

**JUDGMENT : HIS HONOUR JUDGE TOULMIN CMG, QC: TCC : 12th May 2004**

1. This is an application made by an Application Notice dated 1<sup>st</sup> March 2004 under Part 24 of the CPR by McAlpine PPS Pipeline Systems Joint Venture (McAlpine) to enforce the decision of Mr D T Simmonds sitting as an adjudicator, dated 8<sup>th</sup> January 2004, under which he ordered Transco PLC (Transco) to pay McAlpine the sum of £52,119.62 (exclusive of VAT) in respect of interest payable under the contract less the sum of £6,925.08 already paid by Transco, i.e. the sum of £45,194.54.
2. Because this application is brought under Part 24 it is not in itself a final resolution of the question of enforcement. The test I must apply is whether Transco has a real prospect of succeeding in defeating the claim for enforcement. The sum is expressed by the adjudicator to be payable in respect of interest arising from late certification of compensation events under the contract. The adjudicator ordered the sum to be paid within 10 days of his decision. It has not been paid, hence these proceedings.
3. Although the sum claimed is small, the issue is obviously of considerable importance to the parties. The parties told me that they had spent a total of about £100,000 on the adjudication and its enforcement. Certainly, as the history of the litigation demonstrates, the case has been keenly fought on both sides. Indeed, it could be said to have been a prolonged tactical wrangle of the sort that would not have been permitted in court proceedings.
4. In his witness statement dated 19<sup>th</sup> March 2004 Mr Brookes on behalf of Transco set out the defendant's objections to the enforcement of the adjudication. He contended that the dispute which McAlpine referred to adjudication was much narrower than which Mr Simmonds adjudicated and that the adjudicator had no jurisdiction to adjudicate on the wider dispute. Alternatively the adjudicator answered questions which the parties had not referred to him. Transco also claims that it was prejudiced by the evidence which was served at a late stage and to which it says it had no proper opportunity to respond. In this respect, Transco contends that the adjudication was conducted unfairly and the decision ought not to be enforced. Transco contends that there is at least a real prospect of successfully defending McAlpine's claim for enforcement of the decision.
5. McAlpine contends that this is a simple case. The adjudicator had referred to him the issues of the liability of Transco to pay interest under the contract and the amount of interest which was payable. McAlpine says that this is precisely what Mr Simmonds decided. His decision was responsive to the matter on which he was asked to adjudicate and should be enforced. If the decision is wrong, it can be corrected, if necessary, in a subsequent conclusive method of dispute resolution.
6. This case raises important questions of law relating to the Housing Construction Grants Regeneration Act 1996 (the Act) and its application to long running disputes which are referred to adjudication long after the conclusion of the contract under which the claims are made. I shall deal first with the factual history and then the law.

**The facts**

7. Under the contract dated 20<sup>th</sup> November 2000 Transco, the well known gas supply company, employed McAlpine to carry out works in relation to the construction of 37 kilometres of steel pipeline between Farningham and High Halden in Kent for the sum of £15,691,208.41 or such sum as may become due under the contract.
8. The contract incorporated the NEC Form of contract with a priced contract based on an activity schedule entitled "*The Engineering and Construction Contract Option A*".
9. It is common ground between the parties that the Act and the Scheme for Construction Contract Regulations 1998 (the Scheme) applies. Under the Schedule of Contract Data Mr Derek Simmonds was designated as the standing adjudicator who would resolve disputes under the contract.
10. As it has emerged, the dispute relates to Parts 5 and 6 of the contract (clauses 50 to 54 and 60 to 65) and the relationship between the two parts. Part 5 concerns payments under the contract, including the payment of interest. Part 6 concerns compensation events under the contract. Even though I am not concerned with the adjudicator's decision on the merits, it is necessary to set out the relevant contractual provisions in order to understand the contentions of the parties.

11. Under Part 5 of the contract, clause 50 provides a mechanism under which the project manager assesses the amount due under the contract at each assessment date. The Schedule of Contract Data, Part I, provides that the interval between each assessment shall be a calendar month. The assessment date appears to be the assessment next after the work is complete.
12. Under clause 50.2 the amount due is: *"The price of work done to that date plus other amounts to be paid to the contractor less amounts to be paid or retained from the contractor ..."*
13. Under clause 51 the project manager is required to certify payment within one week of each assessment. Clause 51.2 of the contract is of direct relevance to the liability for interest: *"Each certified payment is made within three weeks of the assessment date or if a different period is stated in the contract data within the **period** stated. If a payment is late, interest is paid on the late payment. Interest is assessed from the date by which the late payment should have been made until the date when the late payment is made and is included in the first assessment after the late payment is made"*.
14. Clause 51.3 deals with the circumstance where the amount due is corrected in a later certificate by the project manager. In such circumstances: *"Interest on the correcting amount is paid. Interest is assessed from the date when the incorrect amount was certified until the date when the correcting amount is certified and is included in the assessment which includes the correcting amount"*.
15. The contract goes on in clause 51.4 to deal with the case where the project manager has not issued a certificate which a party contends he should have issued. In those circumstances: *"Interest is paid on the amount which he should have certified. Interest is assessed from the date by which he should have certified the amount until the date when he certifies the amount and it is included in the amount then certified"*.
16. Clause 60 and following deals with compensation events. Clause 60 itself lists 18 compensation events. To give an example, clause 60.1(ii) is as follows: *"(2) The employer does not give possession of a part of the site by the later of its possession date and the date required by the Accepted Programme or ... (4) The project manager gives an instruction to stop or not. to start any work"*.
17. Clause 61 deals with notification of compensation events. Clause 63 deals with assessment of compensation events. Clause 63.1 provides: *"The changes to the prices are assessed as the effect of the compensation event upon*
  - *'the actual cost of the work already done',*
  - *'the forecast/actual cost of the work not yet done' and*
  - *'the resulting fee'"*.
18. Clause 65 is concerned with the implementation of compensation events. Clause 65.4 provides that: *"The project manager includes the changes to the prices and completion date from the quotation which he has accepted or from his own assessment in his notification implementing a compensation event"*.
19. On 1<sup>st</sup> February 2002 McAlpine's project manager wrote to Transco raising the issue of the relationship of Part 6 compensation events to Part 5 liability to pay interest under the contract. "At the most recent progress meeting you stated that we would need to advise against which compensation events we are seeking reimbursement for interest/financing.  
*"We advise that we will prepare a submission in due course once most of the compensation events are finalised ...  
"If for whatever reason the period of payments exceeds one month, then it necessarily follows that there will have been additional financing costs incurred which have not so far been reimbursed.  
"Alternatively, it could be stated that if there **has been what** equates to delayed payment of a reasonable amount due at a particular time, then the justification of an interest charge has occurred"*.
20. On 9<sup>th</sup> July 2002 the letter was followed up with a demand by Mr Watson, the project manager of McAlpine, to Mr Magee, as the project manager on site employed by Transco, demanding the payment of £73,634.22 in respect of financing/interest charges on the project. This did not take any account of compensation events. A schedule followed in a form similar to that later attached to McAlpine's then project manager, Mr Pucci's letter to Transco dated 6<sup>th</sup> October 2003.
21. McAlpine's letter of 9<sup>th</sup> July 2002 was followed up by a letter dated 24<sup>th</sup> July 2002 which is not in my papers and, I assume, takes matters no further than the 9<sup>th</sup> July letter.

22. Mr Magee, as project manager, replied in a letter dated 13<sup>th</sup> August 2002 addressed to Mr Watson. It noted that from time to time both parties had failed to comply with the terms of the contract but said that they should try to do so where possible.
23. The letter set out clause 51.3 of the contract (relating to assessment of interest). It went on: *"Therefore, within our assessments we have included the finance charges on project managers or compensation events that were amended after agreement and compensation events that were not replied to within the required time limitations"*.
24. The letter went on to claim that the assessment included finance charges for compensation events and said that the figure for finance charges had been omitted when a quotation had not been submitted or negotiations had been ongoing or further substantiation was required or the costs had not yet been incurred.
25. The letter concluded: *"Therefore, please find a detailed analysis of all the compensation event headings together with our project manager's assessment for £6,925.08"*.
26. The letter was accompanied by a detailed schedule which followed the same headings as the schedule accompanying the 9<sup>th</sup> July 2002 letter from McAlpine. The schedule set out, in relation to each compensation event, an account of the delay to the assessment and the implementation of the compensation event.
27. McAlpine made no attempt to provide a detailed schedule in response, but on 13<sup>th</sup> September 2002 they served a notice of dissatisfaction. It said that: "The schedules attached to your letter clearly record that compensation events have been evaluated by negotiation rather than in accordance with section 6 of the conditions of contract".
28. The letter claimed that the departure from the contract procedure had resulted in the joint venture's cash flow being adversely affected. It went on: *"Your letter dated 13<sup>th</sup> August 2002 purports to be an assessment under clause 51.3. The said clause 51.3 creates an obligation to make payment if an amount due is corrected in a later certificate. You have expressly excluded finance charges from the consequences of the procedure for valuation of the compensation events which have been adopted throughout the contract and which we were led to believe would be assessed as compensation event No. CE/60"*.
29. The letter ended: *"Accordingly, to avoid any doubt we give notice under clause 90.2 of the Conditions of Contract that we are dissatisfied with the action and/or failure to take action by the project manager in relation to compensation event CE/60. We request a meeting to discuss and seek to resolve the matter"*.
30. This matter was referred to adjudication. I have not seen the details of this adjudication but I am told that on 28<sup>th</sup> October 2002 the adjudicator decided that none of the compensation events had been "closed out" and that McAlpine was entitled to seek consequential costs (including interest).
31. There was then a gap of 10 months before McAlpine made an application to Transco for Payment No. 23 in the £28,229,475.92 on 11<sup>th</sup> July 2003. Included in the amount and the application was compensation event No. 60. *"The balance of the correct sum due as interest in respect of compensation events 1 to 93 for the period of time when the compensation event should in practice have been certified (i.e. after the cost had been incurred when the sum due should have been assessed by either party) to the time when it was certified."*
32. The schedule of submissions refers to Volumes 1 to 5. These are not before me. Transco says they did not contain any case as to the underlying administration of compensation events.
33. In Compensation Events Part A the claim was made by McAlpine for *"the interest due in respect of compensation events 1 to 93 - current submission £86,985.52 - sum previously certified by Transco £6,925.08"*.
34. On 29<sup>th</sup> August 2003 Mr **Magee**, as project manager, replied on Transco notepaper that the adjudicator had already confirmed that the valuation process had been properly and fairly conducted. The letter claimed that clause 50.1 of the contract should be read in conjunction with clauses 62 to 65 and should accommodate the accepted practices on site. The letter also argued for Transco's interpretation of clauses 51.3 and 51.4. It concluded by saying that no further assessment would be made.

35. McAlpine responded with a notice of dissatisfaction, pursuant to clause 90.2 of the contract, of Transco's decision to make no further assessment. It requested a meeting to resolve the matter. This took place on 29<sup>th</sup> September 2003.
36. Unfortunately, although it seems to be agreed that there was only a very short discussion on the question of interest, I have no evidence as to what actually took place at the meeting, although this was an obvious matter on which I could have received evidence. The only clues are contained in the **letters** from McAlpine to Transco dated 3<sup>rd</sup> and 6<sup>th</sup> October 2003.
37. The letter of 3<sup>rd</sup> October 2003 was headed: "*CE60 - interest due in respect of the late certification (CE1 to CE93)*". The letter started: "*At the dissatisfaction meeting on 29<sup>th</sup> September 2003 you requested that we provide you with our views on the relevance of clause 65.1 of the contract to our entitlement to payment in respect of compensation events.*"
38. The letter argued that clause 65.1 deals with the project manager carrying out his procedural duties under the contract. The letter went on: "*This does not affect the contractor's entitlement to get paid for work done, the date upon which such payment should be made and the date from which such interest should run if payment was not made*". The letter went on to give McAlpine's interpretation of clauses 50.1 and 50.2 of the contract and its relationship to clause 63.1.
39. The letter concluded: "*The project manager is obliged to include in his assessments the price for the work actually carried out. The operative date for assessment of payment for works carried out is the assessment date following the work being carried out. Any delay in processing a compensation event, for whatever reason, will not change the date upon which an amount becomes due*".
40. Transco contended that the last sentence makes it clear that McAlpine's case is that any entitlement to interest is automatic and that a factual debate based on compensation events is immaterial.
41. Transco further contends that this last paragraph encapsulates the issue referred to the adjudicator and that what in essence the adjudicator had to decide was whether this contention was or was not correct. If it was correct, McAlpine would be entitled to be paid the sum which they had claimed.
42. This letter was followed by a further letter from McAlpines to Transco on 6<sup>th</sup> October 2003 saying: "*Further to the meeting held on Monday 29<sup>th</sup> September 2003 with the intention of seeking to resolve this matter, we have reviewed our calculations making due allowance for the ad hoc agreements made on site [reference your letter 620 dated 29<sup>th</sup> August 2003]. A revised schedule in accordance with the above is attached. Taking into account the views expressed in our letter reference 821 dated 3<sup>rd</sup> October 2003 we trust that you will now certify payment of the sum set out in the schedule*".
43. The schedule annexed followed the same format as that served by McAlpine on 9<sup>th</sup> July 2002 and contained only relatively minor amendments. It did not attempt to deal with Transco's schedule of 13<sup>th</sup> August 2002 to which no detailed response had yet been, given.
44. Transco responded on 10<sup>th</sup> October 2003. The letter was headed: "*CE60 - interest due in respect of late certification (CE1 to CE93)*". It said that it did not agree with McAlpine's assessment of the effect of clause 65.1 and that: "*Your analysis of the operative date for payment for works carried out and the process of compensation events appears to disregard the effects of clause 63.8*". Clause 65.1 deals with implementing compensation events and says that: "*The project manager implements each compensation event by notifying the contractor of the quotation which he has accepted or of his own assessment. He implements the compensation event when he accepts a quotation or completes his own assessment or when the compensation event occurs, whichever is the latest*". Clause 63.8 stipulates that: "*Assessments for changed prices for compensation events are in the form of changes to the activity schedule*".
45. On 17<sup>th</sup> November 2003 McAlpine served its Notice of Adjudication. The dispute between the parties is set out at paragraph 11. It says that the dispute concerns the referring party's claim for interest by reason of:  
"*11.1 The responding party's failure to certify the amount due to the referring party by the assessment date (clause 51.4 of the contract) and/or*

*"11.2 The amount which is stated to be due in a certified payment, being corrected in a later certificate (clause 51.3 of the contract) "*

46. Subsequent paragraphs in this section refer to McAlpine's claim for interest on 9<sup>th</sup> July 2002, the assessment by the project manager on 13<sup>th</sup> August 2002, the notice of dissatisfaction on 15<sup>th</sup> September 2003 and the amended claim under cover of the letter of 6<sup>th</sup> October 2003.
47. I should now refer specifically to paragraph 15 of the Notice, because it is mentioned in Transco's response. Paragraph 15 says: *"Under cover of a letter dated 10<sup>th</sup> October 2003 the responding party rejected the referring party's claim"*.
48. On 5<sup>th</sup> November 2003 the referring party put the responding party on notice that it would refer the dispute to adjudication in the near future.
49. In paragraph 16 McAlpine sets out its claim: *"16. The referring party claims the sum of £69,965.16 together with further interest accruing at the contractual rate from 6<sup>th</sup> October 2003 to the date of the adjudicator's decision or such other sum as the adjudicator considers is due to the referring party pursuant to the contract in relation to the interest claimed"*.
50. The Referral Notice follows the format of the Notice of Adjudication. It again sets out in paragraph 11, the dispute between the parties.  
*"11. The dispute between the parties concerns the referring party's claim for interest as a result of  
"11.1 the responding party's failure to certify the amount due to the referring party by the assessment date (clause 51.4 of the contract) and/or  
"11.2, the amount which is stated to be due in a certified payment being corrected at a later certificate (clause 51.3 of the contract)"*.
51. The Notice refers to the previous adjudication on 28<sup>th</sup> October 2002 where apparently the adjudicator decided that: *"None of the identified compensation events were both properly and fully 'valued' and McAlpine JB ... are entitled to such further consideration as the contract permits, in particular in respect of the costs that they have incurred as a result of the combined and interactive effect of the identified event"*.
52. I commented in the course of the hearing that I was glad that no court was being asked to enforce this decision.
53. One relevant aspect of these earlier adjudication proceedings is that the question referred is a specific one and it is not simply to be assumed (as McAlpine contends) that the parties necessarily require the adjudicator to resolve all outstanding issues relating to interest in the present adjudication. It is important in each case (and in this case) to consider precisely what matters were referred to the adjudicator and in what terms.
54. After dealing with the chronology in paragraphs 12 to 26, the Referral Notice goes on to explain the calculation of interest by reference to the schedule annexed to the letter of 6<sup>th</sup> October 2003.
55. Paragraph 29 sets out McAlpine's contention as to the nature of the calculation. *"29. The interest is generally calculated as follows. As the works proceed the project manager is obliged to issue certificates. Where the project manager has failed to properly certify sums due, an amount will be recorded as under certified. If the amount under certified remains outstanding until the next certificate is due, interest starts to accrue. Interest continues to accrue until payment in full of the original sum and interest is made. If the **payment** of the interest is not made, then interest accumulates on the outstanding interest."*
56. The Referral Notice then sets out the narrative of three compensation events - CE05, CE22 and CE23 - expressed to be solely by way of example and refers to the schedule. These schedules are referable to the schedules prepared by McAlpine in October 2003 and do not attempt to address the issues in Transco's project manager's schedule in August 2002. They demonstrate McAlpine's case that interest should be certified for compensation events in the month following the event.
57. The contract terms which are relied on are set out in the section "Relevant Contract Terms". They do not include clauses 63 and 64. McAlpine said that the basis on which interest was claimed was set out in the schedule of 6<sup>th</sup> October 2003 and that the legal basis for the claim was under clauses 51.3 and 51.4 of the contract.

58. Paragraph 40 of the Referral Notice claims the sum of £69,965.16 together with interest from 6th October 2003 or "such other sum as the adjudicator considers is due to the referring party pursuant to the contract in relation to its interest claim".
59. The Referral Notice was supported by a witness statement from Mr Williams, McAlpine's site based commercial manager on the project. He claimed in paragraph 8 that "from the outset compensation events were not agreed, certified and paid in a timely manner by the project manager".
60. At paragraph 9.8 Mr Williams referred to the fact that "*the interest amount has been claimed within Compensation Event 60 (Interest/costs in respect of Compensation Event CE01 to CE93) and has not been paid*". In paragraph 10 he noted that in the claim the interest due for all the applicable compensation events included Compensation Event CE60 and that each amount had been calculated in exactly the same way.
61. Mr Williams said at paragraph 11 of his witness statement that the project manager had throughout a substantial part of the construction period always refused to certify on account payments pending final resolution. He stated that the contract did not allow him to do otherwise.
62. On 24<sup>th</sup> November 2003 Mr Simmonds wrote to the parties noting that two Notices of Adjudication had now been served in addition to the earlier notice. This adjudication was one of two adjudications launched by McAlpine at about the same time. He set out directions for the procedure of the adjudications.
63. On 26<sup>th</sup> November 2003 Transco replied through its solicitors. It reserved its position on two jurisdictional issues which it said related to the service of the Notice to Adjudicate and to the fact that new issues had been raised which it said had not been raised previously and to which, therefore, it had not had an opportunity to reply.
64. It also complained that the Notice to Adjudicate and the Referral Notice did not contain a comprehensive submission of McAlpine's claim. It said on this issue: "*Firstly, the submissions are selective. The narrative only deals with a selection of compensation events. At present we have no factual submissions with regards to the majority of compensation events identified by McAlpine. Transco are faced with the prospect of understanding McAlpine's case for the first time in their Reply. We reserve our position with regards to this course of conduct including without limitation issues of natural justice*". It went on: "*Secondly, there appears to be no explanation as to how the contract clauses identified by McAlpine have any relevance to the limited examples given*".
65. Also on 26<sup>th</sup> November 2003 Mr Simmonds replied requiring Transco to raise any jurisdictional issues immediately. He required McAlpine to respond to the matters raised by Transco concerning the Referral.
66. McAlpine's solicitors responded also on 26<sup>th</sup> November 2003 saying that they did not understand the point which Transco was trying to make. They said that the Referral and the Appendices set out McAlpine's claim.
67. On 28<sup>th</sup> November 2003, in a letter to Mr Simmonds, Transco set out further comments on the jurisdictional issues. The letter raised two points no longer pursued. In relation to natural justice the letter said: "*Transco has not been afforded the opportunity to consider McAlpine's claim in this adjudication. The referral makes representations in respect of CE05 and CE22. The statement of Edward Williams refers to CE01 and identifies it as 'typical'. No other particulars of McAlpine's claim have been set out in this adjudication*".
68. On 1<sup>st</sup> December 2003, McAlpine's solicitors replied to Transco's letter. They said that the referring party's claim was set out in its letter of 6<sup>th</sup> October 2003 and in the information attached to that letter (and also to the Referral Notice). It said that the information in the examples was included in order to explain how the interest claimed had been calculated "and to assist the adjudicator's understanding".
69. The adjudicator gave Transco until 5<sup>th</sup> December 2003 to reply to the Notice of Adjudication and the Referral Notice (see letter of 2nd December 2003). On 3<sup>rd</sup> December 2003, in anticipation of Transco's response, the adjudicator ordered that: "McAlpine may as indicated in my facsimile of 24<sup>th</sup> November

2003 submit a Reply within four days of receipt of Response. I reiterate that any Reply shall relate only to those matters raised in the Response but not addressed in the Referral Notice.

70. The Response of 5<sup>th</sup> December 2003 construes paragraphs 15 and 16 of the Notice of Adjudication as disclosing no cause of action against Transco. It said that the Notice of Adjudication was limited to the claims in paragraphs 18 and 19 of the Notice. These paragraphs referred to the payment of adjudicator's reasonable fees and expenses and the request that the adjudicator provide reasons. The particular paragraphs must have been cited. in error.
71. The Response also contends at paragraph 15 that McAlpine had referred the claim of £69,965.16 or such other sum on two bases: (a) The letter of G<sup>tr</sup> October 2003 and (b) as a consequence of Transco's failure to certify the amount due by the assessment date (clause 51.4 of the contract) and/or the amount stated to be due in a certified payment corrected in a subsequent certificate under clause 51.3 of the contract.
72. Transco makes the point that under the contract it is the contract manager and not Transco which is under an obligation to certify and contends that any claim against Transco must contend that Transco has interfered with the project manager's independent role and says that no such claim has been made.
73. Reference is made to the letter of 6<sup>th</sup> October 2003 at paragraphs 18 and 26 of the submission. Transco claims that neither the letter (nor the one dated 1<sup>st</sup> December 2003) crystallises or identifies any evidence upon which the adjudicator could find that the procedures in clauses 60 to 65 had not been followed or that there had been a breach of obligations under clauses 60 to 65 or that there had been a failure to certify under clauses 50 and 51. This is in line with the case which Transco has maintained since the dispute started.
74. At paragraph 26 Transco argued what it regarded as a matter of principle, namely that no evidential proof had been given of McAlpine's contention that it was entitled to be paid in the month immediately following the period in which the costs in respect of compensation events were incurred.
75. The Response goes on to explain Transco's contentions in relation to the interest calculations including its contentions relating to the compensation events. Paragraph 39 contends that there does not appear to be any dispute that the listed compensation events were not properly assessed in accordance with the building contract. It has therefore not submitted any evidence on this matter. It notes that McAlpine (dealing with implementing compensation events) makes no reference to the effect of clause 65.1 either in the Notice of Adjudication or in the Referral.
76. Transco further says that it did not re-serve the project manager's schedule of 13<sup>th</sup> August 2002 because it said that this was not relevant to the issues raised by McAlpine. It would have only been relevant to an alternative claim that was not being pursued.
77. On this point, the Response states as follows: "41. *The schedule attached to McAlpine's letter of 6<sup>th</sup> October 2003 is drafted not on the basis on which the compensation event occurred but on the basis of the date upon which the work was undertaken. This does not fall within the carefully drafted definition set out in clause 65.1.*" Paragraph 42: *"Accordingly, Transco have limited the evidence that they have submitted on this issue as McAlpine have provided no evidence and have not referred a dispute on the basis that there has been a breach of contract by Transco in respect of the assessment process itself."*
78. At paragraph 53 of the Response, an important paragraph, Transco notes that: *"No particulars of the factual background, the dates on which work was actually undertaken or the contractual basis upon which the right to payment and interest is crystallised has been given by McAlpine in the Notice of Adjudication or the Referral"*.
79. At paragraph 54 Transco asserts that events were administered in accordance with the contract and gives an example which it cites carefully only as an illustration and underlines that there is no allegation in the Notice of Adjudication or Referral Notice that the compensation events have not been administered properly.

80. By a letter dated 8th December 2003 McAlpine's solicitors wrote to Mr Simmonds complaining that Transco had provided new information in the Response. This was described in argument by McAlpine's counsel as *"an ambush"*. I do not accept that this is correct, but, if it is, the implication is that a defendant to an adjudication should not be permitted to raise matters which have not previously been discussed between the parties. McAlpine asked to be given until 4 p.m. on 12<sup>th</sup> December on which to file its Reply. This was an extension to the four days for the Reply which the adjudicator had ordered on 3<sup>d</sup> December 2003.
81. On 9th December 2003 Mr Simmonds notified the parties that he had extended McAlpine's time for filing the Reply to 12<sup>th</sup> December 2004. He said that he was concerned at the provision of alleged new information, absence of prior discussion etc. and he confirmed that McAlpine must avoid raising any new issues which entitled Transco to make further comment, thus delaying his decision.
82. On 12<sup>th</sup> December 2003 McAlpine served its Reply with appendices which it described as *"rather bulky"* (500 pages). Despite the adjudicator's order that it should relate only to matters raised in the Response, after providing a brief chronology it included the documents relating to specific **compensation events which were** said to account for 85% of the total amount of interest claimed.
83. The explanation for the extent of the Reply was: *"It has been necessary to send these attachments as evidence to deal with the responding party's assertion that the referring party has failed to provide any detail of the factual background for the compensation events in relation to which interest is claimed. As you will note from the Reply document itself, the documents were not originally included with the Referral as our client did not believe that there was any disagreement between the parties on the factual background until it was raised by the responding party in its Response"*. This is a surprising submission when the project manager's schedule of 13<sup>th</sup> August 2002 had been received by McAlpine but itself had received no detailed response from McAlpine.
84. The Reply rejects Transco's basic case. McAlpine contends (paragraph 13) that its case is that the project manager did not follow the procedure in the contract for the assessment of compensation events. In relation to the nine compensation events which it deals with, the factual accounts go much further than the 6th October 2003 schedule and support an underlying case that the compensation events did need to be investigated.
85. McAlpine explains its interest calculation and the need for appendix 1 as follows: *"31. In relation to paragraph 53 of the Response, the referring party did not provide particulars of the factual background in the Referral or the dates upon which the work was actually undertaken as these issues were not in dispute. The referring party still understands this to be the case. Be that as it may, to assist the adjudicator, the referring party has prepared histories by way of example of the applications and payments in respect of the following compensation events - 01, 04, 05, 14, 22, 24, 38, 39 and 58 (which includes 62 and 66) ....."*
86. Paragraph 33 of the Reply notes that the interest claimed in relation to the items for which chronologies had now been provided equated to £59,728.02, i.e. 85% of the total interest claimed. The chronologies which were appended were very detailed and put in a form which was potentially contentious.
87. On 12<sup>th</sup> December 2003 Transco registered its immediate objection to the service of evidence which it said was on McAlpine's own admission *"extremely bulky"*. It contended that the evidence was not an answer to paragraph 53 of the Response which did not offer affirmative evidence but merely noted the absence of any factual background to the dispute. Transco contended that it did not offer any evidence which required a response and that all it was doing was to deny McAlpine's assertion. Transco also claimed that at paragraph 13 McAlpine made the new allegation that the project manager did not follow the procedure in the contract for the assessment of the compensation events. Transco invited the adjudicator to decline to consider the evidence. Transco no doubt could also have contended that this submission followed the adjudicator's own ruling of 3<sup>rd</sup> December 2003.
88. On 14<sup>th</sup> December 2003, the adjudicator gave his interpretation of the ebb and flow of the procedure in an important letter to the parties. He summarised the position as he saw it: *"(1) McAlpine's case set out in the Referral was simply that payments in respect of various compensation events had not been certified"*



*when they ought to have been. No details were given to prove the claim - dates of notification of the compensation event, provisions of or requests for a quotation, request for and/or provision of further information, period of negotiation etc."*

89. He went on: *"It is in fact necessary to examine the Referral Appendices to glean some information in this respect. From Appendix 6 it appears that Transco in their letter of 13<sup>th</sup> August 2002 first raised the possibility that it may have been McAlpine who were responsible for delaying the certification"*.
90. He noted that Mr Williams in his witness statement gave an example of the sort of detail which would be necessary to establish an entitlement to interest. Transco drew attention to the situation which had already caused Mr Simmonds some concern. In other words, Mr Simmonds said that he did not consider that Transco had *"ambushed"* McAlpine. I have already expressed the same conclusion. He went on: *"5. Transco query in principle the right of McAlpine to provide such evidence in a Reply. They contend that it ought to have been provided with the Referral and they say that they have not had an opportunity to address it"*.
91. The adjudicator said that in order to reach a conclusion as to the entitlement to interest he must decide in each case who was responsible for the delay to certification. *"It is not so much a case of ascertaining basic facts regarding compensation events - these are set down at appendix 11 of the referral; it is the justification for an entitlement to interest arising out of these facts that is missing and it is up to McAlpine as the referring party to discharge the burden of proof in this respect"*.
92. Mr Simmonds went on to say that he was unable properly to investigate the other 46 or so compensation events *"for lack of evidence which McAlpine ought to have realised would be necessary"*. He went on to say that he was sure that both parties would want to conclude the matter without recourse to further proceedings. From this I infer that he was saying that if he had had to determine the matter referred to him for adjudication on the basis of the information available at that stage, there would have been insufficient evidence at least in relation to the 46 cases to find for McAlpine. He went on to say that if the matter was to be dealt with in this adjudication on the merits he would need McAlpine to provide similar evidence to that which they provided in the nine cases and that Transco would need to have time to consider the new evidence. He asked the parties for their comments.
93. On 15<sup>th</sup> December 2003 Osborne Clarke on behalf of Transco replied to say that the schedules in the Reply represented an entirely different case to that in the Notice of Referral, a case moreover which had previously been rejected as irrelevant. Transco asked a series of questions in relation to the proposed directions. It made it clear that it chose not to serve evidence regarding the administration of the compensation events because no claim on that basis had been advanced in the Referral Notice. It explicitly reserved its position in relation to the adjudicator's jurisdiction to consider the new issues and in relation to natural justice. The letter could not be read as consenting to the adjudicator varying or enlarging his original jurisdiction.
94. McAlpine also responded to the adjudicator on 15<sup>th</sup> December 2003. Its letter contended that the new material constituted a defence and that the burden of proof was on the responding party not the referring party. It reaffirmed that its interpretation of the contract was that set out in the letter of 3<sup>rd</sup> October 2003 and its contention that the implementation provisions in the contract did not affect the referring party's entitlement to payment for compensation events.
95. On page 2 of the letter it reaffirmed that the referring party was not obliged to give reasons in the referral for the alleged late payment etc. because none of these were relevant under the contract.
96. In relation to the alleged introduction of new material the letter said under the heading *"alleged introduction of new material"*: *"Any new material which the referring party now seeks to introduce is in direct response to the issues raised in the responding party's response. The referring party is not seeking to introduce any new heads of claim. The referring party's case was and remains that the project manager failed to include the compensation event assessments in the appropriate certificates and that the referring party has an automatic entitlement to interest"*.
97. McAlpine responded to Transco's comment that it had not proved that the works were carried out when they said they would be: *"The time of completion of the works was never an issue between the parties."*

*In the first instance we invite you to ask the responding party if it now disagrees with the completion dates upon which the interest calculation is based. If it does, the referring party will be happy to provide you with proof on the new issue”.*

98. McAlpine concluded by offering to provide further information on a further six compensation events which, together with those already provided, constituted 954 of the claim for interest. The new documents when produced amounted to about another 1000 pages.
99. On 16<sup>th</sup> December 2003 Mr Simmonds gave further directions saying that *“I should make my decision on the basis of the evidence which is undoubtedly available”*. He ordered that McAlpine should provide evidence on the six further compensation events. Transco was ordered then to set out whether it agreed substantially with the evidence submitted by McAlpine and if not to indicate how it was incorrect or misleading. Thereafter there was to be no further evidence.
100. Osborne Clarke on behalf of Transco responded to the adjudicator on 17<sup>th</sup> December 2003. Referring to his letter of 14<sup>th</sup> December 2003 they said clearly on behalf of Transco that the claim had not been proved by McAlpine and should have been rejected. They protested that Transco was now being forced to consider a claim that had not been properly articulated by reference to the contractual provisions or submitted to the project manager under the terms of the contract. The letter also asked for various clarifications of the adjudicator's order.
101. The adjudicator responded to Transco's communication on 17<sup>th</sup> December 2003. He set out his current understanding of McAlpine's claim. *“McAlpine's claim to interest is based on the allegation that certain compensation events were not implemented in accordance with the contract, that assessments were subject to correction (paragraph 11.1 and 11.2 of the Notice of Adjudication and the Referral). As regards either or both of these allegations, the date (s) the work was carried out may or will be relevant, but it (sic) the process of assessment by the PM (project manager) which needs to be examined in each case order to enable the determination of responsibility for delay in or, if appropriate, correction of an assessment. An entitlement under clause 51.3 does not necessarily mean that there has been a breach of contract by the PM in the exercise of his responsibilities under clauses 60 to 65; a claim under clause 51 probably does”*.
102. He went on to say that *“I consider that the outcome of the claim made under clause 51.3 or clause 51.4 must (as far as this adjudication is concerned at least) depend on the behaviour of both the PM and McAlpine in the execution of their duties under clauses 60 to 65”*.
103. By this comment, I understand the adjudicator to be reaffirming his view that this evidence should have formed an integral part of McAlpine's proof to its entitlement to interest and was not merely a matter raised by Transco by way of defence. The letter concluded by asking when Transco would be able to serve its further evidence.
104. On 18<sup>th</sup> December 2003, a Thursday, McAlpine served its evidence in relation to the six further compensation events.
105. On 23<sup>rd</sup> December 2003, the following Tuesday, Transco served a Rejoinder. It consisted of a 16 page submission with three full lever arch files of attachments. It made it clear that it was providing the further evidence under protest. It underlined that the letter from McAlpine dated 3<sup>rd</sup> October 2003 stated that the claim was not based on an assessment of compensation events and that the dispute was crystallised not by reference to certification or the assessment of compensation but by the date on which payment should have been made. It asserts that this formulation of the dispute was entirely different from the dispute identified in the Reply and the one which the adjudicator had suggested that he **would** consider.
106. Transco's Rejoinder referred to the schedule dated 6<sup>th</sup> October 2003 and said that the claim did not calculate interest by reference to timing issues raised by clauses 61.2, 62.1 and 62.3 of the contract. The 15 page submission then proceeds to argue the law.
107. Under protest Transco also served an Appendix 18. This rejoinder/ compensation event evidence runs to 44 pages. It starts by complaining about the unfairness of the procedure and the lack of clarity as to the basis on which the claim is being made. Transco claimed that it has been seriously prejudiced by

the fact that it had been given insufficient time to prepare witness evidence and documentary evidence in response to the evidence that McAlpine had now presented. It made specific complaint in relation to lack of time to interrogate its central archives for further documentation and to provide a detailed analysis of the issues that arose out of the valuation of the outbreak of foot and mouth disease. The submission then endeavoured to deal with the specific compensation events raised.

108. On 29<sup>th</sup> December 2003 DLA, on behalf of McAlpine, sent a three page letter to the adjudicator arguing points which they said arose out of the Rejoinder. On 30<sup>th</sup> December 2003 it was pointed out that Transco had not agreed that the adjudicator was entitled to use his inquisitorial powers in respect of matters which were outside the original Notice of Adjudication.
109. On 8<sup>th</sup> January 2004 Mr Simmonds gave his decision in the adjudication. It dealt in detail with jurisdictional and procedural matters. He concluded that McAlpine had not changed the basis for its claim. The problem, he said, was that McAlpine, prior to its Reply, had not provided details in respect of each compensation event to enable him properly to decide whether or not McAlpine had been claiming interest in respect of each compensation event in circumstances which were not Transco's responsibility (page 10 of his decision).
110. He took the view that he needed further information and that The Act and paragraph 13 of the Scheme gave him the necessary powers. Paragraph 13 of the Scheme said that the adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute and shall decide on the procedure to be followed in the adjudication. It then sets out instances of how this particular power may be exercised.
111. The adjudicator went on to set out his understanding of Transco's objections and concluded that the parties always knew what the dispute really was. He said that it was proper that he should be in possession of the available evidence to reach the best decision. He concluded that McAlpine should have realised that he would have needed the assessment histories in order to reach his decision. He said that such an omission was not a fatal flaw and that he acted within his powers in calling for further evidence. He concluded that his direction related strictly to the dispute and did not amount to a modification or enlargement. He said that Transco was given as full an opportunity, as the adjudication procedure permits, to address the further evidence. The information ought to have been reasonably to hand. He rejected any suggestion that they had been treated unfairly and said that they had not requested an extension of time for his decision. This latter point must be balanced by the fact that for some time previously and at that time Transco had vociferously been making fundamental objections to the procedure.
112. The adjudicator then proceeded to deal with the substance of the dispute as he understood it. This included his analysis of both clauses 50 to 52 and 60 to 65 of the contract. He then analysed each compensation event in detail and gave his decision. He arrived at a total of interest as at September 2002 of £54,327.46 and cumulative interest to January 2004 took the total to £57,679.98. He then made what he described as a nominal deduction of 10% to take account of the absence of a relational database and the non compliance with the procedure relating to compensation events as a result of the process adopted by McAlpine.
113. He ordered Transco to pay £52,119.62 less the £6,925.08 already paid. In making his award of costs he said that "*much of the costs of correspondence could have been avoided if McAlpine had in the first instance provided the compensation event histories which they ought to have realised would be required*".
114. Transco contend that the adjudicator decided that he would have to find against McAlpine on the narrower basis on which it referred the dispute but that this would not resolve the underlying dispute. In these circumstances, the adjudicator decided that he could serve the parties better by deciding the dispute which he believed ought to have been referred, namely the dispute which required an investigation of the underlying facts. As the adjudicator himself put it- "*I consider it proper that I should be in possession of the available evidence to enable me to reach the best decision*". Transco say that he was not required to reach "the best decision" on the dispute as a whole but to reach a decision on the matters on which he was required to adjudicate, namely those issues that had been referred to him.

### The law

115. The jurisdiction of the adjudicator is derived from section 108(1) of the Housing Grants Reconstruction and Regeneration Act 1996 (the Act) under which a party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure which complies with the section which imposes strict time limits under which the maximum period within which the adjudication must take place is normally 42 days.
116. The history of the events leading up to the passing of the Act has been set out by Lord Justice May in **Pegram Shopfitters v. Tally Weijl(UK) Ltd.** [2003] 91 CLR, 173. It is clear from section 108(2)(a) that a party may give notice at any time of its intention to refer a dispute to adjudication. A court must recognise that Parliament has introduced an intervening stage in the dispute resolution process.
117. The way in which this process has been developed was not, I think, envisaged by Parliament at the time when the legislation was passed. At the Report stage in the House of Lords, Lord Ackner gave a flavour of the main purpose of adjudication as it was then envisaged. "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." (Hansard HL vol 571 Cols 989,990)
118. The procedure is presently being used in disputes which are being resolved long after contracts have come to an end as a preliminary form of intensive confrontational litigation. It is not by any means always "relatively inexpensive".
119. This is the third in a series of adjudication cases that have come before me recently. In **Amec Projects Ltd v. Whitefriars City Estates Ltd.** [2004] EWHC(TCC) 393, 27<sup>th</sup> February 2004, the costs of the adjudication and enforcement proceedings were estimated at £277,000. In **AWG Construction Services Ltd. v. Rockingham Speedway Ltd.** 2004 EWHC (TCC) 888 the costs came to over £1 million. In this case I am told that the costs are about £100,000 in relation to a claim for £45,000.
120. In this case McAlpine's application for payment was made to Transco on 11<sup>th</sup> July 2003. If other forms of dispute resolution had been followed, including arbitration and litigation, it would have been possible to have had a final determination of the dispute by now. If the agreed form of dispute resolution had been litigation rather than adjudication, the procedure would have encouraged co-operation between the parties by way of meetings, mediation etc. in order to seek to achieve an amicable solution before trial.
121. Having said this, I fully recognise that in many disputes adjudication provides a provisional answer to disputes which is either accepted by the parties or leads to an early resolution of the dispute. I also readily acknowledge that the courts must interpret the Act in a way which furthers the intention of the legislation.
122. The role of the courts is well set out in two passages in the judgment of Dyson J (which have been approved by the Court of Appeal) most recently in **Pegram Shopfitters**). In **Macob Civil Engineering Ltd. v. Morrison Construction Ltd** [1999] CLR 1 at page 6: "The timetable for adjudications 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." Again in **Macob** Dyson J said: "*Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening stage in the dispute resolution process*".
123. In **Thomas-Frederic's (Construction) Ltd. v. Wilson** [2003] 91 CLR 161 Simon Brown LJ emphasised that the policy of "*pay now, argue later*" did not mean that the adjudicator's decision was binding if it was outside the adjudicator's jurisdiction.
124. Whilst it is clear from section 108(f) of the Act that the adjudicator may take the initiative in ascertaining the facts and the law (see also **Woods Hardwick Ltd. v. Chiltern Air Conditioning** [2001] BLR 23) this is subject to the overriding duty to act fairly and within the ambit of dispute which the adjudicator has been asked to decide.

125. This requirement is emphasised in paragraph 12(a) of the Scheme. It says: "*The adjudicator shall: "(a) 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"*".
126. The following challenges have been made in other cases.
- (1) The adjudicator was not the person nominated under the contract or not appointed in accordance with the agreed procedure (see **Amec Ltd. Capital Projects Ltd v. Whitefriars City Estates** [2004] EWHC(TCC) 393, 27<sup>th</sup> February 2004.
  - (2) There was a real risk that the adjudicator was biased (see **Glencott Development v. Barrett** [2001] BLR 207.
  - (3) The adjudicator had no jurisdiction to reach the decision because he did not reach a decision that was responsive to the issues referred in the adjudication or decided matters that were not referred (see e.g. **Ballast plc v. the Burrell Company** [2001] BLR 529 and **C & B Scene Concept Design v. Isobars** [2002] 82 CLR 154 and, in particular, paragraphs 29 and 30 of the judgment of Sir Murray Stuart-Smith at page 161).
  - (4) There was no dispute on which the adjudicator could reach a decision because a dispute can only arise where the subject matter of the dispute has been brought to the attention of the other party and the other party has had a proper opportunity to consider it (see **Fastrack v. Morrison** [2000] BLR 168).
  - (5) Notwithstanding the relatively free hand that the adjudicator has in directing the procedure, the adjudicator acted unfairly and to the significant prejudice of the defendant in failing to give the parties an equal opportunity to present their case with the result that one party was prejudiced. This problem can occur where one party adds new claims, arguments or evidence to which the other party is not given an adequate opportunity to respond before the adjudicator reaches his decision (see e.g. **Discairn Project Services v. Opek Prime Development Ltd.** [2000] BLR 402).
127. In this case Transco is arguing issues of both natural justice and materiality/prejudice.

**What constitutes the dispute?**

128. McAlpine says that the dispute was a disputed claim for interest in the sum of £69,000 as claimed in the letter of 6<sup>th</sup> October 2003 and the schedule attached thereto supporting the sum claimed. It says that this claim constituted the dispute between the parties. Transco says that the dispute (which under section 108 of the Act includes "any difference") must refer not only to the bare money claim but also to the basis on which the claim is made and which they have had an opportunity to accept or reject. This illustrates the nature of the debate which has taken place in a number of adjudication cases.
129. In **AWG v. Rockingham**, [2004] EWHC 888(TCC) I reviewed the existing authorities, including **Carter v. Nuttall** [2002] BLR 312 and **London and Amsterdam Property Ltd. v. Waterman Partnership Ltd.** [2003] EWHC3059(TCC). I said at paragraph 141: "*What constitutes a dispute will depend in each case on the circumstances and the context in which the referral is made. In some cases the issues 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 adjudication? and, secondly on what basis? If the basis which is argued in the adjudication is wholly different to that which the defendant has had an opportunity to respond to in advance of the adjudication this may constitute a different dispute not referred to the adjudicator or, put another way, in so far as the adjudicator reaches a decision on new issues, it is not responsive to the issues referred to him.*" It seems to me that this formulation follows the line of cases comprehensively reviewed by Judge Wilcox in **London and Amsterdam Property Ltd. v. Waterman Partnership Ltd.**
130. The problem in these cases is often not whether there is a dispute, the point considered by the Court of Appeal in **Halki Shipping Corporation v. Sopex Oils** [1998] 1 WLR 727, but what is the nature of the dispute or difference which has been referred to the adjudicator? In particular, where the parties are represented by experienced solicitors it may be unrealistic to say that the basis on which the claim is made and discussed and on which it has been referred to the adjudicator does not form part of the dispute on which the adjudicator must give his decision. Each case must be considered separately.

131. In order to focus on the issues I asked the parties to comment on a series of questions which are derived from the existing decided cases and, in addition to sharpening the issues in this case, may provide pointers to adjudicators as to the questions which they should have in mind when their jurisdiction is challenged or where further evidence is tendered in the course of the adjudication. The questions with the answers of the parties are as follows.
132. **(1) What issues were discussed at the meeting between the parties before service of the Referral to Adjudication and the Notice of Dissatisfaction?** The parties are agreed that little time was taken at the meeting on 29<sup>th</sup> September 2003 in discussing the interest claim. The only evidence of what was discussed are the references to the meeting in the letters of 3<sup>rd</sup> October 2003 and 6<sup>th</sup> October 2003. There is certainly no evidence that the Transco project manager's schedule of 13<sup>th</sup> August 2002 was discussed or even referred to at the meeting.
133. **(2) What is the dispute that was referred to the adjudicator after the defendant had had an opportunity to respond to the claims put forward by the claimant?** The claimant says that it was the claimant's claim for interest under clause 51 of the contract. The defendant says that it was the claimant's claim for automatic interest. The way the claim was put was identical in relation to every compensation event and required no analysis of the underlying facts relating to an individual compensating event.
134. **(3) What was the basis on which the dispute was referred? Was it (a) general and/or (b) by reference to specific issues.** The claimant says that the dispute was referred on a general basis, albeit on the claimant's interpretation of Sections 5 and 6 of the contract and the corresponding evidential requirements for the claim to succeed (namely, that the claimant had to show a failure to certify in the month following execution of the work). The defendant says it was a specific referral based on the claimant's interpretation of the contract that it was entitled to automatic interest.
135. **(4) Was the adjudicator's decision responsive to the issues referred?** The claimant says that it was. The adjudicator decided when the project manager ought to **have certified payment** and awarded interest in respect of any late certification. The defendant says that the decision was not responsive because any decision based on the Referral Notice should have been confined to the issue of automatic interest. If the adjudicator rejected the claimant's case on this issue he should have made no award in this adjudication.
136. **(5) Were new issues raised in the course of the adjudication?** The claimant says that the defendant raised a new issue in its Response by way of defence, namely that the process of assessment carried out by the project manager under section 6 of the contract was relevant to the question of the claimant's entitlement to interest. The defendant says that during the course of the adjudication the adjudicator made it clear that he did not agree with the claimant's contention that it was entitled to automatic interest and that he needed to understand the process of each compensation event. He went further and said that McAlpine should have known that.
137. **(6) If so, were the new issues objected to by the other party?** The claimant has not answered this question. It has commented that the defendant sought an extension of time to deal with the new issue. The defendant says that the new issues were objected to. Specific objection was taken to the fact that the claimant was permitted at a very late stage to serve material which the defendant did not have a proper opportunity to consider. Because of the lateness of the material and the quantity of the material, the defendant was prejudiced because in the time available it was unable to provide a full answer to the new material which had been served.
138. **(7) Was any such objection one which goes to the fundamental nature of the dispute referred?** The claimant says that the question is not applicable in this case. The defendant says that it does go to the fundamental nature of the dispute referred because the claimants are relying on a different set of materials in support of their claim.
139. **(8) If so, does the objection go to the fairness of the procedure?** The claimant says that the question is not applicable. The defendant says that it does go to the fairness of the procedure if a party is unable to deal with the material as fully as appropriate.

140. **(9) If there was a breach of the procedure, does it significantly affect the fairness of the decision?**  
The claimant says that the question is not applicable. The defendant says that it does affect the fairness of the decision in that it was not able to put its case fully for the consideration of the adjudicator. It would not have been put in this position if the claimant had included the information with the Referral Notice as the adjudicator ruled that it should have done.

#### Conclusion

141. The jurisdiction of the adjudicator is derived from the contract between the parties and specifically clause 90.1 which provides that any dispute under the contract is to be settled by adjudication. The jurisdiction of the adjudicator is also derived from the Act and from the Scheme.
142. The first question is: What was the dispute referred to the adjudicator and on what basis? In my view, the adjudicator was entitled to reach the conclusion which he **summarised in his** letter dated 14<sup>th</sup> December 2003 to the extent that the **claim** referred to him was that set out in the Notice of Adjudication that McAlpine's claim was for interest payments, and that the basis of the claim was that set out in the Referral Notice, namely that payments in respect of various compensation events had not been certified when they ought to have been.
143. I am satisfied that in its Response dated 5<sup>th</sup> December 2003 Transco confirmed its response to the specific points raised in McAlpine's claim and its contention that McAlpine could not succeed on the basis on which the claim had been put forward. In my view, it deliberately stopped short of setting out its affirmative contention on each individual claim.
144. The adjudicator was entitled to conclude, as he did, that this was not an ambush but a reiteration of the stance which Transco had taken since the dispute started. McAlpine had never responded to the schedule which Transco had submitted on 13<sup>th</sup> August 2002. Transco was entitled to take the view that this was not part of McAlpine's case.
145. It seems to me that it is clear from the Act that it is for the party who refers the dispute to adjudication to define the issues which are referred. In the absence of agreement between the parties to vary the terms on which the dispute is referred, the adjudicator has no jurisdiction to vary the basis on which the reference has been made. He can, of course, take the initiative in ascertaining the facts and the law in relation to the dispute referred to him. (See section 108(2)(f) of the Act and paragraph 13 of the scheme).
146. Unfortunately, it is not enough for the adjudicator to say that he was sure that both parties would want to conclude the matter without recourse to further proceedings. If the existing referral does not enable him to deal with the dispute in the way in which he wishes, he is powerless to alter the terms of the referral in the absence of the agreement of both parties. So long as the dispute remains before him, he must decide only the issues referred to him.
147. In the face of Transco's submissions on jurisdiction, he had no basis for embarking on a consideration of what he regarded as the real dispute. He had no jurisdiction to embark on a course which he clearly thought was outside the terms of the Referral Notice without the agreement of both parties. In my view, even though he was entitled to take the view that the parties knew the nature of the dispute in view of the past history of the case, the course on which he embarked after 14<sup>th</sup> December 2003 went far beyond the type of investigation permitted by section 108 (2) (f) of the Act.
148. New issues were introduced in the course of the adjudication without the agreement of Transco, both by McAlpine and by the adjudicator himself. This evidence was objected to by Transco on the basis that it represented a change in the whole basis on which McAlpine put its claim. In my view, the case ultimately being put forward by McAlpine, represented such a change in the nature of the dispute referred to the adjudicator that Transco has a realistic prospect of arguing successfully (this being the test which I must apply) either that the adjudicator failed to give a decision which was responsive to the dispute which was referred to him or, put another way, gave a decision on what amounted to a different dispute which had not been referred to him. In either case, he will have acted beyond his jurisdiction.

149. I must also consider the alternative case on the premise that the adjudicator was entitled to embark on the inquiry which he did to obtain the assessment histories, provided that in doing so he acted fairly between the parties.
150. This question must be considered in the context of the adjudicator's decision that McAlpine should have provided the additional material as part of the case which accompanied the Referral Notice. If this had happened, Transco would have had a proper opportunity to deal with it. As it was, Transco served its response on 5<sup>th</sup> December 2003 which was a response to points raised in the Referral Notice, but without dealing in detail with the compensation events. One week later (after an extension of time) on 12<sup>th</sup> December 2003 McAlpine served particulars of nine events amounting to 500 pages and on 18<sup>th</sup> December it served evidence in relation to six further compensation events.
151. Transco served its response under protest on 23<sup>rd</sup> December 2003. This was the last possible date before Christmas. It had 11 days to consider the first nine compensation events and five days (including a weekend) to consider the further six compensation events. The adjudicator rejected Transco's protest by saying that Transco had been given as full an opportunity as the adjudication procedure permitted to address the further evidence.
152. In my view, it is highly arguable that the adjudicator's rejection of the protest was incorrect for two distinct reasons. In the first place, if, as the adjudicator decided, the evidence should have been served with the Referral Notice, Transco would have had from 17<sup>th</sup> November 2003 to respond to the very detailed evidence which had been served on it. Secondly, this was new evidence in support of a new case. Transco has a realistic prospect of arguing at trial that in any event it was not afforded a fair opportunity of responding to the evidence which had been served at such a late stage.
153. The final question arises as to whether or not Transco was prejudiced by the adjudicator permitting McAlpine to serve evidence at what was a very late stage in the procedure. Again, the test to be applied is whether Transco has a real prospect of succeeding on this issue.
154. Mr Brookes set out the alleged prejudice in paragraphs 51 and following of his witness statement dated 19<sup>th</sup> March 2004. He underlined the amount of new and, he said, selectively collated evidence to which a response was required in a very short time. He noted that the defendant (a) had no realistic prospect of understanding the quantum of the claimant's claim in respect of the compensation event claim; (b) was unable to retrieve from its archive all documentation relating to Compensation Event No. 22 concerning the well publicised outbreak of "foot and mouth"; (c) was unable to locate all the relevant minutes of meetings such as "early warning meetings" or to interrogate central archives for all relevant documentation, enabling it to prepare, assuming time was available, a comprehensive response; (d) had no opportunity to consider the claimant's new evidence with its relevant witnesses. Mr Brookes went on to summarise the unfairness and prejudice which resulted from the adjudicator's decision.
155. It seems to me that Transco has a real prospect of showing such prejudice. on the facts of this case, I also conclude that Transco has a real prospect of succeeding in showing that the breach in the fairness of the procedure significantly affected the fairness of the decision. This must follow, since the decision is based to a significant extent on the new material.
156. In these circumstances I decline to order the enforcement of the adjudicator's decision. The matter can, if the parties wish, go to a full hearing on the merits.

MR MARC ROWLAND appeared on behalf of the claimant.

MR SIMON HARGREAVES appeared on behalf of the defendant.