JUDGMENT : HIS HONOUR JUDGE TOULMIN CMG Q.C.: TCC. 5th April 2004.

1 In this action the particulars of claim dated 16th December 2003 relate to the enforcement of a decision by the adjudicator, Mr. Allan Wood, dated 18th November 2003.

2 AWG Construction Services Limited (formerly Morrison Construction Limited) (AWG) seeks the following relief:
   (1) An order that the adjudicators decision dated 18th November 2003 be set aside on the grounds that the adjudicator had no jurisdiction to make any such decision; and/or
   (2) An order that the adjudicators decision dated 18th November 2003 be set aside because the adjudicator failed to act impartially and failed to comply with the principle of natural justice; and/or
   (3) An order that the adjudicators decision dated 18th November 2003 should not be enforced because there is credible evidence that if the decision is reversed in any subsequent proceedings the defendant will not be able to pay the sums awarded.

3 I shall deal with the third issue after considering the first two issues.

4 By way of defence and counterclaim, originally filed on 22nd December 2003, but subject to later amendment, Rockingham Motor Speedway Limited (Rockingham) denies the claimant's claim, and counterclaims by way of summary judgment the sum of £1,835,061.52, being the total sum awarded by the adjudicator set out in paragraph (xi) of the adjudicators decision.

5 By a late amendment, Rockingham seeks to counterclaim in the alternative the sum of £54,328.73 in relation to matters not in dispute. It contends that I should enforce this part of the decision even if I find that the adjudicator's decision on the main part of the claim is unenforceable because I find that the adjudicator lacked jurisdiction, and/or acted in a way that was contrary to natural justice.

6 Rockingham says that the dispute about the oval track was effectively an entirely separate issue heard, by agreement between the parties, at the same time as the issues about which no objection has been taken to the adjudicators decision.

7 In response, AWG says that I should make no such order because the adjudicator made one award whose components all stand or fall together. They are part of the award and if one part of the award is struck down, then the whole award should fall.

8 The parties have agreed a list of issues a follows:
   (1) Is the decision unenforceable on the grounds that what the adjudicator decided in his decision was something that was not referred to him for a decision and therefore his decision was made without jurisdiction?
   (2) Is the decision unenforceable because it was made in breach of the principles of natural justice and the principles of fairness and impartiality because:
      (2.1) the adjudicator adopted or introduced new matters and new claims upon which he based his decision which the claimant did not have sufficient opportunity to consider and respond to;
      (2.2) the adjudicator allowed the defendant to introduce new matters and new claims upon which he based his decision after the adjudication had commenced and late on in the process which the claimant did not have sufficient opportunity to consider and respond to;
      (2.3) the matters referred to the adjudicator by the defendant, whether a single dispute or multiple disputes, were not suitable for the adjudication procedure set out in the scheme and could not be and were not determined in accordance with the principles of natural justice or the principles of fairness and impartiality?
   (3) If the court decides in the claimant's favour on issues (1) and/or (2) above: (3.1) can and should the adjudicator's decision be separated so that those parts of the decision relating to the Rockingham Building and/or the Tunnels, and/or any other aspect of the decision which might be isolated from those parts of the adjudicator's decision which deal with "additional drainage" can be enforced; or (3.2) is the entire decision invalid?
   (4) If the court decides in the defendant's favour on issues (1) and (2), is the decision or any part of it enforceable? Should the court order a stay of execution pending final determination of the matters referred to the adjudicator in the arbitration proceedings?

(5) If the court decides, in respect of issue (4), that a stay of execution should be ordered then what, if any, condition should be attached to such an order?

9 In relation to Issue 1 AWG contend that the adjudicator decided matters that were not referred to him. Rockingham contest this. In relation to Issue 2 AWG contend that the adjudication was unfair for the reasons set out. Rockingham disagree.

10 I am informed by the parties that issue 2.3 was prompted by some passing comments of mine at the case management conference. Those, in turn, were prompted by references in the correspondence to AWG's claim that the adjudicator would not be able to consider the issues in the time available for the adjudicator to reach a decision.

11 It seemed to me that as disputes referred to adjudication have become ever more complex, and referrals are made (in contrast to the original purpose of the legislation) long after the relationship between the parties is at an end, there might be a conflict for an adjudicator between reaching a decision within the stringent time limits permitted under ss.108 and 109 of the Housing Grants Construction and Regeneration Act 1996 (the Act), and the adjudicator's duty under the Act to act impartially.

12. This is a case where the claimants have so far spent £508,200 and the defendants over £600,000 on the adjudication of this dispute and its enforcement. No doubt in many cases the adjudication process required by the ICE contract saves the parties money as compared with other forms of dispute resolution. But in a significant number of cases it clearly does not succeed in this objective. I recognise, of course, that if the dispute proceeds to mediation, arbitration or litigation in the courts, some of the preparation that has taken place will be useful in those other forms of dispute resolution.

13 I also note that, unlike the time when the Act was passed when there were very significant delays in the courts, the position now is that if the parties had started court proceedings in May 2003, those proceedings would, in all probability, by now have reached a decision at first instance.

14 In this case the chosen means of final resolution is arbitration. Again, had arbitration proceedings been started in May 2003, the parties would, if they had pressed on with the arbitration diligently, have reached a decision by April 2004.

15 It is necessary to set out the facts of the original dispute and the complex history which followed.

16 By an agreement dated 14th August 2000 Rockingham entered into a contract with AWG's predecessors in title, Morrison Construction Limited, for the design and construction of a new motor racing track and ancillary facilities near Corby in Northamptonshire.

17 The project consisted of the construction of two race tracks - an oval track (the Oval) for the purpose of staging competition high speed oval racing, which is modelled on American-style Indy car racing, and a conventional road racing circuit contained within the Oval (the infield track).

The facts.

18. In addition, AWG agreed to design and build a four-storey building at the tracks which would act as a grandstand. The works also included two pedestrian underpasses or tunnels running under the Oval allowing access to the pit area.

19. On 2nd April 2001 the parties signed an addendum to the contract. AWG handed over the works on a piecemeal basis and achieved practical completion by September 2001.

20. There were problems with the Oval track, which Rockingham say became apparent at an event in September 2001 in the course of the first CART race when there was seepage of water through to the surface of the Oval which caused disruption to the race.

21. Rockingham claimed in the adjudication that it should be reimbursed by AWG for lost revenue from ticket sales and for the cost of providing refunds on 21 st September 2001. The adjudicator rejected the first claim, but awarded £123,368.88 out of the £210,637.55 claimed for refunds on 21st September 2001.

22. On 23rd November 2001 the project manager issued the Certificate of Payment No. 29 showing a payment due to AWG of £2,846,686. On 5th December 2001 Rockingham served a withholding notice in the sum of

£2,800,000 on the grounds that there was water seepage through the Oval which made it unsuitable for use as a high speed oval racing circuit. AWG challenged the withholding.

23. By the end of April 2002, following discussions between the parties concerning release of the monies withheld by Rockingham, and the extent of the remedial works to be undertaken, AWG and its track sub-contractor Colas had finished the remedial works to the oval. There was then a dispute as to whether the remedial works had dealt with the problem. Rockingham released E2.4 million to AWG, but continued to withhold £400,000. AWG maintained that the remedial works had been successful.

24. On 14th September 2002 the second CART race was held at the Oval. The race went ahead without problems. Rockingham maintained that this was because favourable weather conditions meant that the drainage system as modified was not tested. AWG disagreed and said that the problem had been solved.

25. Rockingham continued to withhold £400,000, maintaining that the defects in the drainage had not been cured and that in any event it was entitled to be compensated for financial losses caused by the defective Oval in the first CART race.

26. There were further discussions in the latter part of 2002 which were inconclusive. Thereafter, meaningful negotiations ceased, although there was a high level meeting in March 2003.

27. On 8th May 2003 AWG served a Notice of Adjudication under the contract to recover the £400,000 which it claimed that Rockingham had wrongfully withheld. AWG objected to the adjudicator nominated by the Institution of Civil Engineers (ICE) which was the designated nominating body under the contract.

28. AWG served another Notice of Adjudication (The First Adjudication) on 16th May 2003. Mr. Andrew Worby was nominated as adjudicator. Rockingham reserved its position with regard to the adjudicator's jurisdiction on the grounds that it alleged that the parties had orally agreed in May 2002 that Rockingham could withhold the £400,000. Rockingham said that it had much larger claims under the contract for defects. These were not part of this adjudication.

29. On 24th June 2003 Mr. Worby issued a decision in favour of AWG. Rockingham was ordered to pay £413,418.21 plus VAT and the adjudicator's fees.

30. Rockingham refused to pay, and on 2nd July 2003 started proceedings to have Mr. Worby's decision set aside. These proceedings are currently stayed pursuant to the order of His Honour Judge Playford Q.C. sitting as a judge of the Technology and Construction Court.

31 On 6th August 2003 Lovells, on behalf of Rockingham, wrote to Eversheds for AWG:
"Please find enclosed on behalf of our client, Rockingham Motor Speedway Limited, a complete copy of the documents presenting the facts and sums claimed in the dispute between our client and your client."

32. The letter noted that the dispute related to the payment of the sums *"due from your client to our client arising out of breaches of the construction contract between our clients dated 14th August 2000"*. The fourth paragraph said: *"Notwithstanding the existence of the dispute and for the avoidance of any technical prevarication this is the claim in its final form which we propose to adjudication."*

33. Eversheds replied on behalf of AWG on 22nd August 2003 complaining that Lovells had put forward new reports and evidence prepared in August 2003 in support of Rockingham's claim and had given AWG less than three weeks in which to reach agreement, otherwise the dispute would be referred to adjudication.

34. The letter acknowledged that before a dispute existed which could be referred to adjudication, the subject matter of the dispute, issue or decision must be brought to the attention of the other party which must then be given a reasonable opportunity to consider it and respond. There must, at the end of the process, be something to be decided which arises out of the process.

35. The letter referred to particular headings in what, effectively, were three separate disputes - the Oval track, the building or grandstand and the tunnels. AWG complained at the short time limit, observing that the first date on which AWG would have an opportunity to visit the track was 26th August 2003. The deadline for resolution of the dispute imposed by Rockingham was 27th August 2003. AWG suggested that the deadline should be put back to 17th October 2003.

36. Despite this plea, Lovells on behalf of Rockingham, attempted to refer the matter to adjudication. In a letter dated 26th August 2003, served on 27th August 2003, they wrote to Eversheds enclosing a referral notice referring the dispute to adjudication. Supporting documents were served on 28th August 2003. Eversheds asked for more time to consider matters.

37. These matters were considered by Mr. Harrison, the adjudicator appointed by the ICE. He resigned on 3rd September 2003 following a challenge to his jurisdiction on the grounds that the dispute had not arisen because AWG had not had sufficient time to consider Rockingham's claims, and because the Referral Notice contained more than one dispute, and there was at that stage no agreement between the parties that one adjudicator could determine all disputes. Such an agreement was in fact reached on 16th September 2003.

38 In response to Mr. Harrison's resignation, also on 3rd September 2003, Rockingham gave notice to AWG that it would refer to adjudication matters contained in the existing Referral Notice on 1st October 2003 if the dispute could not be resolved in the four week period envisaged under paragraph 90 of the contract.

39 On 17th September 2003 the parties met in the absence of solicitors but with experts to discuss the issues raised by Rockingham as contemplated by the ICE procedure.

40 On 1st October 2003 Rockingham served a further notice of adjudication on AWG. Rockingham and AWG agreed to the appointment of Mr. Allan Wood as adjudicator.

41 The Notice of Adjudication sets out in paragraph 3.1 the nature of the dispute. *"3.1 A dispute between the parties has arisen in relation to the quality and fitness for the purpose of the works designed and constructed by AWG pursuant to the contract and the Addendum. RMSL claims the cost of remedying the defects and damages in respect of financial loss suffered as a result of AWG's breach of its contractual obligations to RMSL."*

42 In paragraph 3.2 Rockingham said that on 6th August 2003 it served on AWG the documents which formed the basis of the adjudication to enable AWG to respond substantively to the claim.

43 Rockingham requested the adjudicator to decide:

"(a) That the Oval was unfit for the purpose of staging high speed oval racing, or alternatively, that AWG was negligent in designing the Oval for the reasons set out in sections 3 and 4 of the Referral Notice and the expert report prepared by Mr. Tindall.

"(b) That AWG should pay Rockingham £2,844,000 or such other sum as the adjudicator thinks fit.

"(c) That Rockingham had suffered the financial loss set out in section 5 of the Referral Notice and the witness statement of Mr. Reed and that AWG should pay Rockingham £2,990,822.35 in respect of such financial loss, or such other sum as the adjudicator thinks fit.

"(d) If the adjudicator finds that AWG should pay less than £2,844,000 (the full cost of replacing the Oval) then in the alternative to (c) AWG should pay £7,880,822.35 as compensation for financial loss particularised in section 5 of the Referral Notice.

"(e) That AWG was negligent in designing the Rockingham Building under the terms of the Addendum to the contract and therefore caused the defects in the building and the tunnels as particularised in section 7 of the Referral Notice and in the report of Mr. Chisem.

"(f) AWG should pay Rockingham £2,833,380 in respect of remedial works for (e).,.

44. On 3rd October 2003 Rockingham served the Referral Notice in the adjudication together with supporting evidence. It noted that it was the same document as that previously served on 28th August 2003 with minor corrections and variations. The overall claim was divided into three parts which related to (a) remedial works to the Oval; (b) remedial works to the building (grandstand); and (c) remedial works to the tunnels. This was in accordance with the agreement which the parties had reached on 16th September 2003 that all disputes could be referred and determined together.

45. The Referral Notice set out in detail the case on fitness for purpose. This claim was, in due course, rejected by the adjudicator. In relation to fitness for purpose, however, it is appropriate to note that in paragraph 4 Rockingham was summarising the design changes that caused the alleged defects in the Oval which it said rendered it unfit for the purpose as built. In this section it referred to Clause 2.9.2 of the employers' requirements under the contract which raised the requirement that AWG must provide subsoil drainage when required.

46. At paragraph 4.28 Rockingham started to set out its case in relation to AWG's alleged failure to use reasonable skill and care. At paragraph 4.31 it put its case in these terms:
"RMSL submits that AWG did not take the steps that were required of a reasonable and careful contractor in the circumstances and acted in breach of its contractual duty of care for the following reasons."

47. It went on:
"(a) As most of the subsoil on site is clay (which is less permeable than other soil) the need for an effective subsoil drainage solution should have been obvious to AWG. In addition, drainage was drawn to AWG's attention in the Employers' Requirements and concerns as to the design chosen by AWG were expressed by RMSL during the course of the construction works.
"(b) At the very least, AWG should have been wary of adopting any solution that would reduce the subsoil drainability at all. It is obvious from the mechanics and processes involved in time stabilisation adopted by AWG that subsoil stabilised in this manner will be much less permeable once it has undergone the stabilisation process. Investigations have shown that the stabilised layer underneath the oval is impermeable. AWG should not have chosen this method.
"(c) AWG should, at the very least, have been alerted to a risk of inadequate drainage and should have reconsidered the design decision. If AWG did not consider the potential impact on subsoil drainage of creating an almost impermeable layer underneath the oval in circumstances where the top pavement layers were designed to be permeable, AWG was clearly negligent.
"(d) AWG's negligence is brought out starkly by the fact that the use of a granular Type one sub-base is the standard method of construction of works comparable to the Oval (see the expert report of Peter Tindall at paragraph 3.9)..."

48. Under the heading "Cost of Replacement of the Oval" Rockingham drives home the point at paragraph 5.2. Quoting Mr. Tindall's report it says: *"Improved subsoil drainability needs to be provided and the only way of achieving this is by rebuilding the Oval on a granular sub-base."*

49. Mr. Tindall set out his case in his 26 page report. At paragraph 12 he identified six possible options. These options included five different solutions including treating the existing surface with porous asphalt material and installation of drains. He rejected all the proposed solutions except option 5.

50. He concluded as follows:
"14.1 There is in my mind little doubt that had the stabilised layer been permeable - as I note was specified in the contract - the excess water problem would not have materialised.
"14.2 Having considered all of the options I conclude that the reconstruction of the track (option 5) is the only solution which will allow water in the pavement to escape and thus finally to resolve the problem. The most reliable treatment is reconstruction to the original design including a granular sub-base instead of a stabilised one. This is also likely to be the quickest form of treatment."

51 AWG wrote on 10th October 2003 a 12 page letter to the adjudicator objecting to Mr. Wood's jurisdiction. The main objection was that AWG contended that there was no dispute between the parties capable of being referred to adjudication. Objection was also taken on grounds which included the allegation that new material had been provided to AWG to which they had not had an opportunity to respond and that the extended period of 42 days was insufficient for the adjudicator to deal properly with the dispute.

52. In this context AWG contended that Mr. Wood could not act impartially and in accordance with natural justice and found support in Judge Lloyd Q.C.'s judgment in **Balfour Beattv,** a case to which I shall refer later.

53. Close to the end of paragraph 1 (on the fourth page of the letter) AWG said that the claims made by Rockingham were completely unsuitable to be resolved through adjudication. The letter said in the following paragraph: *"Our client also relies on the contents of paragraph 36 of the judgment of His Honour Judge Seymour Q.C. in* ***Edmund Nuttall Limited v. R. G. Carter Limited.****"*

54. I shall deal with this case in more detail later, but it is clear from paragraph 4 of the letter that this is a reference to the alleged principle that a dispute for the purpose of adjudication includes a package of facts and arguments previously discussed between the parties in advance of the adjudication and that the adjudicator has no jurisdiction to consider matters outside the package.

55. At this stage I merely note that in **Dyball v. Grubb** decided by His Honour Judge Seymour Q.C. on 28th October 2003 at paragraph 41 he explained his earlier decision by saying that while not resiling from the decision: *"Whether at the time a notice of adjudication was given there was a dispute between the parties in relation to the matter sought to be referred must depend upon the facts and circumstances of the particular case, not least what the dispute is said to be about."*

56. In the letter of 10th October 2003 AWG reserved its right to rely on the alleged principle in any enforcement proceedings.

57. On 15th October 2003 Lovells wrote to Mr. Wood setting out Rockingham's response to AWG's objection. On the plea that new material had been provided, Lovells maintained that the witness statements did not contain any new matters or new arguments. They noted that Mr. Tindall's report had been with AWG since 7th August 2003. From this I infer that Rockingham was continuing to rely exclusively on the case as set out in the Notice of Adjudication and the Referral Notice and in Mr. Tindall's report.

58. On 16th October 2003 AWG served its 147 page Response to the Referral Notice. The Response maintained AWG's objections on jurisdictional grounds. In relation to the allegation of negligent design, it contended (paragraph 237) that no ordinary competent contractor would have done anything different, that it developed the design with Rockingham and its specialist adviser, and that it put the design of the track out to tender to specialist contractors.

59. On 20th October 2003 Mr. Wood informed the parties that in his view the dispute had crystallised and that he had jurisdiction to deal with it.

60. On 24th October 2003 Rockingham filed its Reply, running to 68 pages. In relation to the issue of skill and care it contended that: *"AWG failed to comply with the standard expected of the ordinary contractor in designing the Oval (see paragraph 4.31 of the Referral Notice)."*

61 It claimed that AWG took no steps to consider whether the alternative design would provide adequate drainage to the Oval or what effect it would have on drainage (paragraph 9.8).

I note that paragraph 4.31 referred specifically to the allegation that -a granular Type 1 sub-base was the standard method of construction of works comparable to the Oval.

62. On 27th October 2003 Mr. Wood attended for a site inspection accompanied by both parties and their experts. At this meeting the time for Mr. Woods' decision, which had been extended from 31st October to 14th November 2003, was further extended over the weekend to 17th November 2003.

63. On 30th October 2003 Mr. Tindall wrote a commentary on the extent of defects in the track and the cost of the solution. He made reference to "weepers" which are pools of water lying on the surface of the track which, of course, can make racing cars at high speeds very dangerous. Mr. Tindall maintained that this remained a current problem which needed to be remedied. AWG's expert, Mr. Aldred, had given various options as to how to remedy the problem.

64. At paragraphs 2.7 and 2.8 of his commentary Mr. Tindall states that:
"2.7 Adequate drainage of all layers in the pavement is necessary (as required by the Design Manual for Roads and Bridges) and is the only way to ensure that the track will function."
"2.8 Exposing and dealing with the cause of the defect which is the absence of drainage in the lower part of the pavement is the solution. This requires heavy works."

65. Under "Conclusions" Mr Tindall said that although there was a dispute as to the extent of the problem, both parties agreed that the problem of weepers continued to exist. He said that significant remedial works were required because the cause of the defect lay in the lowest layer of the track which needed to be exposed in order to remedy it. He ended: *"In these circumstances reconstruction of the track cannot be avoided. It is a necessity not a luxury. It is costly but it is the engineering solution that produces the right result."*

66 I note that this commentary is primarily related to the possible solution of weepers and does not address the problem in the context of the basis on which the referral was made, namely the allegations against AWG in respect of which it was alleged that Rockingham was entitled to recover damages against AWG.

67 On 3rd November 2003 AWG made a further challenge to Mr. Wood's jurisdiction. It alleged that Rockingham had substantially shifted its case by introducing new arguments and alleged facts that were not in the adjudication notice.

68. The letter to Mr. Wood went on: *"You can only consider the alleged dispute that was referred to you. This is the package of arguments and facts contained in the referral notice and nothing else."*

69. The letter made a further attempt to justify this approach by reference to the judgment of His Honour Judge Seymour Q.C. in **Nuttall v. Carter** [2002] BLR 212.

70. The letter also alleged that in the Reply Rockingham had broadened its attack on AWG's design and had attempted to introduce additional "*particulars of negligence*". It referred to paragraph 9.10(3) of the Reply saying that it raised for the first time the issue of drainage to stabilised areas. *"RMSL alleges that AWG failed to heed Powerbetter's warning to ensure that adequate drainage was provided at all times prior to and after stabilisation and to ensure that adequate drainage (temporary or permanent) should be provided to ensure that working areas (and stabilised soils after completion of the process) will remain unaffected by the ingress or presence of rainwater or groundwater. RMSL is now arguing that AWG was not only negligent in choosing a soil-based sub-base but was also negligent in not ensuring adequate drainage of that sub-base during and after construction."*

71. In its conclusions, AWG said that RMSL had **substantially** (*my emphasis*) shifted its case and this demonstrated that there was no dispute.

72. Despite its objection, AWG on 4th November 2003 served an 87 page Second Response to the Reply. In the section on reasonable care at paragraph 348 it said that it should be judged by the standard of the ordinary competent contractor judged according to the standards prevailing at the time in question and emphasised that other contractors who tendered proposed to use the same design.

73 On 5th November 2003 Rockingham responded to Mr. Wood in answer to AWG's letter of 3rd November 2003 challenging his jurisdiction. It rejected the assertion that it had made new arguments. It explained its reference in the Reply to Powerbetter's warning by saying that: *"RMSL complaint is not that AWG was negligent in how it constructed the time stabilised base (for example in not ensuring adequate drainage during and after construction). The Referral Notice, Peter Tindall's expert's report and the first witness statement of Rod Wolter make it abundantly clear that the complaint is of using a time stabilised sub-base as part of the design in the manner which AWG/Colas chose to adopt."*

74. This seems to tie the dispute back to the case put forward in the Adjudication Notice and the Referral Notice.

75. At (c) on p.11 of the submission, Rockingham set out the passage in the referral notice relating to the risk of inadequate drainage and set it in context: *"The above passage of the referral notice alone should have enabled AWG to meet RMSL's case on negligence. RMSL is still waiting to hear from AWG what positive steps were taken (by AWG/Colas) to consider the impact of drainage for the oval by using a time stabilised sub-base. This is a crucial question as regards determination by you (the adjudicator) of whether AWG were or were not negligent. RMSL is not in a position to know what steps were taken ..."*

76. On 6th November 2003 Mr. Wood decided that he had jurisdiction to adjudicate. He also rejected Rockingham's claim for loss of amenity.

77. On 11th November 2003 Rockingham served an 86 page reply to AWG's Second Response. This was only a few days before Mr. Wood was due to give his decision. With it they included a fourth statement from Mr. Tindall which consisted of a review which he described as being "*of a back to basics perspective*".

78. He wished to stress three key points - the existence of the defect to the Oval, the drainage of the pavement and the solution to the problem.

79. In relation to the drainage to the pavement he identified AWG's failure to satisfy the requirement to provide adequate drainage (under paragraph 2.9.2 of the contract) as: *"A fundamental flaw to the design which has not been corrected by adding the extra wearing course. To correct this flaw it is necessary to expose the stabilised layer in order to provide drainage."*

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80. He acknowledged that much of the discussion had been focused on the permeability of a Type 1 sub-base layer in relation to drainage. He also acknowledged that: *"No doubt both sides could find many articles and papers that suit their particular argument with varying degrees of conviction."*

81 He said that in his view this was a pointless exercise but, of course, this was the substance of the dispute that was originally referred to the adjudicator in relation to the claim for negligent design (see paragraph 3.2 of the notice of adjudication).

82. At paragraph 10 Mr. Tindall said clearly that in his view the problem was caused: *"Not by the layer itself as such but by the absence of drainage to the layer."* He does not go on to say how additional drainage would solve the problem.

83. The parties would no doubt characterise this either as a wholly new case (AWG) or as an obvious development of their existing case (Rockingham). Mr. Tindall concluded at paras.15 and 16 of his statement that the remedial works of AWG had either not solved the problem or had created a new and just as significant problem. He concluded that reconstruction of the track was necessary.

84. Although the specific point was not taken by either party, I note that Clause 91 of the ICE form envisages that any further information after the original submission should be provided within four weeks of the submission, although the timetable allows for extensions of time.

85. At paragraph 9.17 of its submission Rockingham widened its claim. Instead of alleging a failure to achieve a specific solution, Rockingham claimed that effectively AWG had a duty which amounted almost to strict liability that it would produce a workable solution. It claimed that the duty of reasonable skill and reasonable care existed in the special circumstances that where Rockingham had asked for a design for a specific purpose *"AWG must take special steps to ensure that his (sic) design meets that purpose."*

86. At paragraph 9.37 Rockingham submitted, in addition, that the design flaw should have been obvious to AWG. Relying on the decision in **Brickfield Properties v. Newton** [1971] 1 WLR 862, Rockingham further alleged that as designers AWG was under a continuing duty to check that its design would work in practice and to correct any errors that might emerge.

87. It is suggested that if blame was to be allocated, it would lie with Colas as designer, but that for this adjudication this issue was immaterial because AWG was liable under Clause 26 of the contract for any negligence on the part of Colas.

88. In addition to the statement from Mr. Tindall, the submission included five other witness statements. The submission ran to 50 pages and the statements to a further 90 pages.

89. On Thursday 13th November 2003, Eversheds responded on behalf of AWG. First they protested that they had insufficient time to deal with the points in Rockingham's second Reply which they said they had received for practical purposes on the Wednesday morning, 12th November 2003. The letter also sought to protect AWG's position on jurisdiction.

90. Secondly, Eversheds made an 11 page response together with a summary of legal issues. The response also included statements from Mr. Elliott, Mr. Aldred, Mr. Muburak and Mr. Richardson. The response made it clear that AWG maintained its legal challenges. It emphasised that in its view neither it nor the adjudicator could deal with AWG's second response in the time left in the adjudication process. The letter noted that Rockingham could have made these new arguments at an earlier stage.

91 Mr. Elliott, AWG's expert, noted that he had only had a few hours to respond to Mr. Tindall's latest statement and that a detailed reply to Rockingham's second response had not been possible. He was able to set out his opinion in four pages, although no doubt not as fully as he might have wished.

92. On 14th November 2003 Ms. Willems, the solicitor at Lovells instructed by Rockingham, emphasised in a letter to Mr. Wood that in her view there was a dispute that AWG built a track which had an acknowledged defect and that serious remedial work was required. She ended the letter by saying that AWG's assertion that the track was fit for its purpose was extraordinary.

93. Also on 14th November 2003 Mr. Robson of Eversheds, acting for AWG, wrote to Mr. Wood dealing with various quantum issues and responding to Ms Willems' email. The letter ended by saying to the

adjudicator: *"If you need more time please feel free to ring Nigel Robson on the above number ... during the weekend."*

94. The comment is made by Rockingham that, if he was unhappy, Mr. Robson should either have invited the adjudicator to exclude the recent material or should have asked the adjudicator for a further extension of time for giving his decision. Against this contention must be placed the many formal objections which AWG had made to the procedure, and in particular to the Response on 11 th November 2003.

95. On 18th November 2003 Mr. Wood gave his decision. Any review of the decision must start with an expression of admiration that he was able to produce such a reasoned decision of 30 pages in what were in effect three related but separate disputed adjudications in such a short time against the background which I have outlined. The date for his decision had been extended finally by agreement to 18th November 2003.

96. In addition to the submissions to which I have referred, Mr. Wood had received video footage of water ingress into tunnels, alleged building defects, and a survey of drains proximate to the tunnels.

97. Mr. Wood has also not only had a full day meeting with the parties and their representatives on site on 27th October 2003, but also a further meeting on site on 4th November 2003.

98. In his decision Mr. Wood rejected Rockingham's contention that the Oval was not fit for the purpose of staging safe and highly competitive high speed oval racing.

99. In relation to the allegation that AWG failed to exercise reasonable care and skill Mr. Wood concluded at paragraph 29: *"I considered paragraph 3.10 of the Notice of Adjudication and the alternative matter in dispute set out therein. I also considered sections 3 and 4 of the Referral Notice referred to in the Notice of Adjudication and I was of the view that the matter before me was not limited to a single contention by the Referring Party that the cause of the water problem was the change in the Responding Party's design from a Type 1 sub-base to a stabilised soil sub-base but was of a wider remit such that the Responding Party had been negligent (generally) in the design of the Oval and specifically in respect of drainage considerations to the Oval track."*

100. Paragraphs 42 to 46 of the decision, about the interpretation of which the parties disagree, must be read in the context of the adjudicator's finding in paragraph 29.

101. Rockingham says that the findings crucial to the decision are contained in paras.43 and 44 and that paras.42, 45 and 46 are by way of explanation and dealing with questions of quantum of damage.

102. AWG says that the reasoning in the paragraphs is muddled but that, disentangled, the adjudicator has found in favour of AWG on the issue that was referred to him, and that any other findings against AWG are outside the scope of the Referral Notice and therefore made without jurisdiction.

103. Mr. Wood found as follows:

"42. I considered the evidence of the Parties regarding the appropriate standard of design of oval tracks. And I considered the evidence (and differences between the parties) regarding the water draining (absorbing) qualities of a stabilised sub-base and that of a Type 1 sub-base.

"43. I decided that the Responding Party took no account in the Oval track design of the extent or consequence of the water entering the surface of the Oval track and stored therein, or the subsequent consequential flow/release of such water on to the surface under the natural effects of the build up of the water flows down the slope of the track, or the ability of the relatively dense surfacing materials to adequately cater for such transverse flows to the drainage system at the lower edge of the track under gravity.

"44. I decided that as a result of the omission of any consideration or implementation by the Responding Party in its Oval track design of the possibility and/or effects of water flowing on to the track, the Responding Party has failed to perform its design obligations with the requisite care and skill of a professional designer of such oval tracks. I decided that the Responding Party was in breach of its contractual duty of care owed to the Referring Party and that the Referring Party was entitled to reasonable damages flowing from this breach.

"45. I was not, however, satisfied that the change in the pavement construction design from a Type 1 sub-base material to a stabilised soil material was in itself causative of the problem of water flowing on to the surface of the track. I decided from the evidence that it was probable that, in the event that Type 1 sub-base material had been utilised, that the said problem may have remained to a similar extent.

"46. I was of the view that the replacement of the stabilised soil sub-base by Type 1 materials would not solve the problem of water remaining (or appearing) on the track and that a solution combined with additional drainage provision may be necessary. Whilst this was a matter for the Referring Party's design advisers, I considered it relevant as it went to the reasonableness of the Referring Party's quantum claim in that it omitted any claim for additional drainage of the track."

104. It is contended by Rockingham that the adjudicator said explicitly in paragraph 29 that the dispute before him went wider than the single design issue and that this enabled him to make the wider finding in relation to negligent design. This is at the heart of the question of the enforceability of the award.

105. It is clear that the adjudicator was rejecting the claim that AWG was negligent in changing the design from a Type 1 sub-base material to a stabilised soil material. He held that AWG was negligent on the much wider ground. The particulars which he has found are in paragraph 43, namely that AWG took no account in the design of the extent or consequence of water entering the surface of the Oval and being stored therein, or in the subsequent consequential flow or release of such water on to the surface under the natural effects of the build up of the water flows down the slope of the track, or the ability of the relatively dense surfacing materials adequately to cater for such transverse flows to the drainage system at the lower end of the track under gravity.

106. These are the particulars of the finding under paragraph 44 of the decision in relation to AWG's alleged failure to perform its design obligations and to consider or implement a track design which deals with these problems.

107. On 16th December 2003 AWG commenced these proceedings. On 22nd December 2003 Rockingham served its defence. On 15th January 2004 AWG served its reply and defence to counterclaim. There were discussions as to what security Rockingham would provide in the event that the court decided that security was appropriate.

108. I should complete the history by noting that on 15th December 2003 AWG notified Rockingham of its intention to commence arbitration proceedings. On 5th March 2004 AWG suggested possible arbitrators to Rockingham. On 19th March 2004 Rockingham accepted one of the proposed names as arbitrator. I understand that a preliminary meeting in the arbitration is due later in April 2004.

109. Having considered the history of the adjudication I conclude that the original dispute was set out in the Notice of Adjudication, the Referral Notice and in Mr. Tindall's report. It is clear that these documents were drafted by experienced solicitors and were intended to set out the case which AWG had to meet in the adjudication. The claim in relation to the Oval track was on two grounds: (a) that the Oval was unfit for the purpose of staging high speed oval racing; and (b) in the alternative, that AWG was negligent in the design of the track for the reasons set out in the Referral Notice and in the expert report of Mr. Tindall.

110. The adjudicator rejected the case that the Oval was unfit for the purpose of staging high speed oval racing. The case in relation to negligent design was set out in paragraph 4.3.1 of the Referral Notice, and in particular in sub-paragraph (d) where it is alleged that AWG failed to use the granular Type 1 sub-base which is described as "*the standard method of construction of works comparable to the Oval*".

111 The Notice of Adjudication made specific reference to Mr. Tindall's report. The report set out the possible options. Mr. Tindall concluded, after examining them individually, that option 5 was the only solution which would allow water in the pavement to escape, and thus finally to resolve the problem. He went on to say that the most reliable treatment was to include a granular sub-base instead of a stabilised one.

112. This was the case which AWG met in its Response on 16th October 2003. In its Reply dated 24th October 2003 in relation to the allegation of negligent design Rockingham maintained the case set out in the Notice of Adjudication and the Referral Notice. By then Mr. Wood had informed the parties on 20th October 2003 that the dispute had crystallised and that he had jurisdiction to deal with it.

113. On 5th November 2003 Rockingham refuted AWG's suggestion that it was changing its case, reiterating that it was based on the Referral Notice, the report of Mr. Tindall and the original statement of Mr. Wolter.

114. 1t was only on 11th November 2003 that Rockingham widened the issues. This was no doubt necessary, not least because Mr. Tindall's fourth statement seemed to concede that there were legitimate alternative

views on whether the AWG design or the one proposed by Rockingham constituted good practice in the construction of the Oval track. Mr. Tindall now claimed that the problem of weepers was caused not by the layer itself but by the absence of drainage between the layer.

115. In its submission, Rockingham now alleged that it, Rockingham, had asked for a design for a particular purpose and that AWG had warranted that it would take special steps to ensure the design would meet the purpose.

116. 1 have already concluded that the adjudicator rejected Rockingham's original case on design, and found against AWG on the wider case put forward for the first time in detail by Rockingham on 11th November 2003. It is in the context of these findings that I turn to the law.

The Law

What is the nature of adjudication?

11 7. The history of the events leading up to the Housing Grants Construction and Regeneration Act 1996 (the Act) has been set out by May LJ in **Pegram Shopfitters v Tally Weijl (UK) Limited** [2003] 91 CLR 173.

118. In addition, I cite the speech of Lord Ackner at the report stage in the House of Lords to give the flavour of adjudication as it was then contemplated. *"Adjudication is a highly satisfactory process. It comes under the Rubric of 'pay now, argue later' which is a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up important contracts." (Hansard HL Vol 571 Cots 989, 990)*

119. At paragraph 8 of his judgment in **Pegram** May LJ cited passages from the judgment of Dyson J. in **Macob Civil Engineering v. Morrison Construction Limited** [1999] 64 CLR 1 at p.6. Dyson J. noted that:
"The timetable for adjudications is very tight (see s.108 of the Act) many would say unreasonably tight and likely to result in injustice. Parliament must be taken to be aware of this."

120. I doubt that Parliament was aware of how tight the procedure could become, bearing in mind the way that the jurisdiction has developed.

121. Again in **Macob** Dyson J. said: *"Parliament has not abolished arbitration and litigation of construction disputes. It has **merely** [my emphasis] introduced an intervening stage in the dispute resolution process".*

122. The word 'mere' was entirely appropriate to characterise the summary and inexpensive procedure that was envisaged by Parliament. It is a less appropriate description of a process which has already cost over £1 million. The court has to grapple with a procedure which Parliament introduced to provide a quick, easy and cheap provisional answer so that, in particular, sub-contractors were not unjustly kept out of their money. It has developed into an elaborate and expensive procedure which is wholly confrontational, a full-scale trial normally, on the documents, of the issues referred to the adjudicator (not necessarily the whole dispute) within a timetable of 42 days from notice of adjudication to decision by the adjudicator. In this case the process took about 44 days by agreement between the parties.

123. The claimant has the considerable advantage in a complex adjudication that it can choose when to start the adjudication, having taken the time it has needed to prepare. It will then impose a very tight timetable on the defendant and frequently on the adjudicator. It is with this in mind that I raised the possibility that there may be disputes which are so complex and the advantages so weighted against a defendant that there is a conflict between the right to refer to adjudication and to obtain a decision under s108(2)(c) and (d) of the Act, and the adjudicators duty to act impartially under s108 (e) of the Act and that this may be a conflict which it is impossible to resolve.

124. Neither party has, in the event, argued this point before me in the way in which I had mentioned it and I will not pursue it further. Even though the procedure has developed in many disputes as a detailed procedure involving enormous legal resources which is the very antithesis of the rough and ready procedure envisaged when the legislation was passed and may have its problems, it is important to emphasise that the basis of the jurisdiction in this case is contractual. The parties, no doubt after receiving detailed legal advice, have agreed adjudication as the chosen method of initial dispute resolution. The court must keep this-in mind when reviewing the adjudicator's decision.

125. Nevertheless, even on the basis of contract, the jurisdiction is not entirely free from challenge. As the process has developed, the possible lines of challenge to an adjudicator's award have become more clearly defined.

126. In **Thomas- Frederic's (Construction) Limited v. Wilson** [2003] 91 CLR 161 Simon Brown LJ emphasised that it did not follow that, because the policy of the 1996 Act was *'pay now and argue later'*, even in the short term the adjudicator's decision was binding if a case could be made out to dispute the adjudicator's jurisdiction.

127. Equally, whilst it is clear under the Act and noted by Dyson J. in **Macob,** that the adjudicator is given a fairly free hand in the procedure which he adopts and that he may use an inquisitorial process, this is subject to the overriding requirement to act fairly.

128. The following challenges have been made in other cases.
   (1) A challenge to the jurisdiction of the adjudicator on the grounds that he was not the person nominated under the contract, or appointed in accordance with the agreed procedure. (See **Amec Capital Projects v Whitefriars City Estates** [2004] EWHC 393 (TCC) 27 February 2004.)
   (2) There was a real risk that the adjudicator was biased (see **Glencott Development v. Barratt** [2001] BLR 207).
   (3) The adjudicator did not reach a decision which was responsive to the issues referred in the adjudication, or decided matters which were not referred (see **Ballast plc v. The Burrell Company** [2001] BLR 529).
   (4) There was no dispute on which the adjudicator could reach a decision because a dispute can only arise when the subject matter of the dispute has been brought to the attention of the other party that party has had a proper opportunity to consider it and has modified or rejected the claim (see **Fastrack Contractors v. Morrison** [2000] BLR 168).
   (5) Notwithstanding the relatively free hand that the adjudicator has in directing the procedure, the adjudicator acted unfairly in failing to give the parties an equal opportunity to present their case with the result that one party was prejudiced (see e.g. **Discain Project Services v. Opgk Prime Development Limited No 1 [**2000] BLR 402). This problem can occur in the context of a party adding new claims or arguments to which the other party is not given an adequate opportunity to respond before the adjudicator reaches his decision.

What constitutes a dispute?

129. It is clear that an important part of the fundamental objection taken by AWG in correspondence with the adjudicator and Rockingham depended on a reading of a passage in the judgment of His Honour Judge Seymour Q.C. in **Nuttall v. Carter** [2002] BLR 312.

130. In the context of the particular facts in **Nuttall** His Honour Judge Seymour Q.C. said at paragraph 36:
"What constitutes a dispute between the parties is not only a claim which has been rejected, if that is what the dispute is about, but the whole package of arguments advanced and facts relied upon by each side. No doubt, for the purposes of a reference to adjudication under the 1996 Act or equivalent contractual provision, a party can refine its arguments and abandon points not thought to be meritorious without altering fundamentally the nature of the dispute between them. However, what a party cannot do, in my judgment, is abandon wholesale facts previously relied upon, or arguments previously advanced and contend that because the claim remains the same as that made previously, the 'dispute' is the same ...

'The whole concept underlying adjudication is that the parties to an adjudication should first themselves have attempted to solve their differences by open exchange of views, and if they are unable to do so, they should submit to a third party for decision, the facts and arguments which they have previously rehearsed among themselves. If the adjudication does not work in that way, there is the risk of premature and unnecessary adjudications in cases in which, if only one party had had a proper opportunity to consider the arguments of the other, accommodation might have been reached."

131. At paragraph 39 of his judgment he referred to the dispute as: *"Comprising the package of facts relied upon by each side in support of the respective positions of Nuttall and Carter, and the arguments which had been rehearsed."*

132. Taken out of the context of the previous passage this could imply a rigid formula which prevented any other arguments being deployed once the reference had been made. Clearly, this is what AWG contended for in correspondence as its primary contention.

133. In **Dean & Dyball Construction Limited v. Kenneth Grubb Associates Limited** [2003] EWHC 2465 His Honour Judge Seymour Q.C. said at paragraph 41 that whilst he did not resile from what he said in **Nuttall v. Carter:** *'The proper scope of the inquiry as to whether at the time the notice of adjudication was given there was a dispute between the parties as to the matter sought to be referred must depend on the facts and circumstances of the particular case, not least what the dispute is said to be about."*

134. In my view the starting point as to what constitutes a dispute is two Court of Appeal cases decided well before the 1996 Act. In **Monmouthshire County Council v. Costeltoe and Kemple** [1965] 5 BLR 83, a case concerning an ICE contract, Lord Denning MR said that for there to be a dispute or difference there must be a claim by a contractor and a rejection of it.

135. In **Halki Shipping Corporation v. Sopex Oils Limited** [1998] 1 WLR 727 Swinton Thomas LJ, citing a passage of Templeman LJ in **Ellerine Brothers v. Klinger** [1982] 1 WLR 1375, held that in some cases where there had been a demand, a dispute could be inferred from the other party's failure to respond.

136 In **Sindall v. Solland** unreported June 2001 His Honour Judge Lloyd Q.C. said that: *"For there to be a dispute for the purpose of exercising the statutory right of adjudication it must be clear that a point has emerged, given the process of discussion or negotiation has ended, and there is something which needs to be decided."*

137. In her judgment in **Cowlin Construction Limited v. C.F.W. Architects (a firm)** [2003] BLR 241 at paragraph 88 (p.254) Her Honour Judge Kirkham noted that in **Halki** in the context of the Arbitration Act 1996: *"The Court of Appeal reminded us that the courts have generally construed widely the word 'dispute' and they declined in that case to construe the word more narrowly in the context of arbitration."*

138. She concluded that although there might be a risk of ambush, there was no reason to construe the word '*dispute*' more narrowly in adjudication than in other contexts.

139 Forbes J. took the same approach in **Beckpeppiett v. Norwest Holtz** [2003] BLR 316. In **London and Amsterdam Properties v. Waterman Partnership Limited** [2003] 91 BLR ([2003] EWHC 3059) decided on 18th December 2003 His Honour Judge Wilcox undertook a comprehensive review of the authorities, including those which I have cited, and concluded at paragraph 147 that: *"The reasoning in **Halki** as to what constitutes a dispute in arbitration proceedings applies with equal effect in adjudication proceedings."*

140. It follows from this that in my view if the decision in Nuttall was construed restrictively as a general rule, that a dispute before an adjudicator could consist only of the issues referred to adjudication and only those facts and matters set out in the notice of adjudication and the referral notice, I would regard this as too rigid and contrary to the approach in **Halki** and the other adjudication cases which I have cited. And indeed, it is more rigid than appears from, in my view, a correct reading of the reasoning of His Honour Judge Seymour Q.C. in **Carter v. Nuttall.**

141. In my view, each case must depend on the circumstances and the context in which the referral is made. In some cases the issues referred are very specific. In other cases it is clear that the issues are more general and have been so treated by the parties, and that there is significantly more room for the case to be developed. The test in each case is first what dispute did the parties agree to refer to the adjudicator? And, secondly, on what basis? If the basis which is argued in the adjudication is wholly different to that which a defendant has had an opportunity to respond in advance of the adjudication, this may constitute a different dispute not referred to the adjudicator or, put another way, insofar as the adjudicator reaches a decision on the new issues, it is not responsive to the issues referred to him.

142. It seems to me, following **Halki Shipping**, that a wide interpretation should be given to the word "dispute" so that the adjudicator's jurisdiction is preserved where possible. In appropriate cases falling short of the case where the issues are wholly different, the concept of procedural fairness should be sufficient to ensure that a party will not be prejudiced by the finding of an adjudicator where the case has developed in the course of the adjudication.

143. Adjudication is a valuable procedure which has come to encompass relatively simple disputes of the sort envisaged by the 1996 Act, and complex disputes started long after the relationship between the parties has broken down which are conducted with great sophistication by large firms and their legal advisers, as in the present dispute.

144. It is important that a court should approach the question of what is a dispute with robust common sense which takes into account the nature of the dispute and the manner in which it has been presented to the adjudicator. I bear in mind that having an award enforced against a party is a serious matter for that party. And there are circumstances where there is no alternative to saying that the basis on which the dispute was referred to the adjudicator was essentially different from that on which the adjudicator based his decision.

145. In some cases the basis on which the claim is made will be clear and obvious. In others it will have been the subject of sophisticated legal argument on the precise legal basis which the claim is made. Where the findings are essentially different from the basis on which the dispute has been referred, the objection may go to jurisdiction as well as fairness. To this extent, I am able to reconcile **Nuttall v. Carter** with the other cases. It is, of course, open to the parties as a matter of contract to agree, in the course of an adjudication, that the adjudication may proceed on the new basis.

146. It follows from this that within the limits which I have described, an adjudicator is not confined to considering rigidly only the package of issues, facts and arguments which are referred to him. I answer the agreed issues as follows.

Is the decision enforceable on jurisdictional grounds?

147. Issue 1 poses the question as to whether the adjudicator decided something that was not referred to him for a decision and therefore acted outside his jurisdiction. I conclude that the subject matter of the adjudication was Rockingham's contention that (a) the Oval was unfit for the purpose of staging high speed Oval racing; and (b) that AWG was negligent in the design of the track for the reasons set out in the referral notice and in the expert report of Mr. Tindall.

148. 1 find that on (a) he found in favour of AWG and on (b) he also found in favour of AWG on the case which Rockingham originally presented. The case on which he found for Rockingham was so different from that put forward in the referral notice that it was in essence a different adjudication. The original allegation of negligence depended on a specific allegation of what AWG should have done. The arguments on the issue of additional drainage were crucial, not just to the issue of quantum, as Rockingham contends, but also to the question of liability.

149. I reach this conclusion, although regretfully I am unable to adopt in full the analysis of His Honour Judge Richard Seymour Q.C. in **Nuttall v. Carter** [2002] BLR 312 at 322 for the reasons which I have already set out. I agree with AWG's submission that the need for additional drainage did not form part of the original referral.

150. It is significant that Rockingham's own advisers failed to include additional drainage in their own remedial scheme. Such a case was essentially different from that put forward by Rockingham in August 2003 which was the subject of the notice which Rockingham served on 3rd September 2003 starting the four week period envisaged under the contract for resolution of the dispute. I conclude that the decision that the adjudicator gave fell outside the dispute which was referred to him. The adjudicator therefore answered a question which was not referred to him, and the order should not be enforced (see **Bouyges v. Dahl-Jensen** [2000] BLR 522).

151. I have considered Rockingham's submission that the adjudicator was in the best position to take into account whether there have been significant shifts in the case which he had to decide. It seems to me that while due regard should be paid to the actions of the adjudicator, this is a matter which a reviewing court is fully entitled to consider, applying the appropriate principles.

152. Rockingham also relies on the fact that the scheme empowers the adjudicator to take the initiative when ascertaining the facts and law necessary to determine the dispute and may conduct an entirely inquisitorial process (see **Ferson Contractors v. Levolux AT Limited** [2003] BLR 118 at 120).

153. 1 have no doubt that this is correct and is clear from s108(2)(f) of the Act, but it does not address the issue which I have to decide, which is what is the dispute which was referred to the adjudicator? That case is concerned with a separate issue of what procedure may the adjudicator use in order to resolve the dispute.

Breach of natural justice.

154. This raises issues 2.1 and 2.2 of the agreed issues, namely the allegations that the adjudicator acted in breach of the principles of fairness and impartiality in adopting new matters and new claims on which he based his decision which the claimant did not have sufficient opportunity to respond to and/or in allowing Rockingham to introduce new matters and new claims upon which he based his decision late on in the adjudication process when AWG did not have a proper or sufficient opportunity to consider and respond.

155. In **Discain Project Services v. Opec Prime Development Limited No 1 [**2000] BLR 402 at p.405 His Honour Judge Bowsher Q.C. said:
"I do understand that adjudicators have great difficulty in operating the statutory scheme and I am not in any way detracting from the decision in ***Macob.*** *It would be quite wrong for the parties to search around for breaches of the rules of natural justice. It is a question of fact and degree in each case.*

'That scheme makes regard for the rules of natural justice more, rather than less, important. Because there is no appeal on fact or law from the adjudicator's decision it is all the more important that the manner in which he reaches his decision should be beyond reproach. At the same time, one has to recognise that the adjudicator is working under pressure of time and circumstance which makes it extremely difficult to comply with the rules of natural justice in the manner of a court or arbitrator. Repugnant as it may be to one's approach to judicial decision-making, I think that the system created by the HGCRA can only be made to work in practice if some breaches of the rules of natural justice, which have no demonstrable consequence, are disregarded."

156 It is clear, as His Honour Judge Bowsher Q.C. said in **Discain Project Services Limited No 2** [2001] BLR 287 at p.292 that before the court will grant relief the court must be satisfied that the breach was a serious and significant one. *"It is not enough for the defendant simply to raise the banner of breach of the rules of natural justice to defeat the application to enforce the decision of the adjudicator. The defendant must show that the plea has some force and relevance ..."*

157. In **Balfour Beatty v. London Borough of Lambeth** [2002] BLR 288 at p.301 His Honour Judge Lloyd Q.C. emphasised that the adjudicator is required to act impartially.
'This must mean that he must act in a way that will not lead an outsider to conclude that there might be any element of bias, i.e. that a party has not been treated fairly. In addition, impartiality implies fairness, although the application may be trammelled by the overall constraints of adjudication. Lack of impartiality carries with it overtones of actual or apparent bias when in reality the complaint may be characterised as lack of fairness."

158. This line of authority is consistent with the reasoning set out in the commentary under CPR 17 of the White Book where it notes that: *"One important factor for the court to consider when permission to amend is sought close to the trial date is whether the amendment will put the parties on an unequal footing or place or add an excessive burden to the respondent's task of preparing for trial."*

159. Although adjudication cannot be regarded as equivalent to court proceedings or arbitration, the test which is set out in the White Book is a useful pointer in the different context of assessing the fairness of late allegations or additional evidence in adjudication.

160. AWG raised the objection of unfairness on a considerable number of occasions. In August 2003 they complained successfully that the dispute had not arisen because they had not had a sufficient opportunity to consider Rockingham's claims. Further objections were taken on 10th October 2003 after the notice of referral had been served.

161. On 20th October 2003 Mr. Wood informed the parties, correctly in my view, that he had jurisdiction to hear the dispute. Significantly, he said that the dispute had crystallised. By this I understood him to mean that not only had the claim been made, but the basis for it had been set out and AWG had had a proper opportunity to meet it.

162. On 3rd November 2003 AWG again challenged Mr. Wood's jurisdiction. The new challenge depended substantially on what I regard as a misunderstanding of the law relating to the ability to raise any new facts and arguments once the dispute had been referred to adjudication.

163. On 11th November 2003 Rockingham served its Reply to AWG's Second Response. This detailed Reply was served only a few days before the adjudication process was due to end. It raised a radically new case based on Mr. Tindall's fourth statement in which he, in effect, abandoned his previous opinion as to why AWG failed to exercise due care and skill as to the way in which AWG should have designed the oval, and for the first time said clearly that the problem was not caused by the layer as such but by absence of drainage to the layer.

164. This constituted such a substantial shift in Rockingham's position as to amount to a new case. At paragraph 9.17 of its submission Rockingham made the radically different allegation that in the special circumstances where Rockingham had asked for a design for a particular purpose: *"AWG must take special steps to ensure that the design meets that purpose."*

165. They also argued for the first time that the flaw in the design must have been obvious to AWG. This raised a wholly different set of issues which AWG needed to have an opportunity to consider.

166. Eversheds received the submission late on 11th November 2003. They started work on the Wednesday morning, 12th November 2003, knowing that their response to new matters must be completed so that Mr. Wood could give his decision on the following Monday or Tuesday.

167. In argument, Rockingham concede that if a claim for compensation for the cost of additional drainage had been made there would have been a breach of natural justice because AWG would not have had a proper opportunity to deal with the issue. But they say that these submissions went to quantum and not to liability, and therefore do not affect the adjudicator's decision.

168. 1 cannot agree that the case which AWG was asked to meet after 11th November 2003 was simply concerned with a quantum issue in respect of which no claim was in fact made. After the submission of 11th November 2003, Rockingham's claim was far removed, not only from the notice of adjudication and the referral notice, but also from the dispute which the adjudicator said had crystallised on 20th October 2003. AWG's expert said, in my view reasonably, that he had no proper time to consider the new points raised by Mr. Tindall and to respond to them.

169. In my view, in the context of a case which was being contested on the basis of detailed submissions on both sides the remaining time available for the adjudication did not give AWG a sufficient opportunity (without prejudice to my finding on issue 1) to consider the new material, to discuss it with the clients and the experts, and to make a considered response.

170. The injustice in the procedure lies in the justified claim of AWG that the adjudicator failed to afford AWG a proper opportunity to give a fully considered response to the additional material, and in particular to Mr. Tindall's fourth statement which had been served at such a late stage. AWG was clearly prejudiced by its inability to do so. This is demonstrated by the basis on which the adjudicator made his findings, which took into account matters which Rockingham had raised in detail for the first time on 11th November 2003 and to which AWG had not had a proper opportunity to respond.

Severance.

171. This is Issue 3 of the agreed list of issues. The issue is: can parts of the decision be enforced, or, if part of a decision is unenforceable, is the entire decision unenforceable?

172. Before the dispute was referred to Mr. Wood, Lovells wrote to Eversheds on 12th September 2003. The letter invited Eversheds to agree to one adjudicator deciding the various disputes relating to different aspects of the contract.

173. On 15th September 2003 Eversheds replied on behalf of AWG: *"We think it would be better to appoint a single adjudicator who would have jurisdiction to determine all matters. For the avoidance of doubt, that remains our client's position."*

174. On 16th September 2003 Eversheds added: *"We also agree that there is sufficient connection between the matters set out in your client's Notices of Dissatisfaction that any disputes (the existence of which is not admitted) in these Notices could be referred to the same adjudicator."*

175. There were, in effect, three separate disputes under the contract which, by agreement, were referred to the adjudicator in the Notice of Adjudication. They related to the Oval, the building or grandstand, and the tunnels. There is no complaint by AWG in relation to the findings of the adjudicator in respect of the building and the tunnels. The adjudicator decided that, taking into account monies presently withheld by Rockingham, Rockingham was still entitled to be paid a further £54,328.73.

176. AWG contends, without arguing the point, that just as only one dispute at a time can be referred to adjudication, so there can only be one decision, and if a substantial part of that decision is unenforceable, the balance cannot be enforced.

177. It is right to note that although only a further sum of £54,328.73 was ordered to be paid in relation to the building and the tunnel, if the sum withheld is included, these constituted substantial claims. It is not correct to say, as AWG contends, that the claim in relation to the Oval amounted to 95% of the claim, or that these other claims were de minimis.

178. The policy of adjudication, confirmed in numerous decided cases, is that the decision of the adjudicator should be enforced immediately. Where the parties have agreed that three discrete claims can be heard together, I can see no reason why the decisions on those claims which are not subject to challenge should not be enforced immediately.

179. This conclusion is subject only to the limited circumstances in which the court will order a stay of enforcement of an award pending final determination of matters which have been referred to the adjudicator for his provisional decision. Subject to my consideration of this issue, I conclude that Rockingham is entitled to an immediate payment of £54,328.73.

Stay of any enforcement proceedings.

180. This encompasses issues 4 and 5 and asks the question: should the court grant a stay, and if so on what terms?

181. 1 shall deal with this issue relatively shortly in view of my findings on issues 1 and 2. The general principle is that an adjudicators determination under s.108 of the Act, or under contractual provisions incorporated by that section, ought to be enforced by summary judgment (see e.g. **Bouyges v. Dahl-Jensen** [2000] BLR 522 CA). An exception to that principle occurs where the payee is in liquidation (see the judgment of Chadwick LJ in **Bouyges v. Dahl-Jensen** at p.527).

182. The issue of a stay has been considered in detail by His Honour Judge Lloyd Q.C. in **Herschell v. Bream Properties** [2000] BLR 272, and by His Honour Judge Richard Seymour Q.C. in **Rainford House Limited v. Cadogan Limited** [2001] BLR 48 In **Herschell** Judge Lloyd Q.C. concluded at paragraph 5 that the court has a wide discretion to grant a stay of execution subject to conformity with the overriding objective. Amongst the relevant considerations are (a) the possibility that the applicant might not be able to repay money at the time when it is ordered to be repaid; and (b) the harm and prejudice that might be done to the party which is entitled to the money.

183. In **Rainford House** at paragraph 11 His Honour Judge Seymour Q. C. said: *"So far as the question whether to grant a stay of execution is concerned, each case must depend on its own facts. I agree with Judge Lloyd Q.C. that it is for the applicant for any stay to put before the court credible material which, unless contradicted, demonstrates that the claimant is insolvent. However, in my judgment it is not necessary for the applicant to go further and put before the court evidence as to the present financial position of the claimant so that he does not need to shoulder the additional burden of predicting when any challenge to the correctness in fact of the determination of the adjudicator will be heard, or of putting before the court positive evidence as to what the financial position of the claimant will then be..."*

184. The principles on which a stay may be granted are, as His Honour Judge Lloyd Q.C. set out in **Herschell,** contained in the former Order 47 RSC: *"Where a judgment is given or an order made for the payment by any person of money and the court is satisfied on an application made at the time of judgment or order, or at any time thereafter by the judgment debtor or any other party liable to execution (a) that there are special circumstances which*

render it inexpedient to enforce the judgment or order; or (b) that the applicant is unable, from any cause, to pay the money ... the court may by order stay the execution of the judgment or order ... either absolutely or for such period and subject to such conditions as the court thinks fit."

185. 1 respectfully agree with the approach of both judges that each case must depend on its own facts. In my view, it is not possible to list the considerations which may apply in any individual case. I would also be reluctant to endorse an approach which sets out how far an applicant must go in putting evidence before a court in support of its case.

It seems to me that it is sufficient to note that the court should not grant a stay unless, consistent with the overriding objective, the justice of the case demands it.

186. In general, a court must balance (a) the intention of the legislation that adjudication should be enforced summarily; (b) the right of the successful party not to be prejudiced by being kept out of its money; and (c) in cases where there is a serious risk that a party will not be able to recover the money, that the defendant is not being seriously prejudiced in a way not contemplated by the Act which is silent as to the position where a defendant runs more than a nominal risk of being unable to recover money after trial or arbitration award.

187. A further specific consideration which is relevant in considering whether the justice of the case demands a stay is the diligence with which the applicant has pursued the substantive remedy, whether by litigation or arbitration.

If a party is to be kept out of its money at all, it should be for the shortest reasonable time. This consideration may lead a court to grant a stay in the first instance for a limited time with extensions depending on the conduct of the parties, or a failure by an applicant for a stay to pursue a case with diligence may itself be a bar to a successful application for a stay.

188. Having given this indication of my approach to the issues, I will not deal with the substance of the issues further unless my understanding of the attitude of theaarties is incorrect. My understanding is that AWG is not pursuing its application for a stay in the event that I decline to enforce the adjudicator's decision in full. On the basis of the documents before me but without hearing detailed argument,

I can indicate that I would not at first sight be inclined to order a stay in relation to that part of the adjudicator's award and that I am prepared to order payment by AWG to Rockingham of the sum of £54,328.73. The wider issues would have become relevant if I had been prepared to enforce the whole of the adjudicators award.

189. I am not inclined to express a view as to what attitude I would have taken if I had enforced the whole of the adjudicators decision.

190. I take this course for two reasons. First, the issue should be decided at the time when it arises, if in fact it ever does arise. Secondly, the question should be considered in the context of up to date financial information relating to Rockingham which is not presently available.

Conclusion.

191. I grant the relief sought by the parties as follows.
  (1) An order that the adjudicators decision dated 18th November 2003 in relation to the Oval be set aside on the grounds that the adjudicator had no jurisdiction to make such a decision.
  (2) An order that the adjudicators decision dated 18th November 2003 in relation to the Oval track be set aside because the adjudicator failed to comply with the principles of natural justice.
  (3) An order that the adjudicators decision dated 18 November 2003 be enforced to the effect that Rockingham have summary judgment in the sum of £54,328.73 in relation to the adjudicators decision relating to the building (grandstand) and the tunnels.

(Discussion on costs)

M.Bowderry QC instructed by Eversheds LLP for claimant,

R.Ter Haar QC instructed by Lovells for the defendant