JUDGMENT : HIS HONOUR JUDGE TOULMIN CMG QC : 19th October 2004

1. This is an application by CIB Properties Limited (CIB) to enforce the decision of the Adjudicator, John Uff CBE QC, made on 24th February 2004 that Birse Construction Limited (Birse) should pay CIB £2,164,892.

2. Birse seeks to prevent the enforcement of the Adjudicator's award by raising a number of defences including the plea that adjudication is inappropriate in a dispute of this complexity. This is a defence which goes to the root of the adjudication process. The point has not previously been decided.

3. I give this judgment after hearing oral evidence. The judgment is, therefore, a final judgment. The grounds on which CIB's application is contested are set out in paragraph 18 of the defence and have been amplified in detailed and most helpful submissions. They are:

   A. *There was no dispute in being at the date of the notice of adjudication so that the Adjudicator had no jurisdiction to hear and determine the matters before him. Birse says that any possible dispute had not crystallised because there were ongoing discussions to resolve CIB's claim and CIB had agreed to a further meeting due to take place after CIB served the notice of adjudication.*

   B. *Birse claims that the adjudication could not be and was not conducted fairly and impartially because*
      (a) *it was irredeemably prejudiced by CIB's tactics and conduct before the notice of adjudication was served which meant that Birse was put at a disadvantage before the adjudication started which could not be cured. The limited and piecemeal extensions of time given to Birse in the course of the adjudication could not eliminate the prejudice which had already taken place.*
      (b) *The pressure, which not only Birse but also the Adjudicator was under, led the Adjudicator to act unfairly and to the prejudice of Birse in relation to (i) the time for Birse's response; (ii) the timetable and timescales generally; (iii) the expert evidence and; (iv) the documentation generally.*
      (c) *It led the Adjudicator, because of pressure, into making a slip in his award which transformed what should have been an award in Birse's favour into the present award in favour of CIB.*

   C. *The size and complexity of the dispute meant that it could not be resolved fairly by adjudication. Birse cites in support comments made by Judges in other adjudication cases.*

   D. *The Adjudicator made a slip which the court has power either to correct itself or, in the circumstances of this case, the court has power to invite the Adjudicator to correct. Birse contends that the Adjudicator decided in section 9 of his decision that Birse had no liability for defects in the cladding but in section 14 of his decision he awarded CIB the costs of remedial works in relation to defects in the cladding for which, in section 9, he had said that Birse was not liable. Birse contends that the Adjudicator's letter in response to their own constituted exceptionally an invitation to the court to make a finding on this issue which the court should accept.*

4. At the start of the hearing, Birse relied on two other defences which are no longer being pursued: (a) that the allegation that the service of new documents with the referral notice created a new dispute and; (b) that Birse was entitled to set off its own claim against CIB's enforcement claim.

The Law

5. The starting point of any consideration of these issues is section 108 of the Housing Grants Construction and Regeneration Act 1996 (the Act). Section 108 of the Act provides as follows:

   "108(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose 'dispute' includes any difference.

   (2) The contract shall –
      (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
      (b) provide a timetable with the object of securing the appointment of the Adjudicator and referral of the dispute to him within 7 days of such notice;
      (c) require the Adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
      (d) allow the Adjudicator to extend the period of 28 days by up to 14 days with the consent of the party by whom the dispute was referred;
      (e) impose a duty on the Adjudicator to act impartially and;
      (f) enable the Adjudicator to take the initiative in ascertaining the facts and the law."

6. In relation to the duty of impartiality, paragraph 12(a), of the Scheme for Construction Contracts (the Scheme) provides that:

"the Adjudicator shall act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract."

7. The history of the events leading up to the passing of the Act was set out by May LJ in *Pegram Shopfitters v Weijl (UK) Ltd [2003] 91 CLR 173*. It is clear that Parliament has introduced an intervening stage in construction disputes which enables the parties to achieve a temporary solution in advance of the full process of litigation or arbitration.

8. The purpose of the litigation was described by Lord Ackner in the debate in the House of Lords *(see Hansard HL Vol 571 cols 989-990)*:
"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 completion of important contracts."

9. There is no doubt that the procedure is being used in disputes which are to be resolved long after the contract which is the subject matter of the dispute, has come to an end. It has come to be used, as in this case, as a form of intense confrontational litigation which can be very costly. I was told that CIB's costs of the two adjudications amounted to £973,732.41 and Birse's costs to £1,161,341.70, in each case excluding VAT. To this must be added the Adjudicator's costs in the two adjudications. The Adjudicator's costs in the second adjudication amounted to over £150,000. This could not be described as inexpensive.

10. The procedure, as in this case, can often encourage the parties to engage in tactical manoeuvring of a type that is these days deprecated in litigation before these courts. This manoeuvring continued up to and throughout the adjudication.

11. There is no doubt that a wrong or unenforceable decision of an adjudicator can lead to great unfairness to one side or the other. This is inherent in the legislation. On the other hand, the proponents of adjudication point to the very many cases where adjudication (or the threat of adjudication) leads to the early resolution of the dispute. They also perceive it to be an advantage that, unlike ordinary litigation, each party bears its own costs in any event and it is only the cost of the Adjudicator that can be the subject of a conventional order.

12. The background policy which the courts must respect is well set out in two passages in the judgment of Dyson J (which was approved by the Court of Appeal) in ***Macob Civil Engineering Limited v Morrison Construction Limited*** *[1999] CLR 1 6*:
"The timetable for adjudication is very tight (see section 108 of the Act). Many would say unreasonably tight and likely to result in injustice. Parliament must be taken to be aware of this."

13. In his judgment in *Macob* Dyson J also said:
"Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening stage in the dispute resolution process."

14. The jurisdiction has been developed primarily by Judges of this court in conformity with the legislation. The following steps are relevant in adjudication:
    (a) There must be a dispute arising under a construction contract which is capable of being referred to adjudication.
    (b) Notice must be given to the other party to refer that dispute to adjudication.
    (c) A timetable must be provided under which, if there is no designated Adjudicator, the Adjudicator must be appointed within 7 days.
    (d) The Adjudicator must reach a decision on the dispute which has been referred to him.
    (e) The Adjudicator must (subject to (f) below) reach his decision within 28 days of the referral or such longer period as is agreed by the parties after the dispute has been referred.
    (f) The Adjudicator is permitted to extend the 28 day time limit to up to 42 days with the agreement only of the referring party.
    (g) The Adjudicator has an overriding duty to act fairly and impartially. This requires the Adjudicator to direct the procedure so that each party has a proper and equal opportunity to present its case.

15. The question of what is a dispute was decided by the Court of Appeal in ***Halki Shipping v Sopex Oils*** *[1998] 1 WLR 726 at 761*. Whether there is a dispute depends on the ordinary meaning of the word and the facts of the case. In ***Halki,*** Swinton Thomas LJ citing a passage of Templeman LJ in ***Ellerine Brothers v Klinger*** *[1982] 1 WLR 1375* held that in appropriate cases, where there had been a demand, a dispute could be inferred to exist where a party had failed to respond to the demand.

16. I do not understand the word 'difference' in the Act to add any additional concept. Rather it prevents barren arguments over whether a situation can properly be characterised as a dispute or a difference.

17. In ***Sindall v Solland*** *[unreported June 2001]* a decision approved by Forbes J in ***Beck Peppiatt v Norwest Holst*** *[2003] EWHC 822 (TCC)* His Honour Judge Lloyd QC carried the analysis of what is a dispute a stage further. He said:
"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 that needs to be decided."

18. I accept entirely the spirit of this analysis as an expression of a common sense approach. There is a danger that it can be taken too literally. It is clear that in this case each side was engaged in tactical manoeuvres in relation to its own claims. In relation to the threat of CIB starting an adjudication Birse was anxious to keep discussions going so that it could say that the process of negotiation had not ended.

19. In my view the test is whether, taking a common sense approach, the dispute has crystallised. Even after it has crystallised, parties may wish to have further discussions in order to resolve it. Whether or not it has, in fact, crystallised will depend on the facts in each case including whether or not the parties are in continuing and genuine discussions in order to try to resolve the dispute.

20. The court has, from the beginning, declined to enforce an Adjudicator's award on the grounds of bias or procedural unfairness (see eg ***Glencot Development v Barrett*** *[2001] BLR 207*, ***Discain Project Services v Opecprime Development Ltd*** *[2000] BLR 402 and* ***McAlpine PPS Pipeline Systems Joint Venture v Transco*** *TCC No HT-04-66 judgment 12 May 2004)*. There are a number of decisions where the court has refused to enforce a decision where the Adjudicator has conducted the procedure in a manner which is unjust or to the unfair disadvantage of a party.

21. In considering these questions courts must have in mind section 108(2)(f) of the Act which enables the Adjudicator to take the initiative in ascertaining the facts and the law provided he acts in a way that is fair. This applies to orders relating to the disclosure of documents as much as to any other aspect of the procedure. In this case, Birse challenges the Adjudicator's decision not only on specific grounds but also on the general ground that the dispute was too complex to be decided by means of adjudication.

22. Although this point has not been decided directly, Birse cites in support comments of Judges in previous cases. In particular in ***London and Amsterdam Properties v Waterman Partnership*** *[2004] 1 BLR 179 196* His Honour Judge Wilcox said at paragraph 146:
"It must also be recognised that there may be some disputes, particularly arising at the end of a project, which are too complex to permit a fair adjudication process within the time limits of the scheme."

23. In ***AWG v Rockingham Motorway Speedway Limited*** *[2004] EWHC 888 (TCC)* at paragraph 123 I raised the possibility that there may be disputes which are so complex and the advantages of the procedure are weighted to such an extent against the defendant that there is a conflict between the right to refer to adjudication and obtain a decision within the time limits laid down in section 108(2)(c) and (d) and the Adjudicator's duty to act impartially under section 108(f) of the Act. I went on to suggest (erroneously as I now think) that this was a conflict which it might be impossible to resolve.

24. The answer to the problem lies in construing the Act itself. The Act confers a general right to refer a dispute or difference to adjudication provided it can be adjudicated in accordance with a procedure complying with section 108(2). This general right exists irrespective of the apparent complexity of the dispute but it does not require an adjudicator to reach a decision if he is unable to do so within the time limits imposed by section 108(2) of the Act.

25. Section 108(2) sets out requirements as to the time limits within which the procedure (including time limits) within which the adjudication must be carried out. Section 108(2)(c) is a permissive section. A party is not bound to agree to an extension of time beyond the 28 days. If a defendant does not agree to further extensions of time after the dispute has been referred, the time limit for the Adjudicator's decision is, therefore, 28 days or up to 42 days on the application of the Adjudicator with the agreement of the referring party (see section 108(2)(d).

26. It is argued by CIB that if a defendant agrees to one extension of time, it must be taken to have agreed to further necessary extensions of time. I do not agree that this is necessarily the case. It will depend in each case on the circumstances in which the initial extension of time is agreed. There will be cases where this is a proper inference. There will be other cases where no such inference can be drawn, for example, where a defendant has made it clear that the initial extension of time is agreed without prejudice to any further extensions. The test is not, therefore, whether the dispute is too complicated to refer to adjudication but whether the Adjudicator was able to reach a fair decision within the time limits allowed by the parties.

27. In complex cases it is likely also that issues will be raised as to whether (1) the Adjudicator acted fairly in the procedure and (2) whether his decision was properly responsive to the dispute that was referred to him or, as it was put in ***Bouygues v Dahl-Jensen*** *[2000] 1 WLR 525 (paragraph 12), "Did he answer the right question or questions?"*

28. In addition to these arguments, Birse has an additional argument that there was a slip which the Adjudicator should be ordered, or at least encouraged, to correct. Birse cites in support my decision in ***Bloor v Bowmer and Kirkland*** *[2001] BLR 314*. CIB argues that this decision was wrong but says that in any event it does not go far enough to assist Birse in the present circumstances.

29. In ***Bloor v Bowmer and Kirkland*** I said at page 319:
"In the absence of any specific agreement to the contrary, a term can and should be implied into the contract referring the dispute to adjudication that the Adjudicator may, on his own initiative, or on the application of a party correct an error arising from an accidental error or omission. The purpose of the adjudication is to enable broad justice to be done between the parties. Parties acting in good faith would be bound to agree at the start of the adjudication that the Adjudicator could correct an obvious mistake of the sort which he made in this case."

30. In reaching this conclusion I was careful to analyse what amounted in law to an accidental slip or omission. I referred to the Master of the Rolls, Sir John Donaldson's analysis of what amounted to a slip under the old procedural rules in ***R v Cripps and Muldoon*** *[1984] QB 686:*
"It is a distinction between having second thoughts and intentions and correcting an award to give effect to first thoughts or intentions which creates the problem. Neither an arbitrator or a judge can make any claim to infallibility. If he assesses the evidence wrongly or misappreciates the law the resulting award or judgment will be erroneous but it cannot be corrected under section 17 (of the Arbitration Act 1950) or under the old Order 20 Rule 11. It cannot normally be corrected under section 22 (where the arbitrator has made a mistake). The remedy is to appeal if the right of appeal exists. The skilled arbitrator or judge may be tempted to describe this as an accidental slip but this is a natural form of self-exculpation."

31. The distinction under the 1996 Arbitration Act which received the Royal Assent a few weeks before the HCGRA (the Act) is summarised in *Mustill & Boyd on Commercial Arbitration, Ch 27 p 406*:
"This enables the arbitrator to make an award on a claim which he has inadvertently overlooked such as an award of interest or to correct errors of accounting or arithmetic such as attributing a credit item to the wrong party but the section does not give the arbitrator licence to give effect to second thoughts on a matter on which he has made a conscious judgment."

32. This is only one of the two hurdles which Birse must overcome in relation its claim that the adjudicator made a slip which should be corrected. The threshold question is whether the Adjudicator is prepared to admit or correct the slip at a time when it does not prejudice the other party. If the Adjudicator is not prepared to make a correction promptly that is an end of the matter. In ***Bouygues v Dahl-Jensen*** there was an error by an adjudicator which at page 55 Dyson J concluded was a mistake which fell into the category of a slip. The Adjudicator refused to admit or correct the mistake. Dyson J held that the Adjudicator's decision had to stand because the Adjudicator was not exceeding his terms of reference:
"He was doing precisely what he was asked to do and was answering the right question albeit in the wrong way."

The appeal was dismissed (see *[2001] BLR 522)* The Court of Appeal held that (subject to a separate point relating to bankruptcy law) Dyson J had stated correctly the relevant law and its application to that case.

33. I conclude, therefore, that the law before this case is that in relation to a slip or alleged slip there are two questions: (1) is the Adjudicator prepared to acknowledge that he has made a mistake and correct it? (2) is the mistake a genuine slip which failed to give effect to his first thoughts? If the answer to both questions is "Yes" then, subject to the important question of the time within which the correction is made and questions of prejudice, the court can if the justice of the case so requires give effect to the amendment to rectify the slip.

34. Having considered the matter again, I adhere to my decision in ***Bloor.*** It found some limited support from Dyson J in ***Ed McNuttall v Sevenoaks District Council*** *[decided 14th April 2000]* a few days after ***Bloor*** when he concluded in relation to the decision in *Bloor*:
"In my view, putting the matter at its lowest, it is at least arguable that it is right."

35. The decision in ***Bloor*** is, however, of very limited and narrow application. In this case I am being asked by Birse to say that the court should review the Adjudicator's decision, conclude that he has made a slip, and either invite or order him to amend his decision. This is a very difficult argument on which to succeed in the light of the existing law. Birse contends that while under existing law this may normally be the case, the position is different where the Adjudicator has invited the court to rule on the matter. I shall consider this argument after I have considered the Adjudicator's letter dated 19th March 2004 in response to Birse's request that he reconsider his decision.

The facts

36. CIB and Birse entered into a contract dated 8th August 2000 for the construction of a new building which was to be called the Riverdale Data Centre, Molesworth Street, London E13. CIB was to be the owner of the property and Birse was the main contractor. Clause 16.14.3 of the contract provided:
"Owner or contractor may at any time give written notice of its intention to refer any dispute arising under the contract for construction to adjudication. The adjudication provisions of the Scheme for Construction Contracts shall apply."

37. The express provisions relating to time limits and the ability of the Adjudicator to take initiative in finding the facts followed the statutory provisions. In relation to extension of time limits, for the Adjudicator's decision, by agreement of both parties, the scheme stipulated that the Adjudicator shall reach his decision not later than:
"19(i)(c) such period exceeding 28 days after the referral notice as the parties to the dispute may, after the giving of that notice, agree."

In other words, the contract was in conformity with the Act that any extension of time beyond the 28 days required the agreement of both parties (subject to the exception of up to 42 days at the request of the Adjudicator).

38. By a letter dated 21st December 2001 CIB terminated the contract. As a result of the termination three categories of claim were made which were later categorised as E1, E2 and E3. E1 was Birse's claim based on its final account up to termination of the contract. E2 was Birse's claim for the cost of completing the works on the basis that CIB had terminated the contract wrongfully. E3 was CIB's claim for the additional cost of completing the works after Birse had left the site over what CIB would have had to pay under the contract with Birse. This claim only arose if CIB was entitled to terminate the contract – see article 14.2.4 of the contract. Since CIB's claim related to the time after Birse left site, Birse was largely reliant on CIB's documents to enable it to evaluate CIB's claim.

39. On 4th July 2002 CIB wrote to Birse claiming that CIB had a number of specific claims under the contract which amounted in total to a sum in the region of £7,500,000 and that CIB's total claim amounted in total to £9,000,000 excluding VAT and finance charges. CIB gave notice that it proposed to proceed to arbitration.

40. On 10th July 2002 Birse gave notice that it was referring to adjudication the issue of whether or not CIB was entitled to terminate the contract. It gave CIB no advance warning and it is clear that this step

took CIB by surprise and annoyed it. From June 2002 Birse, unknown to CIB, had prepared witness statements and a "Birse case matrix" in preparation for the adjudication.

41. Irrespective of whether or not Birse was strictly entitled to refer the matter to adjudication, CIB felt that it was a less than open way of dealing with the dispute that had arisen. I have little doubt that this referral to adjudication soured the relationship between the parties and was at least partly responsible for the subsequent secretive conduct of CIB.

42. On 28th August 2002, Mr Martin Bowdery QC, as Adjudicator, in a careful, reasoned decision decided that, contrary to Birse's contentions, CIB was entitled to terminate the contract and that the termination was not wrongful.

43. On 2nd October 2002 Mr Budden, Group Manager of Birse, wrote to Mr Dupont, regional head of Corporate Realty Services of CIB, giving notice that Birse would not accept Mr Bowdery's decision as final.

44. Both sides began preparing their detailed claims. Mr Dupont wrote a letter to Birse on 27th September 2002 in which CIB claimed sums in the region of £11 million and said that when the final determination was completed CIB would make a demand for payment. On 17th September 2002, Mr Hart had already been engaged with five assistants to work on CIB's detailed claim.

45. Mr Budden wrote on 2nd October 2002 in response to Mr Dupont's letter:
"We note your statement that final costs are likely to exceed £11 million. No doubt we will be given the opportunity to comment on your arguments and valuation in due course. Notwithstanding the issue of termination, our own final account which is in preparation for the works will be in the region of £11.25 million including VAT but excluding legal costs and finance charges. We will, however, forward to you our version of the final account upon its completion so as to facilitate dialogue on the amounts payable either way. It is regrettable, and notwithstanding arguments as to fault, that the project came to an unseemly end. However, we in return give notice that we will continue to pursue our own entitlements under the contract."

46. Mr Budden's letter concluded by saying that the matter had been put in the hands of Mr Heath:
"He has full authority to deal with this matter and it is his remit to bring it to resolution. Therefore, please address all future correspondence and communication to him at our Northampton office. This will ensure prompt attention is given to any matters raised."

47. On 3rd October 2002 Mr Heath followed up Mr Budden's letter by writing to Mr Dupont proposing a meeting.

48. On 9th October 2002 Mr Dupont replied agreeing to a meeting and suggesting that the parties follow the pre-action protocol for construction and engineering disputes. He said that CIB would issue its demand once the final costs had been determined.

49. The meeting took place on 29th October 2002. It is clear from the subsequent letters of the two parties that it was an amicable meeting. It appears that the follow up meeting on 6th November 2002 was also amicable.

50. Mr Dupont gave oral evidence that he was working closely with Mr Daniel Atkinson, managing director of Knowles Law Limited and a non-practising barrister (see also letters of 9th October 2002 and 1st November 2002). While Mr Dupont was responsible for making the overall decisions, it is clear from the earliest stages that Mr Atkinson, who also gave oral evidence, was responsible for the legal advice and the tactics. These must be seen against the background of Birse's earlier referral to adjudication.

51. In a letter from Mr Atkinson to Mr Heath, received by Birse on 14th November 2002, he set out his understanding in relation to Birse's claim for payment and CIB's claim for the cost of completion of the works. Mr Atkinson said that Birse told him that the full claim would be submitted towards the end of January 2003. He said that CIB anticipated that particulars of the major part of its costs would be available in the near future and that CIB would confirm the precise date by the end of the following week.

52. Mr Atkinson's follow up letter dated 27th November 2002 said that CIB was not yet in a position to give a definitive time scale for its demand for payment. In fact, the demand for payment was served on 28th July 2003.

53. The parties were discussing mediation and on 15th November 2002, Hammonds, representing Birse, wrote to Mr Atkinson saying:
"We believe it would be sensible to proceed to the provisional appointment of a mediator for a mediation to take place during March next year."

54. It is clear, therefore, that both sides, by November 2002, had solicitors involved in the tactics of the dispute.

55. On 11th December 2002 Mr Heath wrote to Mr Atkinson that its final account was on schedule for submission at the end of January 2003. it was not, in fact, served until 25th September 2003.

56. On 28th January 2003 Birse instructed Dr Wolmuth as their cladding expert in relation to the proposed mediation. The proposed mediation did not, in fact, take place. On 19th February 2003 Mr Atkinson wrote to Mr Hilton at Hammonds in relation to their discussion on the postponement of the mediation from 3rd March 2003 to July 2003:
"As previously advised, our client has not and does not irrevocably agree to mediation."

57. The last part of his letter is as follows:
"For the avoidance of doubt, the above is without prejudice to our client's right to issue any demand for payment pursuant to the terms of the contract for construction dated 8th August 2000 and to pursue any remedies contractual or otherwise."

58. In his reply dated 19th February 2003, Mr Hilton of Hammonds noted the reservation of rights in the last paragraph of the letter. In oral evidence he said that he understood CIB to be reserving its rights in open correspondence.

59. On 22nd May 2003 the work on site was substantially completed. Until this had happened, CIB could not finalise what was later known as the E3 claim, namely costs of completing the work after Birse had left the site.

60. By a letter dated 28th July 2003, CIB sent a letter signed by Mr Dupont to Birse addressed to Mr Budden at the Barton-on-Humber office demanding payment within 30 days of sums totalling £16,609,154.98. CIB reserved the right to claim further sums in respect of existing and further breaches of the contract. The letter was accompanied by Mr Hart's expert report. Both the demand letter and Mr Hart's expert report made reference to what has been referred to as the 52 files of supporting documents which became the subject of a wrangle over photocopying. These were declared to be available for inspection.

61. The demand letter concluded:
"Should contractor not respond to these demands for payment within the time limits indicated, owners will conclude that its entitlement of payment is disputed. In that case, owner reserves the right to take all available steps to enforce its legal rights as set out in this letter without further notice to contractor."

62. The letter also enclosed 15 lever arch files which have been included in the trial bundle in 22 files.

63. In its final submission Birse rightly treats this as part of the history. Having read the documents and heard from Mr Atkinson, I have no doubt that CIB was prepared to conduct matters in as hardnosed a way as it felt it was able to, subject only to acting in a way which it regarded as correct.

64. Although initially Birse claimed it was seriously prejudiced, I am not persuaded that in sending the demand to Mr Budden at Head Office rather than to Mr Heath at Northampton, CIB was being deliberately obstructive.

65. In terms of prejudice, in the event, this was minimal. Mr Heath received a copy of the documents on 31st July 2003. The demand was distributed by Birse on 6th August 2003. Birse was able to discuss it with its solicitors on 19th August 2003. It was holiday time and had the 30 day deadline been strictly adhered to, and at the end of it there had been a referral to adjudication, a court might well have concluded that Birse had not been given a sufficient opportunity to consider the claim and make its response and that, therefore, a dispute or difference had not yet arisen. CIB did not take this course.

66. There is no doubt that the document was what Mr Darling QC, for Birse, called "*a very meaty document*" or that it had taken a very substantial amount of time to prepare. Gardner and Theobald were engaged in January 2002 to produce lengthy and detailed reports on valuations 1 and 2. They produced reports in August 2002 and a further valuation report in June 2003. Mr Hart was instructed by CIB in June 2002 to work on quantum. He was assisted from 17th September 2002 by a team of five primary assistants and some eight others. By the date of the demand, Mr Hart's team had spent 2,500 hours working on the quantum claim. It is also clear that CIB had been working on the documents since October/November 2002.

67. I am satisfied that after CIB's experience in relation to the first adjudication it had in mind from the end of 2002 that it would be likely to proceed to adjudication and that its preparation of the documents and exhibits was undertaken with this in mind. This preparation continued up to the time when the notice of referral was served.

68. An internal CIB memorandum of 30th July 2003 says:
"The demand states that unless payment is received within 30 days we will deem it to be disputed and hence adjudication will then follow."

69. Another memorandum of 8th August 2003 said specifically:
"We are gearing up for a second adjudication."

70. The demand dealt not only with CIB's claim, E3, but also with Birse's claims, E1 and E2. E1, Birse's claim on the final account, was the subject of Mr Hart's report served with the letter of claim of 28th July 2003. Mr Hart assessed the claim at £26,509,533.95. When Birse served its draft final account on 25th September 2003 it valued the costs of the works to termination at £34,335,483.31. E2, Birse's claim for the costs of completing the works under the contract, was assessed by Mr Hart in his report at £21,769,940.60. E3, the additional cost to CIB of completing the works, was assessed by Mr Hart in his report at £14,646,798.94. In his later report of 3rd November 2003, the sum claim was increased to £14,687,205.63. In the event, the Adjudicator awarded the sum of £2,164,892.

71. Birse's response to the letter of demand was dated 27th August 2003. It asked for some general initial questions and suggested a meeting.

72. CIB's response dated 28th August 2003 was rather uncompromising in tone. It noted that Birse had not inspected the 52 files. It said that the answers to Birse's questions were in the documents provided in the first adjudication and in the quantum reports of Gardner and Theobald and Mr Hart. It requested details of Birse's disagreement with CIB's determination. It repeated the demand for payment and stated baldly:
"In the absence of the aforesaid payment, CIB reserves the right to take all available steps to enforce its legal right as set out in the demand without further notice."

73. CIB's letter does indicate agreement, without prejudice, to a meeting. It ends by looking forward to Birse's early payment on the demand.

74. There follows considerable correspondence between the parties. CIB's letters, including those ostensibly from Mr Dupont, read like solicitors' letters attempting to put CIB in a good light. The various references to CIB adopting an open and candid approach (see eg the letter of 10th September 2003) sound hollow in the context of the existing plan without any direct warning to proceed to adjudication, as was clear from the internal correspondence.

75. On 12th September 2003 internal documents show that CIB had a referral to adjudication already prepared in draft and that they expected to serve it in the week of 6th October 2003.

76. On 25th September 2003 Birse served its final draft account to CIB. It ran to 14 volumes. Birse also gave a very limited response to CIB's demand which consisted of a list of 126 detailed questions. It was put together by Birse staff in preparation for the meeting due on 2nd October 2003. Mr Hilton of Hammonds said in evidence that he was not involved in this exercise.

77. It was clear that Birse was not deceived by CIB's tactics. They were aware that CIB might at any stage refer the dispute to adjudication. Their own tactics were to try to avoid this by trying to avoid the

dispute being regarded as crystallised. On 30th September 2003 Hammonds wrote to Mr Ashworth of Davies Langton and Everest instructing him as an expert. The third short paragraph states: *"Please note these instructions are urgent – there is a strong risk that CIB will shortly commence an adjudication."*

78. In a letter dated 29 October 2003 instructing Mr Crowter as an expert, Hammonds stressed that:
"There is a real risk that Citibank may refer the entirety of the claim or discrete parts of it to adjudication in the immediate future."

79. The letter stressed that:
"At the time of receiving the demand Birse's greatest concern was that Citibank would refer the demand to adjudication. Birse adopted a tactic of questioning the claimant to clarify issues while avoiding crystallising the dispute."

80. In my view both sides were jockeying for tactical advantage in a way which is apparently permitted in adjudication but is not permitted in current litigation practice.

81. Mr Dupont's notes before the meeting between the parties on 2nd October 2003 makes it clear that the referral to adjudication was, as far as CIB was concerned, a week or two weeks away from completion. Mr Dupont agreed that this fact was not mentioned to Birse at the meeting later in the day. It was this type of conduct which I referred to earlier as secretive although it did not, in fact, mislead Birse.

82. CIB's internally agreed tactics for the meeting were to arrange a mediation within the following two weeks with authority to settle. This would fit into the timetable of the referral to adjudication which would not yet be complete. I am satisfied that CIB was prepared to enter into a genuine mediation but only on the basis that if it failed it would not deflect CIB from its timetable for referral to adjudication. Birse claims that the referral to mediation was merely a tactic to deflect Birse from preparing for a possible adjudication. I do not think this is correct or that the offer of mediation was a sham.

83. On 7th October 2003 Hammonds inspected the 52 further files and requested a full set of photocopies. This was the start of a wrangle in relation to the copying of the files which was not resolved until Birse approved a quotation for copying costs on 27th October 2003. Copying was completed on 6th November 2003 apart from two files and videos. The responsibility for copying rested with Birse and Hammonds. If they had proceeded with the matter with expedition the files would have been copied as early as the end of August 2003.

84. The mediation took place on 21st October 2003 before Robert Gaitskell QC. The mediation acknowledged that a dispute had arisen. The outcome of the mediation was to identify key questions which the parties agreed to address on their own.

85. The parties agreed to a further meeting on 5th November 2003 at Hammonds' offices in London. This was to be "a party on party" meeting. This was confirmed by Mr Atkinson by fax on 22nd October 2003.

86. In the letter to Mr Crowter dated 29th October 2003 Hammonds said: *"Birse is optimistic that Citibank will not commence an adjudication at least until after the meeting that is scheduled for 5th November 2003."*

87. It is clear, therefore, that Birse was aware before the meeting of 5th November 2003 that the discussions which were taking place were without prejudice to the possibility that CIB might start an adjudication at any time and certainly after 5th November 2003.

88. Before the meeting of 5th November 2003, on 29th October 2003, CIB answered both the seven original questions and the 126 subsequent questions posed by Birse.

89. The meeting of 5th November 2003 is of particular importance since Birse claims that it was inconclusive and that the parties agreed to a further meeting in order to try to resolve the dispute. It claims that this meant that the dispute had not crystallised and that CIB's referral to adjudication was premature.

90. Birse's claim was, therefore, that there was no dispute within the meaning of section 108 of the Act and that the Adjudicator had no jurisdiction to hear the dispute. CIB claims that the dispute had already crystallised and that there was no agreement to a further meeting or that it would defer any further action until such a meeting had been held.

91. The whole day had been set aside for the meeting but it does not seem to have had the flavour of a negotiating meeting that was about to reach a resolution of the issues between the parties. Most of the morning was taken up with a presentation by Mr Buckingham of a Birse narrative programme. CIB's three central questions were answered briefly by Mr Heath immediately before lunch. CIB was not satisfied either with the answers or that the answers were a serious attempt to deal with the questions which CIB had raised.

92. After lunch, the parties had a brief discussion as to where to go next. What happened is disputed. It is clear that the availability of Mr Dupont and Mr Heath to attend a further meeting was discussed. Mr Dupont was not available until 24th November 2004 and Mr Heath was on holiday from 8th December 2004. Mr Dupont's note of the meeting concluded, "*Take three to four weeks to review*". He had to concede in cross-examination that he had, much later, added the words "then decide if to meet again, set aside dates in case". I found his evidence wholly unsatisfactory on this issue.

93. Mrs Kennedy, a solicitor at Hammonds, gave oral evidence. She made a contemporaneous handwritten note which two days later she turned into a typewritten note. Having considered the evidence, I prefer the evidence of her handwritten note. The typed note adds the gloss to the handwritten note that a further meeting would be reconvened in the first week of December at a date to be agreed. Her handwritten note refers to a discussion in which Mr Heath talks about the next meeting. There is then a discussion of availability and the note ends by saying, "*Aim for a meeting in the first week of December*".

94. Mr Atkinson contested the words "*it was agreed in advance of the next meeting*" and also that there was any firm agreement to a further meeting. He said that CIB agreed to examine the information, take the temperature and get back to Birse.

95. There is a conflict here between the evidence of Mrs Kennedy and Mr Atkinson which I must resolve. I must consider it in the context of what, if anything, was agreed in relation to a further meeting. CIB, under the direction of Mr Atkinson, had been pursuing a policy of continuous preparation for an adjudication. It is unlikely that at a meeting at which he was present Mr Atkinson would have allowed CIB to enter into any agreement with Birse which would deflect it from the strategy which had been pursued for months. Birse, on the other hand, was aware of CIB's general strategy and were themselves anxious to keep dialogue going for as long as possible in order that they could argue that the dispute had not crystallised and thus a referral to an adjudication was premature.

96. I am satisfied, having considered all the evidence on this point, that there was a discussion about a further meeting, that no firm date was fixed, but in principle CIB expressed themselves as being prepared to attend such a meeting in the first week in December. I am also satisfied that in saying this CIB was not, and was not understood by Birse, to be agreeing to foreclose any other option, including adjudication, until after such a meeting had taken place. I accept Mr Atkinson's evidence that something was said about "*taking the temperature*" or "*testing the temperature*." In the context of CIB's preparations for an imminent adjudication. This would reflect CIB's tentative attitude to a further meeting.

97. On 4th November 2004, the day before the meeting, Mr Atkinson had drafted a letter whose purpose was to signify the conclusion of negotiations. This letter was sent on 14th November 2003 at the same time as the notice of referral to adjudication.

98. Mr Atkinson's letter was responded to by Hammonds on 19th November 2003. They were clearly anxious to keep the discussions open. In relation to the proposed meeting, Hammonds said in that letter:

"Given the ongoing meetings between our clients in relation to this matter we are surprised at the course of action that you have adopted. You will recall that at the conclusion of the meeting on 5th November 2003 your client specifically agreed to reconvene a further meeting for the first week of December, a date to be agreed."

99. This letter falls short of saying that CIB was not entitled to refer the matter to adjudication because the dispute had not crystallised or because there was an undertaking amounting to an agreement to continue discussions before starting an adjudication. I find that neither Birse nor Hammonds was

surprised at this step which CIB took. I also find that CIB was not debarred from making the reference to an adjudication by reason of any agreement that there would be further discussions in December 2003. In my view, it was very clear that there was a dispute and that it had crystallised even if at a future time there might be discussions as to how the dispute might be resolved.

100. Mr Hilton, Mrs Kennedy and Mr Heath all agreed in evidence that there was no agreement between the parties which would preclude CIB from starting an adjudication.

101. This history is relevant to the two issues which I have to decide: first, was there, in fact, a dispute within the terms of section 108 of the Act; second, the history leading up to the notice of referral forms part of the history on which Birse relies in support of its case that there was a dispute of such complexity that it was not susceptible to adjudication, and it is also part of the background of the claim for unfairness against which the adjudication must be considered.

Conduct of the Adjudication

102. The notice of adjudication set out the demand dated 28th July 2003. It identified the documents sent with the demand. In paragraph 8, the notice said:
"Despite CIB having provided Birse with further information and further evidence to support its demand and despite CIB having provided Birse with time to consider supporting information, Birse has failed to accept that it is liable to CIB for the demanded sums (or indeed any sums) and Birse has failed to make any payment in respect of CIB's demand. In the circumstances a dispute has now arisen which may be characterised as a dispute over the entitlement of CIB in respect of the heads of claim set out in CIB's letter dated 28th July 2003."

103. The notice of referral sets out the issues relating to CIB's claim in paragraph 9. Paragraph 10 sets out the relief sought in four claims which follow the claims A to D in the summary at the end of the demand of 28th July 2003.

104. The notice of adjudication was accompanied by a referral letter from CIB to Mr Heath and Mr Budden also dated 14th November 2003. The letter referred to various documents, including the demand for payment dated 28th July 2003, the documents which accompanied it, and the further documents which had since been disclosed and made available for inspection. These further documents were, in fact, served on 22nd November 2003.

105. The referral letter said that Birse had had sufficient opportunity to decide whether to accept or reject the demand for payment but had adopted an approach which was clearly intended to delay payment on the demand. Accordingly, CIB considered that a dispute had arisen between the parties which it was entitled to refer to adjudication in accordance with article GC 16.4.3 of the contract.

106. Hammonds' immediate response was the facsimile letter dated 19th November 2003 to which I have already referred. This was replied to by Knowles Limited on behalf of CIB saying that there had been no agreement to a further meeting.

107. On 25th November 2003, Mr John Uff CBE QC, as the appointed Adjudicator, wrote to the parties to acknowledge the communications from the parties. He immediately raised the question of an extension of time for determination of the adjudication in view of the volume of material so far provided by the referring party, and he asked whether the parties had agreed any proposals for the provision of further statements of case and further evidence and documentation.

108. In view of the case put forward by Birse it is necessary to consider in detail the history of the adjudication procedure and the conduct of the Adjudicator.

109. Hammonds, on behalf of Birse, wrote in response on 26th November 2003. Birse contended:
(1) no dispute had arisen;
(2) Birse had been blatantly ambushed by Citibank with the referral;
(3) the matter was extremely complex;
(4) as a result of points (1) to (3) the process was inherently unfair:

"The sums of money involved, together with the amounts of documentation, render this matter inappropriate for resolution by way of adjudication. It is not possible to deal with this matter in the time that is available."

110. The letter continued:

"We also stress that the last three points cannot be cured simply providing an extra two weeks (or any further period) in the event that Knowles agree to such an extension."

111. This last statement clearly refers to the 14 day extension which Knowles would be entitled to agree under section 108(2)(d), not the consensual extension permitted under section 108(2)(c).

112. By a letter dated 19th November 2004, Knowles wrote to the Adjudicator consenting on behalf of CIB to his having the additional 14 days to reach his decision. The letter acknowledged that any further extension would require the agreement of both parties. This had not yet been the subject of any discussion between the parties.

113. On 27th November 2003 the Adjudicator gave directions on the preliminary issue of whether the dispute had crystallised and, therefore, whether he had jurisdiction. He proposed, after reading the submissions of the parties, to give his decision by 2nd December 2003, later extended to 3rd December 2003.

114. Although the timetable was tight, I am not persuaded that Mr Uff was unfair in imposing it. Birse made written submissions on 29th November 2003 and further submissions on 2nd December 2003.

115. On 27th November 2003, on the basis that he had jurisdiction, the Adjudicator set out a timetable for written submissions to be made by 10th December 2003. He accepted Hammonds' submission, on behalf of Birse, that there should be an oral hearing. He said he could be available on 22nd or 23rd December 2003 but invited the parties to agree a modest extension in order that the hearing could take place in early January 2004.

116. On 28th November 2003 Knowles wrote to Hammonds with a copy to the Adjudicator. The letter stated: "*While we dispute that commencement of the adjudication was an ambush, as you allege, we accept that this is a large case. Our client's objective is to obtain a fair and properly considered decision. This is the most likely way for the outcome of the adjudication to be accepted by both parties and hence for later arbitration or litigation to be avoided."*

117. The letter made it clear that CIB would consider requests for further extensions of time and invited Birse to say whether it agreed an extension of time to the 9th January 2004 and whether Birse had proposals for further extensions. There were discussions between the parties as to the future timetable, as a result of which the parties agreed on the 1st/2nd December 2003 that the written procedure would be extended to 16th December 2003 and that the time for the Adjudicator to reach his decision would be extended to 9th January 2004.

118. After receiving details submissions from the parties on 3rd December 2003 the Adjudicator notified the parties in a reasoned decision that he intended to proceed with the adjudication. As he readily acknowledged, this did not dispose of the issue which in the end would be a matter for the court but it was a necessary step since if he had concluded that there was no dispute within the Act he would have had to have withdrawn from the adjudication.

119. On 4th December 2003 Hammonds wrote to the Adjudicator formally agreeing to the timetable and the short extension of time beyond the 42 days. The letter made it clear that Birse continued to consider the adjudication process to be inappropriate in the current circumstances and that no extension of time, whether in days or weeks, would materially alter the position.

120. On 10th December 2003 Hammonds served Birse's response document together with nine boxes of documents as they had agreed with CIB on 2nd December 2003. On receipt of this, the Adjudicator raised two further issues: (a) whether the final account may be relied on by Birse and; (b) whether the assessment of the CIB claim by CIB was binding on Birse. He enquired whether these two issues should be considered on 22nd December 2003 in advance of a detailed evaluation of the claim with the remaining parts of the adjudication deemed dealt with at a later date.

121. Birse responded to the Adjudicator on 11th December 2003 asking for a hearing on both 22nd and 23rd December 2003 dealing with all matters. CIB also responded on 11th December 2003 but suggested that a decision on further preliminary issues should be given by 31st December 2003 and on the remaining matters by 19th January 2004.

122. On 11th December 2003 the Adjudicator directed that the time for rendering the decision was extended by agreement between the parties to 9th January 2004, that he would give a decision on the preliminary issues stated in his fax sent that day by the end of 23rd December 2003. He said that in relation to the substantive issues he would permit a further round of written submissions by the end of 5th January 2004 but would not hold a further oral hearing before he gave his decision on 9th January 2004. He left open explicitly the possibility that the parties would agree further extensions of time for his decision and that if they did so he would adjust the timetable.

123. There were then various discussions between the parties. On 12th December 2003 Birse proposed that the adjudication should be turned into an arbitration. CIB indicated that it would consider a detailed proposal. Birse made a detailed proposal. The Adjudicator gave general encouragement to constructive proposals that would assist in the resolution of all disputes between the parties. Unfortunately the discussions did not reach a conclusion satisfactory to the parties.

124. On 16th December 2003, CIB served its reply to Birse's response to the referral notice. The reply included Mr Hart's further report on the extent of the changes between his initial report and his later explanatory report.

125. On 17th December 2003 Birse proposed that the adjudication should deal with the issues of natural justice, jurisdiction and no loss on 22nd December 2003. On 19th December 2003, CIB proposed that the adjudication should continue but that it should be followed by a dispute resolution procedure which would be completed by 1st December 2004.

126. The hearing took place on 22nd December 2003. Birse proposed at the hearing that the adjudication should take place over a period of twelve months. This was not accepted. Various preliminary issues were considered by the Adjudicator. He gave his decision on 23rd December 2003, rejecting Birse's contention that the adjudication was inherently unfair or that there had been a breach of natural justice.

127. At the hearing on 22nd December 2003 in relation to the hearing of the substantive issues the parties agreed a new timetable in the event that the Adjudicator found, as he did, that the adjudication could continue. This included provision for meetings between the Adjudicator and experts on each side on 12th and 15th January 2004 and a possible further day in the week of 19th January 2004. The parties agreed to extend time for the Adjudicator's decision until 30th January 2004 (subject to any further extension agreed between the parties).

128. On 30th December 2003, over five weeks after the referral notice, Birse applied to the Adjudicator for an order that CIB disclose documents, the scope of which the letter acknowledged was "enormous". This request was opposed by CIB in a long reasoned letter. Mr Hilton of Hammonds admitted in evidence that Birse's request amounted to an old-fashioned discovery application. I comment that it would not have been appropriate in modern litigation, let alone in an adjudication.

129. On 5th January 2004 the Adjudicator noted that there was no provision for enforcing orders for disclosure of documents but that he could, in appropriate cases, draw inferences from non-disclosure. In this case he ruled that the requests of Birse were too broad and not consistent with the time scale of the adjudication. He accepted that both parties were entitled to request disclosure of key documents and invited the parties to submit reformulated requests for disclosure by 4 pm, 6th January 2004. This was an entirely reasonable way for the Adjudicator to proceed.

130. Both parties submitted requests for further disclosure. Knowles, on behalf of CIB, objected to Birse's request. Birse agreed to disclose all the documents requested by CIB. Hammonds noted (email of 7th January 2004) that the documents could well amount to 50 to 100 files of documents which would have to be distilled from a thousand files. Birse's own request for disclosure was again very extensive.

131. On 7th January 2004 the Adjudicator gave his decision on the request. He requested Birse to disclose the documents that it had agreed to disclose and laid down a procedure for disclosure. He rejected most of Hammonds' requests for CIB to disclose further documents but ordered some very limited further disclosure. The procedure which he adopted was in accordance with paragraph 13(a) of the Scheme, which provides that the Adjudicator:

"may request any party to the contract to supply him with such documents as he may reasonably require."

132. This ruling is consistent with a policy of adjudication that the Adjudicator is in control of the procedure.

133. Also on 7th January 2004, by email, the Adjudicator notified the parties of his intention to appoint an Assessor
"whose principal task will be [to] assist me in handling and collating the many valuations and accounts that need to be considered."

At one stage Birse made a complaint of procedural unfairness in relation to a hearing with the Assessor where each party put forward an audit trail to prove certain documents. In cross-examination Birse's expert, Mr Crowter, accepted that the matter had been dealt with properly.

134. On 12th January 2004, the Adjudicator notified the parties that his purpose was not to restrict the parties in their further submissions but to ensure that the other party had notice of the topics to be covered. He added the further direction that the parties may serve written submissions in reply by 16th January 2004. He also gave notice that he might wish to hold an additional meeting with relevant factual witnesses. It was also on 12th January 2004 that the Adjudicator first met the experts. I shall deal with the experts' meetings later.

135. The Adjudicator noted that in its fax of 9th January 2004, Hammonds said that Birse considered it essential for there to be a further oral hearing. He asked whether there was agreement to this course for action and noted that if it was to take place there would be a further delay in his decision. He wondered whether the parties would agree to a further extension until 6th February 2004.

136. On 14th January 2004 Hammonds delivered its further submissions and supporting documents, including a supplementary report of Mr Crowter This was followed by a letter to the Adjudicator dated 15th January 2004. The letter commented on the Adjudicator's decision of 23rd December 2003 stating that "*unfairness/natural justice is largely dependent on the quantum of available time*" and that, "*a proper opportunity to consider the case presented by the other party*" could be accommodated within the timeframe of the process.

137. Hammonds contended on behalf of Birse that:
"As a consequence of your decisions regarding discovery, no doubt due to the inherent nature of the process in which the parties are engaged, it has been denied the opportunity to properly investigate and/or assess the claims made against it to significantly test the assertions made and be in a position properly to defend that case."

138. Hammonds' claimed that CIB's claim was inadequately particularised and that by being denied disclosure of the documents on which CIB replied to substantiate its case the Adjudicator was acting contrary to natural justice.

139. On 20th January 2004 Hammonds agreed that time for delivery of the award should be extended to 16th February 2004 with time for the additional oral hearings which they had requested.

140. This letter was followed by a letter from Hammonds to the Adjudicator on 21st January 2004. It proposed:
1) A quantum experts' meeting on 30th January 2004;
2) Hearings on 2nd and 4th February 2004 for witnesses of fact;
3) A 'sweep up' hearing for legal submissions on 16th February 2004;
4) The decision be delivered on 23rd February 2004.

141. The Adjudicator said in reply that he had no objections to Hammonds' proposals.

142. Also on 21st January 2004 CIB (Knowles) responded to Hammonds' email of 20th January 2004 by noting that with extensions the proceedings will have taken some three months. In an addendum dealing with the letter of 21st January 2004 it formally agreed to the extension to 16th February 2004 but did not agree to the extension to the 23rd February 2004 since there did not seem to CIB to be a need for additional oral submissions.

143. By an email sent on 23rd January 2004 the Adjudicator said that, given the extended procedure, he could not undertake to deliver his award by 16th February 2004 but would be able to do so by 20th

February 2004 on the basis that the parties deliver by 10 am on 16th February 2004 written submissions limited to 50 pages on any outstanding matters. There was further discussion in the email about the need for oral hearings and other procedural hearings.

144. The Adjudicator ruled in favour of Birse in relation to questioning on subcontractor procurement and delay issues post-determination (email 23rd January 2004).

145. CIB sought to exclude Mr Crowter's expert submissions on behalf of Birse which were due on 27th January 2004 on the grounds that they were served a day late on 28th January 2004. The Adjudicator refused to exclude them.

146. On 28th January 2004 Hammonds made submissions in relation to the last part of the adjudication. The letter again proposed the timetable which it had proposed on 21st January 2004.

147. Also on 28th January 2004 Knowles responded by making specific submissions in the context of its general submission that it would leave the matter in the hands of the Adjudicator.

148. In fact, the 'sweep up' hearing which Hammonds had requested did take place on 18th February 2004. The time for delivery of the decision was extended by agreement to 23rd February 2004.

149. Birse makes a separate allegation that the adjudication was unfair because their expert, Mr Crowter, was prejudiced by the procedure ordered by the Adjudicator.

150. Since the hearing on 12th January, the Adjudicator had been working intensively with the experts on both sides. After the meeting on 12th January the Adjudicator ordered that various schedules should be prepared.

151. On 13th January 2004 Mr Crowter wrote to the Adjudicator saying that some of the tasks set by the Adjudicator could not be completed within the time which the Adjudicator had directed but that the exercise, when completed, would be very useful in identifying the real issues.

152. On 14th January 2004 Birse's submission included supplementary experts' reports and one from Mr Crowter dated 19th December 2003.

153. On 15th January 2004 the second experts' meeting took place. On 19th January 2004 Mr Crowter submitted his answers to the Adjudicator. Very properly the Adjudicator accepted the answers although they were provided a day later than ordered. On 20th January 2004 the third experts' meeting took place with the Adjudicator.

154. On 21st January 2004 Hammonds proposed a quantum experts' meeting on 30th January 2004 to consider, in particular, E3 with hearings on 2nd and 4th February 2004 for witnesses of fact. On 22nd January 2004 Mr Crowter set out the headings for his written submissions on E3. On 26th January 2004 the fourth experts' meeting took place with the Adjudicator.

155. Before the fourth experts' meeting Mr Crowter had on 24th January 2004, submitted his E2 evaluation. On 28th January 2004 Mr Crowter submitted his E3 evaluation. On 29th January 2004 Mr Crowter submitted his updated E1 schedule and further schedules relating to E1, E2 and E3.

156. On 30th January 2004 there was a fifth experts' meeting at which Mr Crowter was able to make detailed submissions relating to E3 which, therefore, the Adjudicator was able to take into account.

157. On 3rd February 2004 Mr Crowter sent an email submitting the final version of his E3 analysis with explanations. The email confirmed that his analysis was directly comparable to that of Mr Hart and that Mr Crowter had examined critically each of the 1900 items in Mr Hart's E3 spreadsheet.

158. Oral evidence took place on 30th January 2004 and 3rd February 2004. On 4th February 2004 there was a sixth experts' meeting and on 6th February 2004 Mr Crowter submitted a further different schedule.

159. All this took place well before the parties' closing written submissions on 16th January 2004. Although the timetable was very tight, I am unable to conclude that Mr Crowter was not given a proper opportunity to put forward Birse's case. He was and he did so.

160. On 16th February 2004, Hammonds renewed Birse's application for the disclosure of documents made on 30th December 2003 and on 6th January 2004. The letter said*: "The recent expert and witness hearings have,*

in our view, completely undermined the position taken by Knowles. We consider that the documents disclosed in this referral failed to: 1) Tell us how CIB's global claims are broken down; 2) Tell you or us whether costs are costs to complete or costs to rectify defects and/or valuations… 3) Tell you or us which items within the claim should be the responsibility of CIB. It is clear from the witness hearings that there were matters which were the responsibility of CIB which would have caused delay and additional cost of the works and for which Birse should not be responsible. CIB would have it, however, that Birse is responsible for all costs. 4) Tell us why the works took so long to complete."

The letter concluded by inviting the Adjudicator to draw the conclusion that CIB had failed to prove its case.

161. On 24th February 2004 Mr Uff delivered his adjudication decision.

162. On 5th March 2004 Hammonds wrote to the Adjudicator. They referred to paragraphs 9.6-9.15 of his decision and said that: "*You decided in paragraph 9.15 that Birse did not have liability for patent or latent defects in the work of façade and that these costs should be excluded from the claims against Birse."*

163. The letter went on:
"We are concerned that, when you later considered the amounts which should be deducted from the cladding claims at paragraphs 14.20 and 14.21 of your decision you have made an accidental slip by not fully taking into account this finding when undertaking your valuation."

164. The letter went on to suggest how the decision should be amended. The long letter concluded by saying that one of the real risks of adjudicating a dispute of this kind meant that slips leading to injustice were almost inevitable*: "Hence our submissions as to the overall unfairness of this whole process. Since the ultimate effect on our clients of this accidental slip amounts to over £2 million they are understandably extremely concerned about this huge discrepancy and would be grateful if it could be rectified as soon as possible."*

165. Also on 5th March 2004 Knowles responded to Hammonds' letter by saying that it was not a correct characterisation to say that Birse was requesting the correction of an accidental slip or omission: "*In fact, Birse's complaint is that you have misapplied the law to the facts of the case. This cannot be an accidental slip or omission."*

166. On 19th March 2004 (the delay having been caused by his unavoidable absence from chambers) Mr Uff responded. He said:
"The matter which has been raised by Hammonds, namely the way in which the decision at paragraphs 9.609.15 of the decision have been applied in section 14, is an issue with which I am familiar. I am aware that it could have been argued on both sides that the figure to be deducted from the E3 account by reason of the decision at paragraph 9.15 could have been materially different from those which I, in fact, accepted. In the circumstances of the adjudication, particularly the pressure of time, I consider the appropriate decision was to accept Mr Crowter's figure for categories Z2, Z3 and Z4 in full. I fully accept that had time been available Birse would have contended for much greater deductions and CIB for lesser deductions. Given the exchange between the parties I do not consider that it would be useful for me to express any view on whether my approach contains any error. If the parties or the court decide that there is any error I should be happy to review the decision and to receive further submissions from the parties…"

The Decision

167. The decision of the Adjudicator runs to 139 pages. It is divided into sections. The preamble, CIB's claims, Birse's response, CIB's reply, CIB and Birse's evidence, final submissions, a discussion of the evidence, a discussion of whether Birse was entitled to an indemnity from CIB as claimed and the decision with reasons on each of the claims. It is clearly a conscientious and careful piece of work from an very experienced Adjudicator.

168. At paragraphs 7.09 and 7.10 he notes the guidance given by His Honour Judge Wilcox **in *London & Amsterdam v Waterman's Partnership*** *(judgment 18th December 2003 now reported in BLR)* where the learned Judge noted that:
"The scheme does not envisage that there should be a provisional resolution of a dispute by an Adjudicator at all costs. That would be far greater an injustice than that which the HGCR Act was enacted to remedy."

169. The Adjudicator said that: *"In the light of such guidance it is appropriate to record that if I came to the conclusion that I had not sufficiently appreciated the nature of any issue referred to me, I would not give a decision on that issue."*

170. He said that undoubtedly the availability of more time would have refined the process of investigation but he went on: "*I am confident of having understood the case of each party in relation to the principal issues."*

171. In relation to the determination of quantum, which he acknowledged proved exceedingly complex and difficult, he said that what was important was that the figures and sums of money to be allowed or awarded individually should be approximately correct and should reflect the merits of the case. He concluded:
"I consider that I have been able to do substantial justice between the parties and to arrive at an overall figure which reflects the merits of the case as I find them."

172. The Adjudicator's assertion is disputed by Birse who say that in the decision the Adjudicator concedes: "I fully accept had time been available Birse would have contended for greater deductions and CIB for lesser deductions in relation to allocated costs within the E3 account."

173. In my view, the tests which the Adjudicator set himself, namely that he could only reach a decision if (a) he had sufficiently appreciated the nature of any issue referred to him before giving a decision on that issue, including the submissions of each party; and (b) if he was satisfied that he could do broad justice between the parties was impeccable.

174. He was also correct to acknowledge that if he had had more time he could have refined his decision further. That is inherent in this adjudication procedure. I still have to consider whether, in fact, he achieved his own standard.

Birse's Contentions

175. I should set out Birse's criticisms in more detail. Birse contends first that no dispute had crystallised in relation to the demand. The stage had not been reached when CIB gave notice of adjudication where a point needed to be decided by an adjudicator. Birse makes this point both as a general submission and specifically on the basis of the contention that on 5th November 2003 the parties agreed to have further discussions to settle the dispute, which rendered premature the referral on 14th November 2000.

176. In relation to its claim that Birse was irredeemably prejudiced by CIB's conduct before the notice of adjudication, it relies on;
    1) The alleged secret preparation for adjudication.
    2) The alleged failure to refer to the possibility of an adjudication in correspondence with Birse.
    3) After they decided to go to adjudication CIB allegedly gave the false impression that they were prepared to enter into meaningful discussions.
    4) Refusal to answer and/or dilatory conduct in answering Birse's questions.
    5) The dilatory conduct in copying the 52 files.
    6) The statement that they would consider further Birse's points made at the meeting on 5th November 2003.
    7) The statement on 5th November 2003 that CIB would be providing further information in relation to its corporate structure.

177. Birse contends that the adjudication did not cure the overwhelming disadvantage arising from CIB's conduct. He granted piecemeal extensions of time which did not cure the mischief. Birse suggests that if the adjudication had been timetabled to last 100 days at the outset it might have cured the problem.

178. In relation to claims that the adjudication acted unfairly in the conduct of the adjudication, Birse makes complaint of the amount of time the Adjudicator allowed for submissions on jurisdiction; the preparation of the response which was not as good a document as Birse would have wished to put forward; the tight timetable for expert evidence which was, as they put it, shoe-horned into January 2004. This, it is alleged, was particularly the case with E3 which involved consideration of how CIB managed to spend such considerable sums over such a short period.

179. In relation to that particular issue, Mr Crowter said in oral evidence:
"I was able merely to make inferences as to the magnitude of the cost relative to the work that was left and draw inferences about the time it took but I was not able to quantify or understand why these things happened or understand the processes

that had gone on after Birse left the site. Birse did not have that information other than the 52 files which were merely an audit trail to the money. There was no explanation as to how the money had been spent."

180. In relation to the size and complexity of the Claim Birse relied on:
    1) The fact that over £12 million plus VAT and interest was claimed.
    2) Forty-nine files were filed with the referral notice containing 24 experts' reports on defects, 18 lever arch files of reports on quantum, and 16 witness statements.
    3) A further 52 files relating to CIB's E3 claim.
    4) A further 55 files served by the parties in the course of the adjudication.
    5) There were very significant issues to be considered in the course of the adjudication.

181. Birse claims that CIB was determined to have an award by the end of January 2004 or shortly afterwards.

182. Birse's contentions in relation to the slip have been already fully set out. It is right to add, in relation to the slip, that in her final submission Miss Hannaford said that in the adjudication, *"It has taken account of some deduction but not the total figure for the cost of remedial works"*. Miss Hannaford explained the slip by saying that in paragraph 14.20 Birse was not responsible for costs in category Z2, Z3 and Z4. She says that it follows from the finding that not only the costs in category Z but those in Mr Hart's category B and Mr Crowter's categories B, X and Z should be deducted. Put another way, Miss Hannaford sees procedural unfairness in the Adjudicator declining to express a view on whether or not he had made a slip and for that reason she says that the decision should not be enforced.

CIB's Contentions

183. CIB's contentions can be summarised by saying that by 14th November 2003 Birse had had a proper opportunity to respond positively to the 30 day demand received by Birse at the latest by 6th August 2003. In relation to the claim of unfairness in starting the adjudication, CIB says that this was not unfair. The 2002 adjudication which Birse had started did not resolve the dispute because Birse would not concede that CIB was entitled to terminate the contract under clause 14.2.4. It was clear that at that stage both parties were looking to see what sums should be paid. The parties were, in effect, in dispute at that stage and this was acknowledged by both parties who agreed to have a mediation in March 2003.

184. Birse was put on notice in late 2002 that CIB reserved the right to take any steps to resolve the dispute and it must have been clear to them that this included adjudication. CIB says that the reason why Birse asked the various questions and failed to consider expeditiously the documents disclosed by CIB was that Birse was anxious to be able to say that the dispute had not been crystallised and, therefore, any adjudication would be premature. CIB contends that the dispute had crystallised long before 14th November 2003.

185. With regard to the adjudication itself, CIB says that the Adjudicator took the initiative in the procedure as he was entitled to do. The timetable which extended the period of 42 days was agreed as a result of the meeting on 22nd December 2003 when the twelve month timetable was put forward. It might have been a different position if Birse had refused any extension to the 42 day period and said that the issues were too complicated to be adjudicated in the time, but this was not the case here.

186. In relation to the claim that the Adjudicator did not require full disclosure of documents, CIB contends that it was for the Adjudicator to decide what documents he needs in order fairly to determine the issues before them. This he did in this case.

187. In relation to the issue of a slip Mr Ramsay, on behalf of CIB, argues:
    1) That in his letter dated 19th March 2004 the Adjudicator indicated that the figures in his adjudication represented his considered view;
    2) The decision is explicable by the fact that the Adjudicator was unable to accept in full either of the experts' figures and came to his own conclusion which was properly reflected in his award;
    3) That in saying that he is prepared to review his decision if the parties agreed that he had made an error or that he would review it if the decision of the court was that he was required to do so, he was not making any concession or admission that he had, in fact, made an error.

Conclusions

188. I have already made a number of findings in the course of this judgment but it is appropriate to draw the findings together in a series of conclusions. These are as follows:

189. 1. I am satisfied that the claim notified by CIB on 28th July 2003 was disputed by Birse and that the dispute had crystallised by the date of the referral to adjudication on 14th November 2003. In the 15 intervening weeks there had been a proper opportunity for Birse to consider the claim and provide a constructive response which may or may not have led to further discussions. Instead, Birse attempted to manoeuvre tactically so that it could make the claim that the dispute had not crystallised. Both sides had, for a long time before the start of the adjudication, been engaged in tactical manoeuvres. Looking at the history it is impossible to conclude that Birse was ambushed by CIB.

190. 2. At the meeting between the parties on 5th November 2003 CIB may have said in general terms that it was prepared to have a further meeting with Birse but this was not on the understanding that it would delay any steps to enforce its rights, including adjudication, until such a meeting had taken place. CIB was entitled to refer the dispute to the Adjudicator on 14th November 2003.

191. 3. The conduct of CIB before the notice of adjudication did not render the whole process unfair or put Birse at an overwhelming disadvantage. It is clear that this was a very complex dispute and that Birse would require more than the 30 days originally stipulated in which to consider the claim. There was a 15 week period in which Birse could have made a constructive response. CIB at all stages carefully reserved its legal rights. Birse was aware, although CIB did not make it explicit, that this included the likelihood of a referral to adjudication of part or all of the claim. At an earlier stage Birse itself had sprung an adjudication on CIB.

192. 4. In relation to the specific claims of bad faith made by Birse I conclude that CIB did not act in bad faith before the referral in not explicitly referring to the possibility of adjudication in having discussions and taking part in the mediation and in relation to the copying of the 52 files, and also in relation to providing further information on corporate structure. CIB did not prejudice the adjudication by conduct which rendered the adjudication which followed an unfair proceeding. Birse's problems were largely caused by its own tactical decision to play for time.

193. 5. I have considered the conduct of the Adjudicator, John Uff CBE QC. At all stages he was careful to consider how he could conduct the adjudication fairly and he succeeded in doing so. He was mindful of his duty to ensure that both parties had a fair opportunity to put their case. I accept without reservation his assurances in his decision that if he had not felt able to reach a decision fair to the parties he would not have done so. It is acknowledged that adjudication is not a final proceeding and that within the limits of an adjudication proceeding the Adjudicator fully discharged the duty not only to act fairly but to reach a fair determination on the evidence. In relation to the experts' issues, the Adjudicator gave the parties a fair opportunity to deploy their cases before him. The Adjudicator felt he was able to deal with the experts' issues on the basis of the evidence he received. I see no reason to doubt his judgment.

194. In the light of the decision of the Court of Appeal in ***Amec Projects v Whitefriars City Estates*** [2004] EWCA CIV 1418, handed down while this Judgment was being revised, I should note that the Court of Appeal held that a party has no absolute right to make submissions on the issue of jurisdiction even though, if the adjudicator considers that he has jurisdiction, the immediate consequences set out in paragraphs 9 and 11 of this Judgment will follow. Birse's challenge must also fail on this ground.

195. 6. The Adjudicator was not bound to agree to Birse's proposal at the hearing on 22nd December 2003 that a timetable should be agreed, that there should be an extended procedure lasting one year or that adjudication should be followed by a dispute resolution procedure which would be concluded similarly by December 2004. He was acting entirely within his jurisdiction to set a timetable which he felt would enable the adjudication to be fairly concluded in the early part of 2004.

196. 7. The Adjudicator was not bound to accede to Birse's request for extensive disclosure made in the course of the adjudication. These requests were inappropriate and may well have been made largely for tactical reasons.

197. 8. It is clear that the claim was complex. If the Adjudicator was to reach a fair decision he clearly needed more than the 42 days to which he was statutorily entitled under the Act (provided that the referring party CIB agreed). He sought and obtained the agreement of Birse to extensions of time which enabled him to reach a fair conclusion having given both parties a proper opportunity to put their case. Birse is not to be criticised for agreeing to extensions of time but, having agreed to do so, this enable the Adjudicator to reach a decision on the matters referred to him after making a due and impartial enquiry.

198. 9. I appreciate that Birse has taken the position that it objected to the adjudication on the grounds that it was irrevocably prejudiced by CIB's conduct and the complexity of the dispute which it had to deal with in a relatively short time. I have concluded that it was not prejudiced because (a) it had fifteen weeks from the demand in which to make a substantive response and (b) in the course of the extended adjudication it had a full opportunity to make further investigations and to put its substantive case to the Adjudicator within the limits imposed by the adjudication process, and it did so.

199. 10 I have already considered the question of whether there are some disputes, including this one, which are so complex that they are not suitable for adjudication. I conclude that this issue is governed by the Act. There is a general right under section 108(1) for a party to a construction contract to refer a dispute or difference to adjudication. There is a duty on the Adjudicator to reach a decision provided that the conditions in section 108(2) are met. This means that the Adjudicator must be able to discharge his duty to reach a decision impartially and fairly within the time limit stipulated in section 108(2)(c) and (d). A defendant is not bound to agree to extend time beyond the time limits laid down in the Act even if such a refusal renders the task of the Adjudicator to be impossible.

200. 11 I am doubtful how far I should investigate the alleged slip. In ***Bloor*** I reached the very limited conclusion that in certain circumstances an Adjudicator may, on his own initiative or at the request of a party, correct an accidental error or omission. In this case Birse asks me to extend the principle to circumstances where the Adjudicator declines to take any such step. I do not understand the Adjudicator's letter dated 19th March 2004, properly read, to constitute an invitation to the court to reach a conclusion in relation to the alleged slip and to indicate whether or not the Adjudicator should correct it. Even if he has gone this far I should have to consider the Adjudicator's invitation in the context of the decision of Dyson J in ***Bouygues v Dahl-Jensen*** upheld by the Court of Appeal. The conclusion in that case was that if the Adjudicator was answering the right question, the decision ought not to be reviewed. It seems to me that Parliament intended the procedure to be an interim procedure which, if carried out fairly and in a manner which is procedurally correct, is not subject to review by the court. I conclude that even if the Adjudicator had invited the court to carry out a review the court should decline to do so. However, I do not understand the Adjudicator's letter to be making such a request but rather to be saying politely that if the court concludes that he has made a slip and orders him to correct it, of course, he will do so.

201. As far as the merits of Birse's contention are concerned I will merely give the indication that I incline to the view expressed by CIB that this was not a slip at all and that the decision is explicable by the conclusion that the Adjudicator was unable to accept in full the figures of either expert and, doing the best he could, he came to his own conclusion which was reflected in his final monetary decision which was a sum substantially less than the original referral to adjudication of £14,687,205.63.

202. I conclude that the Adjudicator's decision should be enforced and order Birse to pay CIB the sum of £2,164,892.

Counsel for the Claimant: MR VIVIAN RAMSAY QC & MR LEE (instructed by Messrs Shadbolt & Co)
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