**JUDGMENT : LORD JUSTICE DYSON** : CA. 28th October 2004.

1. **Lord Justice Dyson : Introduction :** This appeal raises questions of alleged bias and procedural unfairness by an adjudicator appointed to determine a dispute in relation to a construction contract referred to him under the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act").

2. **The facts** : Pursuant to a contract partly contained in what was described as a *"letter of intent"* dated 18 October 2000, AMEC Capital Projects Ltd ("AMEC") was engaged by Whitefriars City Estates Ltd ("Whitefriars") to carry out certain pre-construction works and the procurement of a second stage tender in connection with a building development in Tudor Street, London EC4. The contract incorporated the JCT Standard Form of Building Contract with Contractors Design, 1998 Edition with amendments. It provided for reference of disputes to an adjudicator. The relevant contractual provisions were as follows:

*"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 1 or a person nominated by him), or*
*where no such agreement has been executed, the individual named as the Adjudicator in Appendix 1,*
*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 1 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 to, the Adjudicator within 7 days of the date of the notice of intention to refer.*
*.2.2 upon receipt by the Parties, from the individual named as the Adjudicator in Appendix 1, 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."*

*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*
*.1. either Party may apply to the individual named as the Adjudicator in Appendix 1 to replace the Adjudicator to adjudicate that dispute or difference save that*
*.2. if the individual named as the Adjudicator in Appendix 1 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."*

3. Appendix 1 provided that: *"the Adjudicator will be George Ashworth of Davis Langdon & Everest, or in the event of his unavailability a person nominated by him."*

4. AMEC carried out the pre-construction services and on 1 May 2001 was given possession of the site. It submitted its second stage tender in June. The tender figure was the subject of negotiations, but the parties were unable to agree on a price. In the result, on 31 July 2001 Whitefriars terminated the contract and appointed a replacement contractor. AMEC had by this time submitted invoices dated 26 March for £204,000 (which had been paid), 17 April for £97,000 and 18 June for £414,629.41. The last two invoices have never been paid. On 10 October, it submitted a draft final account in the net sum of £508,401.52 (exclusive of VAT and interest).

5. On 23 April 2003, AMEC's solicitors gave notice of adjudication pursuant to clause 39A of the contract in respect of its claim for £508,401.52 plus VAT and interest. Mr Michael Biscoe of Biscoe Associates was appointed as adjudicator by the Royal Institute of British Architects ("RIBA") pursuant to the machinery for the selection of adjudicators provided by para 2(1)(c) of the Scheme for Construction Contracts ("the Scheme") annexed to the 1996 Act. On 5 June, he issued his reasoned decision that Whitefriars should pay the principal sum claimed plus VAT of £88,970.26 and interest in the sum of £120,513.44, making a total of £717,885.22. AMEC commenced enforcement proceedings. Whitefriars resisted the claim on a number of grounds which included (i) that Mr Biscoe had no jurisdiction

because he had not been appointed in accordance with the terms of the contract and (ii) that he had acted in breach of the rules of natural justice.

6. On 19 September 2003, His Honour Judge Humphrey LLoyd QC decided that para 2(1)(c) of the Scheme was not applicable, and that, in accordance with Appendix 1, the adjudicator should have been *"George Ashworth of Davis Langdon & Everest, or in the event of his unavailability a person nominated by him"*. Accordingly, Mr Biscoe had no jurisdiction and his decision was a nullity. The judge did not need to, nor did he, decide the other issues that had been raised by Whitefriars.

7. On 31 October, AMEC's solicitors served a second notice of adjudication on Whitefriars in respect of the claim for £508,401.52 plus VAT and interest. They wrote:
*" As previously advised to your solicitors, Kingsley Napley, there is no George Ashworth at Davis Langdon & Everest and so, the terms incorporated into the contract fail to provide a mechanism that will allow our client to appoint and instruct an adjudicator in accordance with section 108(2)(b) of the Act. The only Mr Ashworth who could be identified at Davis Langdon & Everest was a Geoffrey Ashworth who sadly died a few weeks ago.*
*In the circumstances, as a result of section 108(5) 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 an adjudicator."*

8. On the same day, they wrote a letter to the RIBA in which they summarised the history of the first adjudication and the decision of Judge LLoyd QC and applied for the appointment of an adjudicator. The letter stated:
*"Given that our present application is in relation to the same dispute and bearing in mind that 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"*

9. Mr Biscoe was duly nominated. He accepted the nomination and following the service of a Referral of Adjudication, a Response, Set-Off and Counterclaim and a Reply, he issued his second decision on 17 December. He decided that Whitefriars was obliged to pay the net sum claimed plus VAT and interest. Whitefriars failed to honour this decision. AMEC issued enforcement proceedings for a second time. Whitefriars defended the claim on the grounds that (a) upon the true construction of the contract, the adjudicator should have been nominated by the partner managing Mr Ashworth's practice and not pursuant to the Scheme; and (b) Mr Biscoe's decision was void since he had committed several breaches of natural justice. On 27 February 2004, His Honour Judge Toulmin QC dismissed the claim. He held that AMEC had applied the correct contractual machinery for the appointment of the adjudicator so that Mr Briscoe had the requisite jurisdiction, but he decided that there had been breaches of the rules of natural justice sufficient to invalidate the decision. AMEC appeals with the permission of Potter LJ. Whitefriars has served a respondent's notice seeking to uphold the judge's decision on the grounds that the AMEC had followed the wrong contractual machinery, and that Mr Biscoe's decision was therefore void on the grounds of want of jurisdiction.

10. **The jurisdiction point** : It is common ground that the "George Ashworth" was a misnomer for "Geoffrey Ashworth", and that the reference to "George" should be understood as being a reference to "Geoffrey". Geoffrey Ashworth had been a partner of Davis Langdon & Everest but he had died on 13 October 2003. Mr Thomas QC submits that the death of Mr Ashworth did not result in a breakdown of the clause 39A machinery for the appointment of an adjudicator. He says that on the death of Mr Ashworth, clause 39A.3.2 applied. Upon his death he became "unavailable" and AMEC should have applied for the appointment of an adjudicator to the partner or director who for the time being was managing Mr Ashworth's practice. The word "referred" where it appears in the third line of claim 39A.3 does not connote that a dispute must already have been referred before the adjudicator becomes unavailable. It can cover the situation where an adjudicator becomes unavailable when a reference is to be made.

11. In my judgment, the judge reached the correct conclusion on this issue. The starting point is that the word "Adjudicator" is defined in clause 1.3 of the conditions of the standard form of contract as "any

individual *appointed* pursuant to clause 39A as the Adjudicator" (emphasis added). It is clear that clause 39A.2 is dealing with the appointment of the adjudicator. It provides a number of different methods by which the adjudicator may be appointed. That is made plain by the proviso which, it is common ground, governs an appointment made by any of the methods described in clause 39A.2. Thus, on the face of it, if a person is not appointed as adjudicator pursuant to clause 39A.2, the default machinery of the Scheme must apply. It is common ground that (i) no Adjudication Agreement was executed with an adjudicator under clause 39A.2, (ii) Mr Ashworth (the person named in Appendix 1) was not the adjudicator because, by reason of his death, he was unavailable, and (iii) he did not nominate an adjudicator. It follows that there was no appointment of an adjudicator pursuant to clause 39A.2.

12. Clause 39A.3 is dealing with the situation that arises if the Adjudicator (i.e. the person appointed as Adjudicator pursuant to clause 39A) "dies or becomes ill or unavailable for some other cause". It cannot apply before a person has been appointed, even if he has been nominated as adjudicator. On Mr Thomas's argument, it is necessary to read the word "Adjudicator" in the first line of clause 39A.3 as meaning, or at least as including, the person named as the Adjudicator in Appendix 1. But if that had been the intention of the parties, they would have said so. The scheme of clause 39A is clear. Clause 39A.2 is dealing with the original appointment of an adjudicator. If, after an adjudicator has been appointed, he becomes unavailable and is therefore unable to adjudicate on a dispute "referred to him", then a replacement may be appointed in one of the two ways described in clause 39A.3.1 and .2. This interpretation accords with the clear and plain language of the contract. It fits more naturally with the use of the words "a dispute or difference referred to him". The natural interpretation of these words is that the dispute or difference has [already] been referred to the adjudicator. Mr Thomas's interpretation of these words is strained.

13. So why should the words not be given their plain and ordinary meaning? Mr Thomas suggests that this interpretation can give rise to anomalies which the parties cannot sensibly have intended. In particular, he points out that it would mean that, if the person named in the Appendix as adjudicator was unavailable to be appointed to determine a dispute, the contractual machinery would break down, but could spring back to life if the named adjudicator were to become available to decide a subsequent dispute. He submits that it is unlikely that this is what the parties would have intended. Rather, they are likely to have intended to provide their own mechanism for appointment for the duration of the contract, and not a mechanism that sometimes applied, and sometimes did not. I have little doubt that the parties would have hoped that the same mechanism could apply throughout the contract, and perhaps also that the same adjudicator could be appointed to decide all disputes as they arose. But it was obviously prudent to provide for an alternative arrangement if the mechanism of first choice were to break down. It is by no means self-evident that the parties would not have wished the mechanism of first choice to be revived (if that were possible) once a different mechanism had been adopted. I have no doubt that the judge reached the right conclusion on the issue of jurisdiction.

14. **Breach of natural justice : The legal principles :** The common law rules of natural justice or procedural fairness are two-fold. First, the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made. Secondly, the person affected has the right to an unbiased tribunal. These two requirements are conceptually distinct. It is quite possible to have a decision from an unbiased tribunal which is unfair because the losing party was denied an effective opportunity of making representations. Conversely, it is possible for a tribunal to allow the losing party an effective opportunity to make representations, but be biased. In either event, the decision will be in breach of natural justice, and be liable to be quashed if susceptible to judicial review, or (in the world of private law) to be held to be invalid and unenforceable.

15. In the present case, although allegations of breach of the first of these rules have been made by Whitefriars from time to time, Mr Thomas has made it clear that he now only relies on the alleged bias of Mr Biscoe.

16. It is rightly not in dispute that the rule against bias applies to adjudicators appointed to determine disputes under the 1996 Act. It is not said on behalf of Whitefriars that Mr Biscoe was in fact biased in

reaching his second decision. It is, however, submitted that his decision should be declared to be invalid on the grounds of apparent bias. The test for apparent bias is not in doubt. It is whether a fair-minded and informed observer, having considered all the circumstances which have a bearing on the suggestion that the decision-maker was biased, would conclude that there was a real possibility that he was biased: ***Porter v Magill*** [2001] UKHL 67, [2002] 2 AC 357 para 103.

17. Bias can come in many forms. As the Court of Appeal said in ***In re Medicaments and Related Classes of Goods (No 2)*** [2001] 1 WLR 701 para 37:

*"Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve. A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him."*

18. The circumstances giving rise to a real possibility of bias are many. In ***Locabail (UK) Ltd v Bayfield Properties Ltd*** [2000] QB 451 at para 25, the Court of Appeal made some observations about the factors which may or may not give rise to a real danger of bias, emphasising that everything would depend on the facts. It is true that the court was considering bias in the context of the test of *"real danger of bias"* which had been propounded by the House of Lords in ***R v Gough*** [1993] AC 646, rather than the later fair-minded and informed observer test approved in ***Porter v Magill***. But the later test was described by Lord Hope in *Porter* as no more than a *"modest adjustment"* of the test in ***Gough.*** Moreover, in ***Locabail*** (para 17) the court said that in the overwhelming majority of cases the application of the real danger or possibility test and the reasonable suspicion or apprehension test (effectively that approved in ***Porter***) would yield the same result. It seems to me, therefore, that the value of the guidance given in ***Locabail*** remains undimmed. It is important to emphasise, however, that it should be treated as no more than guidance: it should not be treated as if it were a statute. The court said:

*"**25.** It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit local Law Society or chambers (see **K.F.T.C.I.C. v Icori Estero S.p.A.** (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6, 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of an individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see **Vakauta v Kelly** (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."*

19. The risk of apparent bias may need to be considered where the decision of a tribunal is allowed on appeal, a rehearing is ordered and the question arises whether the rehearing should be conducted by the same or a different tribunal. It arose in the rather unusual circumstances of the present case when

the RIBA had to consider whether to nominate Mr Biscoe to decide the same issue as he had purported to decide in the first adjudication, namely whether AMEC was entitled to recover the sum that it was claiming for work done prior to the termination of its contract. The question that falls to be decided in all such cases is whether the fair-minded and informed observer would consider that the tribunal could be relied on to approach the issue on the second occasion with an open mind, or whether he or she would conclude that there was a real (as opposed to fanciful) possibility that the tribunal would approach its task with a closed mind, predisposed to reaching the same decision as before, regardless of the evidence and arguments that might be adduced. Usually, the reason for sending a case back for a rehearing will be that there is fresh evidence or a new point, or the appeal court has held that the tribunal made some mistake which, it is to be expected, will not be repeated on the rehearing. The present case is unusual in that the court did not find that Mr Biscoe had made any mistake in arriving at his first decision, and, so far as the RIBA were aware, there was no fresh material.

20. In my judgment, the mere fact that the tribunal has previously decided the issue is not of itself sufficient to justify a conclusion of apparent bias. Something more is required. Judges are assumed to be trustworthy and to understand that they should approach every case with an open mind. The same applies to adjudicators, who are almost always professional persons. That is not to say that, if it is asked to redetermine an issue and the evidence and arguments are merely a repeat of what went before, the tribunal will not be likely to reach the same conclusion as before. It would be unrealistic, indeed absurd, to expect the tribunal in such circumstances to ignore its earlier decision and not to be inclined to come to the same conclusion as before, particularly if the previous decision was carefully reasoned. The vice which the law must guard against is that the tribunal may approach the rehearing with a closed mind. If a judge has considered an issue carefully before reaching a decision on the first occasion, it cannot sensibly be said that he has a closed mind if, the evidence and arguments being the same as before, he does not give as careful a consideration on the second occasion as on the first. He will, however, be expected to give such reconsideration of the matter as is reasonably necessary for him to be satisfied that his first decision was correct. As I have said, it will be a most unusual case where the second hearing is for practical purposes an exact rerun of the first.

21. The mere fact that the tribunal has decided the issue before is therefore not enough for apparent bias. There needs to be something of substance to lead the fair-minded and informed observer to conclude that there is a real possibility that the tribunal will not bring an open mind and objective judgment to bear. As was said in ***Locabail,*** the mere fact that the tribunal had previously commented adversely on a party or found his evidence unreliable would not found a sustainable objection. On the other hand, if the tribunal had made an extremely hostile remark about a party, the position might well be different. Thus, in ***Ealing London Borough Council v Jan*** [2002] EWCA Civ 329, this court decided that the judge should not hear the retrial of proceedings where he had twice said of the respondent in preliminary proceedings that he could not trust him *"further than he could throw him"*. So too in ***Timmins v Gormley,*** which was heard with ***Locabail,*** it was held that there was a sufficient danger where a personal injuries case in which insurers were the real defendants was heard by a recorder who had published articles in which he had expressed "pronounced pro-claimant anti-insurer views".

22. It is easy enough to make challenges of breach of natural justice against an adjudicator. The purpose of the scheme of the 1996 Act is now well known. It is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement. The intention of Parliament to achieve this purpose will be undermined if allegations of breach of natural justice are not examined critically when they are raised by parties who are seeking to avoid complying with adjudicators' decisions. It is only where the defendant has advanced a properly arguable objection based on apparent bias that he should be permitted to resist summary enforcement of the adjudicator's award on that ground.

23. **Apparent bias in this case :** With that introduction, I turn to consider the various arguments advanced by Mr Thomas in support of his submission that there was apparent bias in the present case.

24. Mr Thomas accepts that the mere fact of Mr Biscoe's reappointment is not sufficient to found a case of apparent bias. The additional factors on which he relies are (a) that Mr Biscoe's first decision was made without jurisdiction and (b) that the legal advice that Mr Biscoe obtained during the first adjudication in relation to the defence being advanced by Whitefriars (which was not disclosed to the parties) was *"carried forward"* into the second adjudication. I shall take these in turn.

25. I confess that I fail to understand how the fact that the original decision was made without jurisdiction has any relevance to the issue of apparent bias. The fact that the first decision was a nullity did not make Mr Biscoe any more or less likely to approach the second adjudication with a closed mind than if the first decision had been one which he had jurisdiction to make. In my view, the first point is misconceived.

26. In order to explain the second point, it is necessary to set out a little of the history. AMEC's claim in the first adjudication (repeated in the second) was that it was entitled to be paid the sum claimed as *"reasonable and proper costs"* incurred in accordance with the letter of 18 October 2000 following the giving by Whitefriars of notice to cease work. In its response to the claim, Whitefriars contended that it was not precluded by clause 30.3.4 of the standard conditions of contract from advancing a set-off and counterclaim. That clause provides so far as material:
*"**30.3.4** Not later than 5 days before the final date for payment of an amount due pursuant to clause 30.3.3 the Employer may give a written notice to the Contractor which shall specify any amount proposed to be withheld and/or deducted from that due amount, the ground or grounds for such withholding and/or deduction and the amount of withholding and/or deduction attributable to each ground.*
***30.3.5** Where the Employer does not give any written notice pursuant to clause 30.3.3 and/or to clause 30.3.4 the Employer shall pay the Contractor the amount stated in the Application for Interim Payment."*

27. Whitefriars contended that clause 30.3.4 did not oblige the employer to give written notice of any amount to be withheld or deducted: oral notice was sufficient. As he was entitled to do, Mr Biscoe obtained legal advice on this point. In his first award, he held (at para 6.7) that the contract required a written notice to be given, and that an oral notice would not suffice. The failure to give notice in writing was fatal to Whitefriars' defence.

28. In the second adjudication, Whitefriars took a different point. It argued that, since there had been a termination of the contract, the provisions of clause 30 did not apply. It contended that payment was governed by clause 27.6, which provided that, in the event of the determination of AMEC's employment, AMEC was not entitled to any further payment until all the works had been completed by the replacement contractor. It followed that the failure to give notice in writing in accordance with clause 30.3.4 was irrelevant. AMEC's response was that clause 27 had no application. The termination had not been made pursuant to clause 27, but rather pursuant to the provisions of the letter of 18 October 2000.

29. The essential reasoning of Mr Biscoe is to be found in para 7.2 of his decision:
*"**7.2** 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 to meet each application in full. This oversight, which I assume it to have been, occurred twice and inevitably means that it must meet the invoices in full."*

30. Implicitly, he rejected Whitefriars' clause 27 defence. Whitefriars did not advance any alternative argument in the event that its clause 27 defence was rejected. It did not even explicitly repeat its earlier unsuccessful oral notice point. In these circumstances, I consider that Mr Biscoe was not obliged to reconsider the oral notice point, since it had not been raised, and Mr Thomas does not suggest otherwise. There being no notices in writing, it was inevitable that Mr Biscoe would arrive at the same conclusion as before.

31. This is the background against which the significance of the legal advice is to be considered. But it is apparent that the legal advice did not deal with the clause 27 point because this issue had not been raised in the first adjudication. It is true that the absence of written notice was relevant in the second adjudication in the sense that, subject to the clause 27 point, the absence of written notice was fatal to Whitefriars' defence. But no issue was raised in the second adjudication as to the relevance of the lack

of written notice if the clause 27 defence failed. In these circumstances, the legal advice was of no relevance to the issues raised in the second adjudication. The argument based on the legal advice must, therefore, be rejected.

32. I should add that, even if Whitefriars had resurrected the oral notice point as an alternative to the clause 27 point, I would have rejected a bias argument based on that legal advice. The mere fact that legal advice had been obtained in the first adjudication would not have led the fair-minded informed observer to conclude that there was a real possibility that Mr Biscoe would have approached the oral notice point with a closed mind.

33. During the course of argument, Mr Thomas advanced a different complaint. He submitted that Mr Biscoe had failed to deal with the clause 27 point. On the face of it, there is force in this submission, although if Whitefriars had been genuinely concerned about Mr Biscoe's failure to deal explicitly with it, I would have expected it to ask him to supplement his decision by giving his reasons for rejecting the clause 27 defence. Be that as it may, Whitefriars has not raised this complaint before, and in my view it is too late to raise it now. Even if the point is a good one, it has nothing whatsoever to do with apparent bias.

34. **Three further arguments** : Mr Thomas relies on three further arguments in support of his case on apparent bias. These are (a) the telephone conversation of 7 November between Mr Cassidy and Mr Biscoe; (b) the advice obtained by Mr Biscoe in relation to his jurisdiction; and (c) the possibility of a claim made by Whitefriars against Mr Biscoe.

35. **The telephone conversation** : Following the nomination of Mr Biscoe, Mr Cassidy (the partner at Masons who was acting as solicitor on behalf of AMEC) telephoned the office of Biscoe Associates on 7 November. He wanted to know to which office he should send the papers. He spoke to Mr Biscoe, who wanted to know why the dispute was being referred to him for a second time. The full note made by Mr Biscoe of the conversation was sent to both parties and is in these terms:
*"I had a telephone conversation with Mr Peter Cassidy of Masons on Friday 7 Nov 2003. I confirmed 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 him 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 10 Nov and that I would not be able to deal with the matter until the following week."*

36. It has not been suggested that this note is inaccurate, but Whitefriars do not accept that it is necessarily complete. In my judgment, there are no grounds for believing that the note does not fully and accurately reflect what was said during the telephone conversation. In his letter of 17 November, Mr Biscoe said that the conversation:
*" was of an administrative nature and the issues discussed were to allow me to understand why I was being involved again and were confined to matters of fact and did not in least prejudice the position of the Respondent nor benefit the Referring Party. It merely assisted me in understanding what was being asked of me."*

37. The passage in the conversation which led the judge to hold that a fair-minded and informed observer might well have concluded that there was a real possibility of bias was the statement by Mr Cassidy that the reason why the dispute was being referred to Mr Biscoe was that his familiarity with the facts would save time and costs. But if Mr Biscoe had not been told that this was the reason why the matter

was coming back to him (as it plainly was), he would have been likely to infer that it was, at any rate once he had seen the judgment of Judge LLoyd. As I have said, Mr Thomas accepts that the fact that the dispute was referred back to Mr Biscoe does not of itself justify a conclusion of apparent bias in this case. I do not see how the position is affected by Mr Cassidy's comment that the reason why the dispute was being referred to Mr Biscoe was that he was familiar with the facts. In particular, I do not accept that this remark amounted to an invitation to Mr Biscoe to reach the same decision as on the previous occasion, still less that it is to be inferred that there was a real possibility that Mr Biscoe would reach the same decision *by reason of that remark*. I would accept that conversations between one party and the tribunal in the absence of the other party should be avoided. Communications should ordinarily be in writing with copies to all parties. But I see nothing in the circumstances of this conversation, which arose out of an innocuous telephone call to Mr Biscoe's office, which would lead the fair-minded and informed observer to conclude that what was said would give rise to a real possibility of bias.

38. **The advice in relation to jurisdiction :** In their letter to Mr Biscoe dated 12 November, Whitefriars' solicitors inter alia challenged his jurisdiction on the grounds that the Scheme did not apply. This is the argument that was repeated to this court and which I have rejected at paras 10 to 13 above. Although, as is common ground, Mr Biscoe had no power to determine his jurisdiction, he had to decide what to do in the light of the challenge that had been made. Unsurprisingly, he sought legal advice. Mr Thomas does not suggest that he was not entitled to take this sensible step. He was advised by Clyde & Co that his nomination by the RIBA was valid and that he did have jurisdiction to determine the dispute. On 24 November, Mr Biscoe notified the parties that he had been so advised by Clyde & Co and set out the gist of the advice that he had received. Whitefriars' solicitors were able to, and did, make representations to Mr Biscoe on the jurisdiction issue, but they were unable to persuade him not to proceed with the adjudication.

39. Mr Thomas does not submit that there was a breach of the rules of natural justice in the sense that Whitefriars were not given a reasonable and effective opportunity to make representations on the question of jurisdiction. There is no doubt that Whitefriars' solicitors were able to, and did, deploy their arguments in their letter of 12 November. The substance of the legal advice was conveyed in Mr Biscoe's letter of 24 November. It did not contain anything that could not have been foreseen by Whitefriars' solicitors. The issue of jurisdiction raised a short point of construction. Nevertheless, Mr Thomas contends that the failure of Mr Biscoe to disclose the gist of the advice before he decided that he had jurisdiction is a factor that should be taken into account and lead to the conclusion that there was apparent bias in this case. I confess that I have great difficulty in understanding this submission. It seems to me that, if there is anything in this complaint, it can only be that there was a failure to allow Whitefriars an opportunity to make representations. In my view, Whitefriars' complaint has nothing to do with bias. The judge decided that the failure to disclose the gist of the advice before he decided that he had jurisdiction was contrary to natural justice. He said:

*"**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 Servics v Opec Prime Development Ltd**. [2000] BLR 402 at 405 per His Honour Judge Bowsher QC."*

40. In my judgment, Mr Thomas is right not to seek to uphold this conclusion of the judge. There was no breach of the rules of natural justice here. As I have said, Whitefriars' solicitors had already made representations on the point of construction. They do not suggest that there was a line of argument that they had not foreseen which they would have wished to advance in order to meet the advice

given by Clyde & Co. Natural justice requires no more than that a party should have an effective opportunity to make representations before a decision is made. In my view, Whitefriars had such an opportunity in the present case and took advantage of it.

41. A more fundamental question was raised as to whether adjudicators are in any event obliged to give parties the opportunity to make representations in relation to questions of jurisdiction. I respectfully disagree with the judge's view that the requirements of natural justice apply without distinction, whether the issue being considered by the adjudicator is his own jurisdiction or the merits of the dispute that has been referred to him for decision. The reason for the common law right to prior notice and an effective opportunity to make representations is to protect parties from the risk of decisions being reached unfairly. But it is only directed at decisions which can affect parties' rights. Procedural fairness does not require that parties should have the right to make representations in relation to decisions which do not affect their rights, still less in relation to "decisions" which are nullities and which cannot affect their rights. Since the "decision" of an adjudicator as to his jurisdiction is of no legal effect and cannot affect the rights of the parties, it is difficult to see the logical justification for a rule of law that an adjudicator can only make such a "decision" after giving the parties an opportunity to make representations. The matter can be tested in this way. Let us suppose that the court were to hold that an adjudicator was right to "decide" that he had jurisdiction, but that he had reached this "decision" without giving the parties an opportunity to make representations on the point. The court would not declare the "decision" to be void. It would not do so because the adjudicator's "decision" was of no legal effect. No useful purpose would be served by such a declaration, not least because the court had held that the adjudicator did in fact have jurisdiction. The court would not grant any relief for the supposed breach of natural justice in such a case. It seems to me that this demonstrates that the rules of natural justice have no part to play in relation to issues that the decision-maker has no power to decide.

42. Nevertheless, I consider that, where time permits, adjudicators would be well-advised to give the parties the opportunity to make representations on an issue of jurisdiction: they may receive valuable assistance which will help them to decide whether they should proceed with the adjudication. And that is what happened in the present case. But I do not consider that an adjudicator who decides to proceed with an adjudication is acting in breach of natural justice if he does not allow the parties that opportunity.

43. For the reasons that I have given, the complaint made in relation to the advice on jurisdiction is irrelevant to any question of bias.

44. **Possibility of a claim :** By their letter dated 12 November 2003, Whitefriars' solicitors asked Mr Biscoe to recuse himself on the grounds that his ability *"to act impartially and unbiased in this matter has been compromised"* inter alia *"because you may be liable for some of our clients' costs"*. They explained that Whitefriars had incurred approximately £100,000 in legal costs in contesting the first adjudication, and a further £28,000 in defending the proceedings issued by AMEC to enforce the first adjudication. It was Whitefriars' intention to claim these costs from AMEC. But in so far as it was unable to do so, it intended to recover the costs from Mr Biscoe *"as damages for proceeding with an adjudication wrongly"*. On the face of it, it seems to me that such a claim would have had no prospects of success, since para 26 of the Scheme provides:

*"The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith…"*

45. Bad faith has never been alleged. But even if there were any substance in the claim, the fair-minded and informed observer would not conclude on that account that there was a real possibility that Mr Biscoe was biased. His response in a letter dated 17 November contained the following passage:

*"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 find it 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".*

46. In my judgment, there is nothing in the circumstances of this case which would have led the fair-minded and informed observer to doubt that Mr Biscoe would act precisely as he said he would act in this letter. I consider that such an observer would interpret this letter as showing no more than that Mr Biscoe was showing a resolute refusal to succumb to some rather crude bullying. If the threat of proceedings against a tribunal were, without more, to lead to a conclusion of apparent bias, it would be open to a party to undermine the integrity of the Scheme simply by making such a threat. Mr Thomas recognises the danger of such abuse that is inherent in this argument, and relies on it as a subsidiary point which, he says, should be taken into account with his other submissions. I find it difficult to conceive of circumstances where the threat of proceedings against a tribunal would of itself lead the fair-minded and informed observer to conclude that there was a possibility of bias. But I am in no doubt that the threat that was made against Mr Biscoe would not lead the fair-minded informed observer to conclude that there was a real possibility of bias in the present case.

47. **Conclusion :** The judge held that there was a real possibility of bias in the present case by reason of the combined effect of the fact that (a) on AMEC's case, the issues were the same in the two adjudications; (b) on the basis of Mr Biscoe's findings, the issues that he had to decide were the same in both adjudications; (c) the legal advice obtained in the first adjudication may have been "carried forward" into the second adjudication and influenced the second decision; (d) Mr Biscoe did not give the parties an opportunity to comment on the legal advice obtained on the jurisdiction issue in the second adjudication; and (e) Mr Cassidy had a private conversation with Mr Biscoe. For the reasons that I have given, I do not consider that these factors, whether taken individually or in combination, justify the conclusion that there was apparent bias in this case. I would allow this appeal.

48. **Lord Justice Chadwick:** I agree.

49. **Lord Justice Kennedy:** I also agree.

Order: The appellant's appeal is allowed. The respondent to pay the appellant the sum of £642,784.31 and the sum of £12,305.68 in respect of the Adjudicator's costs; its costs of appeal and the respondent's appeal and the costs of its claim below in case no: HT-04/05 to be assessed on the standard basis if not agreed; and the sum of £25,000 on account of its costs of its appeal and the respondent's costs. Application for a stay refused. Application for permission to appeal to the House of Lords refused.

MR STEPHEN FURST QC (instructed by Messrs Masons) appeared on behalf of the Appellant

MR DAVID THOMAS QC (instructed by Messrs Kingsley Napley) appeared on behalf of the Respondent

**AMEC Capital Projects Ltd. v Whitefriars City Estates Ltd.** [2004] EWCA Civ 1535

1 **LORD JUSTICE CHADWICK**: At this hearing, fixed for the purpose of handing down the judgments in this matter, counsel instructed on behalf of the respondent - who was not the counsel who appeared on the appeal nor below - has drawn our attention to a point which was not raised either below or on this appeal. The point is said to arise out of paragraph 9(2) of the adjudication scheme relevant in this case. Counsel has invited us to re-open the appeal for the purpose of hearing further argument on that point.

We have considered his written submissions and the oral submissions that he has made to us this morning.

3. In my view there is nothing in the point. Paragraph 9(2) has been included in the scheme so as to avoid the possibility of inconsistent findings by different adjudicators addressing the same issue. The paragraph is not directed to a case where the decision of the adjudicator in the first hearing has been held to be a nullity; and so must be treated as a decision which has never been made. I would not myself adjourn this appeal for further hearing. I can see no purpose in doing so.

4. **LORD JUSTICE DYSON**: I agree.