hear both sides of a dispute, which may be sufficient to invalidate an adjudication. In such circumstances, it may be more appropriate to categorise them as breaches of natural justice, rather than bias.

111. There is now clear judicial authority as to how overall bias is to be judged. The test laid down by the House of Lords in *Porter v Magill [2002] 2* AC 357 is set out in the speech of Lord Hope of Craighead at page 494. It follows the test set out by Lord Phillips of Worth Matravers MR in ***Re Medicaments*** *[2001]* **1 WLR 700,** with one small amendment. The test is whether at the time when he gave his decision the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the adjudicator was biased. In *Re Medicaments* Lord Philips MR, at paragraph 86 on page *727,* emphasised that:

"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 ... that the tribunal was biased".

112. I first consider the individual objections, and then return to the overall test.

113. The first objection relates to the re-appointment of Mr. Biscoe as adjudicator. As is demonstrated by two previous decisions of this Court, each case must be considered on its own merits. I agree with His Honour Judge Bowsher QC, in ***Carter v Nuttall*** *[2002]* BLR 359, that the mere fact that an adjudicator is re-appointed to consider a dispute which had already been referred to and decided by him, does not inevitably lead to a conclusion of a serious risk of bias. The point was taken in that case after re-appointment, but before the second adjudication had taken place. The adjudicator said that at the time when he accepted the appointment he was not aware of the precise case that was going to be put to him, although he said that he would be likely to reach the same conclusion as before on the same facts. 114.1 note that the case was brought before His Honour Judge Bowsher QC at the start of the adjudication, not at the time of the adjudicator's decision, which is the stage at which overall bias must bejudged.

115. In ***Pring v Harper*** *[2002]* EWHC 1775, His Honour Judge Lloyd QC concluded in the circumstances of that case that where the adjudicator had adjudicated between the head contractor and the subcontractor, and was asked to adjudicate on the same facts in the dispute between the same subcontractor and the sub-subcontractor, he concluded:

"In my view there is a very real risk that an adjudicator in the position of Mr. Riches would be carrying forward from an earlier adjudication not merely what he had seen or been told, but also the judgments which he had formed and the opinions which he had reached which led him to conclude that that sum was the correct measure of Alpine's damages recoverable from PSH".

116. His Honour Judge Lloyd QC declined to enforce the award, which was for exactly the same amount as that awarded in the earlier adjudication.

117. In this case Whitefriars say that there is a real possibility of bias in the possibility that Mr. Biscoe would follow his previous decision which they say had been reached unfairly. Amec say simply that I should follow ***Carter v Nuttall*** and say that there was no real possibility of bias.

118. In my view it is not possible to conclude that the re-appointment of an adjudicator who has already reached a decision on the same or similar facts will inevitably lead the fair-minded and informed observer to conclude that there was a real possibility that the decision would be biased.

119 In practice there may be significant difficulties for an adjudicator in attempting to consider afresh matters which he has already decided. Such difficulties may well manifest themselves in the course of the subsequent adjudication. Adjudication can, as in this case, be an extremely expensive form of alternative dispute resolution, and it is very often better when the same or very similar issues need to be considered afresh, and objection is taken to the re-appointment of the first adjudicator, that they should be considered by a different adjudicator. It is often not possible at the outset to foresee problems which may only become apparent in the course of the second adjudication.

120. Whitefriars say that the re-appointment of Mr. Biscoe must be considered against the background that his first decision was found to be a nullity, and that if Amec fail to pay the costs of the first adjudication there is a risk that Whitefriars would bring proceedings against Mr. Biscoe for its wasted costs.

121. These circumstances, the first of which was known to the RIBA at the time of the second appointment, point to the good sense of appointing a different adjudicator. Both these points are matters to be taken into account in the overall assessment of the possibility that the decision was biased. I am not ready to conclude that, taken in isolation, they mean that there is a real possibility that Mr. Biscoe was biased in reaching his decision in the second adjudication.

122. The next objection is that in the previous proceedings before His Honour Judge Lloyd QC, Whitefriars had objected that Mr. Biscoe had taken into account the advice of legal advisers that may have been important to his decision, but which was not disclosed to the parties. Whitefriars argue that a fair-minded and informed observer would consider that there was a real possibility of bias where, in the first adjudication, Mr. Biscoe asked Clyde & Co. not only for advice in relation to his jurisdiction, an issue which I will deal with separately, but also in relation to the validity of oral notices that Whitefriars gave specifying amounts to be withheld or deducted from the amount due to Amec under

the invoices. The reference in Clyde & Co's billing guide is to a payment of £481 for research, case law and authorities, and £581 for analysing documents and the final draft of the adjudicator' s decision. This advice was not disclosed to the parties.

123. The reasoning also formed an important part of the adjudicator's second decision.

124. In my view there is a real risk that Mr. Biscoe carried forward into the second adjudication the advice which he received from Clyde & Co. in the first adjudication in relation to the withholding issue. This, by itself, amounts to a breach of natural justice.

125. It is clear that Mr. Biscoe also received advice from Clyde & Co. on issues of jurisdiction. Whitefriars say that, even though eventually the advice was disclosed, this was done after Mr. Biscoe had reached his decision on this issue. They also complain that the advice on the issue of jurisdiction had also been carried forward from the first adjudication. I reject this latter criticism in relation to the first adjudication. Whatever happened in the first adjudication on the issue of jurisdiction, fresh advice was obtained in the second adjudication on this question, which Mr. Biscoe had to consider in the second adjudication in the light of the circumstances which then arose.

126. The other contention has more substance. Where an adjudicator is seeking advice from a third party, it is essential that he informs the parties in advance (as Mr. Biscoe did in the second adjudication), that he notifies the parties of how he has formulated the question on which the advice has been sought, so that the parties can evaluate the advice in context and, finally, he discloses the substance of the advice which he has been given and gives the parties an opportunity to comment on it before he reaches his decision. This did not happen in this case. Mr. Biscoe declared that he had jurisdiction to act before he disclosed the advice from Clyde & Co. on which his decision was based. This was contrary to natural justice.

127. I am very conscious that the time limits may dictate the manner in which the steps are carried out, but it seems to me that justice demands that the parties should be informed of the questions asked of the third party expert, of the answers given by the expert and that an opportunity should be given to comment on the advice given by the expert in advance of the adjudicator's decision. I can see no distinction between expert advice given on the question of jurisdiction and advice which goes to the merits. See, for example, *Discain Project Services v Opec Prime Development Ltd. [2000]* BLR 402 at 405 per His Honour Judge Bousher QC.

128. I am also asked by Whitefriars to determine that the decision in the first adjudication was contrary to natural justice, because the legal advice was not disclosed. I decline to do so. The issue does not arise out of the decision which I have been asked to enforce, namely the second adjudication.

129. A further complaint was made by Whitefriars that on the 7th November 2003, the date on which the referral notice was served on Whitefriars Mr. Cassidy, the partner at Masons, instructed by Amec had a conversation with Mr. Biscoe. The only evidence which I have comes from Mr. Biscoe and I must deal with it on that basis.

130. The content of the note is significant. The conversation went beyond what appears to have been the original enquiry as to where the papers were to be sent. In circumstances where Amec was returning for a further decision to the adjudicator who had found in its favour at the previous adjudication on what Amec was contending were the same facts and issues, this further discussion was extremely unwise. Mr. Cassidy's explanation that the reason for coming back to Mr. Biscoe was his familiarity with the facts might well have led the fair-minded and informed observer to conclude that there was a real possibility that Mr. Biscoe was being invited to reach the same conclusion as on the previous adjudication.

131. I accept that no allegation is made, and this finding is not in any way intended to imply, that this is what Mr. Cassidy intended. The test is a different one, namely the perception of the fair-minded and informed observer. This issue must be looked at in the context of my other findings. Taken on its own, such a conversation might not have warranted the conclusion of a real possibility of bias but, in the context of this case, its effect must be considered with the other evidence on the issue of overall bias. Even taken in isolation, the conversation was unwise.

132. At this stage I must consider the overall question of bias and ask the question of whether or not, at the time of the adjudicator's decision, the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the adjudicator was biased.

133. In ***Re Medicaments***, at paragraph 37, Lord Phillips of Worth Matravers MR observed:

"Bias is an attitude of mind which prevents the judge from making an objective determination of the issues 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 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, predisposed a judge towards a particular view of the evidence or issues before him".

134. I conclude that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the adjudicator was biased. The following are relevant considerations.

1. On Amec's case the issues were the same as in the first adjudication.

2. The basis of the adjudicator's finding was that the issues which he had to decide were identical to those in the first adjudication.

3. On the crucial issue of notices, as appears from Clyde & Co's fee sheets, the adjudicator obtained legal advice in the first adjudication, which he did not disclose to the parties. He did not obtain legal advice on this point in the second adjudication. There is a real risk that he carried the legal advice forward to the second adjudication, and that it influenced the judgments which he formed. The legal advice was never disclosed to the parties as it should have been, and the parties never had an opportunity to comment on it.

4. Although in the second adjudication he disclosed the substance of the legal advice on jurisdiction to the parties, the adjudicator only did so after he had reached his decision on the issue. Whitefriars therefore had no opportunity to comment on the advice before the adjudicator made his decision.

5. Although, taken in isolation, it might not have been sufficient to persuade the fair-minded and informed observer that the adjudicator was biased, in the circumstances of this case the explanation by Mr. Cassidy in his telephone call with Mr. Biscoe that Mr. Biscoe was being appointed adjudicator because the adjudication raised the same facts and issues as the previous adjudication, carried with it the risk that a fair-minded and informed observer might have concluded that the conversation might have led the adjudicator to the biased conclusion that he could simply reach the same conclusion as in the previous adjudication.

135. I conclude, therefore, that applying the test in ***Porter v Magill***, there is a real possibility that the adjudicator was biased.

Failure to decide the dispute referred to him

136. The final issue is Whitefriars' complaint that the adjudicator failed to decide the dispute that was referred to him. The notice of adjudication is contained in Masons letter to Whitefriars dated the 31s^{t} October 2003 and, in the application to the RIBA for the appointment of an adjudicator of the same date. The letter of referral said:

"In accordance with the contract Amec carried out the pre-construction services until its engagement was terminated by you on the 3r^{d} August 2001, and you are wrongfully withholding moneys properly due to Amec for carrying out those services under the contract. The sum properly due and owing to Amec is £508,401.52 (having taken into account the payment of £204,000 made to Amec by you on the 26th March 2002 ...

"Please treat this letter as our client's notice of adjudication to you, pursuant to section 108(1) of the Housing Grants Construction and Regeneration Act 1996 (the Act) in relation to the dispute detailed above" .

137. The brief outline of the matter in dispute is also set out in the RIBA Form of Application for nomination of a person to act as an adjudicator. It reads as follows:

"Whitefriars City Estate Limited has unjustifiably and unreasonably withheld fees due to Amec Capital Projects Limited for services performed by it in accordance with the terms of the contract".

138. The test which I must apply was set out by the Court of Appeal in ***Bouygues v Dahl-Jensen*** [2000] PLR 522. In that case the court approved the test set out by Knox J. in ***Nikko Hotels (UK) Ltd. v MEPC Plc*** *[* 1991] 2 EGLR 103 at 108B, namely:

"If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity".

This test is accepted by the parties.

139. Amec say that the adjudicator answered the right question. Whitefriars say the question which was referred to the adjudicator was whether Whitefriars was unjustifiably and unreasonably withholding fees to Amec for services performed by it in accordance with the terms of the project. It was not referring to fees withheld at the interim stage, as in the first adjudication.

140. Construed literally, as it was by the adjudicator, the question of the withholding referred to him must have occurred at the interim stage. This was the time when Whitefriars did withhold moneys due under the contract. The separate issue, introduced in Mr. Ingram's letter dated the 3rd October 2003, related to the position after the determination of the contract. That letter contends that after determination the contractor is not entitled to any further payment.

141. In my view Mr. Biscoe was entitled to interpret Amec's referral as relating to the payments on the invoices, and not to what payments, if any, were due on termination of the agreement. He was entitled to conclude that the matters relating to the overall sums that were due after termination should be part of a separate adjudication. In my view, therefore, his decision was taken in response to the issue referred to him by Amec. On this issue I find for Amec.

142. The result is that by reason of my findings in relation to the issue of bias, I decline to enforce the adjudication award of Mr. Biscoe. The parties have agreed that costs will follow the event. I therefore award Whitefriars the costs of this application.

143. Having heard brief submissions at the end of the last hearing, I refer the question of assessment of costs to the Costs Judge in the event that the parties are unable to agree.

144. I should end by saying that I am grateful to both parties, including especially both counsel, for the way in which the issues have been presented to me.

Stephen Furst QC and Jane Lemon (instructed by Messrs Masons) for the Claimants
David Thomas QC (instructed by Messrs Kingsley Napley) for the Defendants