

1. **JUDGE THORNTON QC 1. Introduction** : This judgment relates to an application by William Verry Ltd. ("Verry") for summary judgment for a sum that an adjudicator has directed should be paid to it by North West London Communal Mikvah ("NWLCM"), an unincorporated charitable trust established with the object of providing a Mikvah, a Jewish Ritual Bath, in Golders Green, London, NW 11. The necessary construction work was carried out by Verry pursuant to a JCT 98 Standard Form of Building Contract, Private with Quantities edition and the Architect nominated under that contract was Comprehensive Design (London) Ltd. "CDL" . The contract provided that the contract sum, prior to any variations or additions, was £2,445,245.00 and that the date for completion, prior to any extensions of time being granted, was to be 10 December 2001 with a contract period of 68 weeks.
2. The work and its performance and valuation have not been dispute-free so that three separate adjudications and a fourth abortive adjudication have taken place. This application arises out of the third adjudication which, like the second, had been carried out by Mr. Bruce Kettle FRICS. The decision was dated and issued on 23 January 2004 and directed NWLCM to pay Verry £67,055.97 plus interest. NWLCM has declined to pay Verry that sum on three separate jurisdictional grounds: that the adjudicator's appointment was invalid because the referral notice was issued one day too late; that there was no relevant dispute in existence when Verry served its purported notice of adjudication and that the adjudicator wrongly, unfairly and without justification failed to consider or decide a critical issue that had been referred to him.
3. **2. The Use of CPR Part 8 Proceedings** : Verry started CPR Part 8 proceedings in its attempt to enforce the adjudicator's decision. Part 8, which is the successor to the originating summons procedure under the old Rules of the Supreme Court, is applicable where a party seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact or where a rule or practice direction requires or permits the use of the Part 8 procedure. Verry essentially seeks a judgment and not merely a decision of certain questions. Part 8 proceedings are designed to cater for decisions of law and not for trials and monetary judgments for which the appropriate procedure is a 7 claim issued with an application for summary judgment. The court may, however, at any stage in the proceedings order that the claim should continue as if the claimant had not used the Part 8 procedure and, if it does so, may give any directions it considers appropriate (CPR 8.1(3)). Fortunately, Verry applied to the court for directions prior to the service of the proceedings and the court ordered that an application for summary judgment should be served with the claim form. This direction had the effect of transforming the Part 8 proceedings into Part 7 proceedings.
4. **3. Essential Factual Background** : The adjudicator's decision arises out of his appointment which was to determine the disputes validly referred to him for decision that had arisen under a construction contract in writing. This appointment, and its terms of reference, inevitably will arise out of a factual background that is known to both parties and since the jurisdictional issues raised by NWLCM involve a construction of both the adjudication notice and the referral notice, it is necessary to have in mind the essential factual background to the appointment of the adjudicator when construing and interpreting the documents in which those terms of reference are enshrined. It is now well established that an adjudicator's terms of reference, where the adjudication is backed by the mandatory terms of the Housing Grants Regeneration and Construction Act 1996 ("HGCRA") , are to be found in the notices of adjudication and referral and in any document identifying the dispute that these documents refer to directly or by necessary implication. Thus, all these documents must be construed against the same matrix of facts that would be admissible as an aid to the construction of any commercial contract or agreement.
5. The first adjudication arose out of disputes in connection with the build up of Verry's application for payment no 29 and resulted in a decision dated 27 March 2003. This decision was complied with.
6. The contract period was greatly extended for reasons that were in dispute. However, by May 2003, Verry was contending that the works were had achieved practical completion on 19 May 2003 and that time should have been extended up to 28 April 2003. A submission claiming an extension of time was submitted by Verry to CDL on 12 June 2003 which CDL intimated that it would consider

7. A second adjudication arose out of disputes in connection with the build up of Verry's application for payment no 34 submitted a short time before practical completion was certified. These disputes concerned many of the additions and omissions that were valued in that application as well as Verry's claims for extensions of time and loss and expense.
8. The adjudicator first decided that the subject matter of the referred disputes was sufficiently different to the earlier referral as not to prevent any decision he made from being enforced. He did, however, decide that he would not decide any valuation issue which had already been decided in the first adjudication but which was not now covered by additional or new information. He then decided that Verry should receive 206 days, extension of time with a revised date for completion of 24 October 2002, that the revised Contract Sum that should result from interim application 34 should be £2, 445, 245 and that the net sum thereby payable to Verry was £334,651.00. This payment decision had been reached by deducting the full amount of retention, being 5% of the gross revised contract sum that he had decided upon. This was the maximum permitted retention allowed prior to practical completion. This payment decision was also complied with.
9. In reaching his decision, the adjudicator valued the variations and the loss and expense attributable to the delay and disruption Verry had incurred. These totals were added to the Contract Sum so that the work was being valued on the basis that it was complete. The adjudicator did not reduce the overall value of the work to take account of any defects since neither party had referred to defects in their submissions. He did, however, comment that CDL had notified Verry of a very large number of snagging items, many of which were of a minimal nature and that CDL had previously made it clear that practical completion would not be certified until all snagging had been completed to the Architect's satisfaction.
10. The adjudicator's decision was dated 12 August 2003. On 18 September 2003, CDL issued a list of the snagging and incomplete items about which Verry had already been instructed to take action. CDL stated that this list followed protracted attempts to achieve practical completion. The letter also stated that Verry was in breach of clause 4.1.1 and that action under clause 4.1.2 would be taken. These references were respectively to Verry's obligation to comply with all instructions issued by CDL and to CDL's entitlement to instruct others to comply with them at Verry's cost if the instructions were not complied with by Verry. A further letter dated 23 September 2003 in similar vein was sent to Verry. These letters were responded to by Verry in letters dated 24 and 27 September 2003. Verry denied that it was in default in any respect or that it had failed to comply with any instruction by CDL. The letter dated 24 September 2003 stated:
"We therefore do not agree with your vexatious use of Clause 4.2.1 of the Main Contract. We firmly state that we are not in breach of this clause and would remind you that should you take the course of action you intend under Clause 4.1.2, you will be in breach of your obligations under the terms of the contract... Your vexations actions are repudiatory breach of contract. ... We therefore request you to withdraw your notice under Clause 4.1.2."
11. On 1 October 2003, CDL certified practical completion as having been achieved on 1 October 2003 *"subject to the notice of non-compliance set out in the letters of 18 September 2003 and 23 September 2003"*. On 24 November 2003, the quantity surveyor appointed under the contract, the Anthony Garson Partnership, wrote to Verry and informed it that it had issued valuation no 34 which was the prelude to the issue of interim certificate no 34. The letter stated:
"the total value of the work notified to us in writing as not being in accordance with the contract is £80,431.22 and we have deducted a proportion of this amount ie £67,055.97 from the gross Valuation."
12. CDL then issued a further interim certificate, no 34, dated 26 November 2003. This was the first interim certificate to have been issued since the adjudicator's previous decision dated 12 August 2003. No further work had been carried out on site since that earlier decision had been issued. The interim certificate stated that no sum was due to Verry even though the size of the retention fund had been reduced from 5% of the gross adjusted contract sum to 2½ % of that sum. This reduced percentage conformed to the contract which provided for such a reduction in interim certificates following practical completion. The certificate had achieved the result that nothing was due by reducing the gross adjusted contract sum previously provided for so that a reduced percentage

retention of 2¹/₂ % deducted from the reduced gross contract sum produced the same net figure as the previously certified net figure deducted from a larger gross figure and a 5% retention.

13. The contract provided that the first half of the sum retained as retention should be paid to the contractor following the issue of an interim certificate issued within a month of practical completion. The interim certificate that was issued was, in consequence, not to Verry's liking and, on 3 December 2003, it served the following notice of adjudication:
"We hereby give you notice on behalf of WVW of its intention to refer to adjudication a dispute that has arisen in connection with its construction contract with you ... The dispute to be referred to adjudication concerns our client's entitlement to the release and payment of the first half of the retention pursuant to Clause 30.4.1.2 of the Contract."
14. The RIGS nominated Mr. Kettle to adjudicate this dispute, the same adjudicator who had acted in the previous adjudication and who had provided the decision dated 12 August 2003. In its referral notice, Verry stated that the decision of 12 August 2003 had decided that the gross value of the work was £2,682,238.93; that that decision was binding until revised in a subsequent arbitration; that a further interim certificate should have been issued following practical completion being certified providing for payment of half the retention withheld from that figure for the gross value of the work; and that the reduction of the gross value of the work in interim certificate no 34 "has deprived WVW of its contractual right to be paid half the retention".
15. In its response, NWLCM raised two jurisdictional issues and then contended that interim certificate no 34 was validly issued since the contract provided that the sum certified in any certificate should be the value of work properly executed. Since the adjudicator's decision, no further valuation nor any further work had been carried out and the valuation leading to interim certificate no 34 correctly revalued the work to take account of the defects identified in CDL's letters to Verry in September 2003 which Verry had declined to rectify. A valuation of the defective work based upon the value of that work in the previous gross valuation was provided in NWLCM's response. The total value of defects was contended to be greater than the figure by which that gross value had been reduced in interim certificate no 34. The response explained that the smaller deduction of £67,055.97 had been used so as to produce a nil balance due to Verry rather than a negative balance which would have involved a repayment to NWLCM
16. The adjudicator, in his decision, decided that Verry was entitled to be paid £67, 055.97. He concluded that it was not open to CDL to reduce the gross value of the work since the value contained in his previous decision could not be reduced until the dispute or difference as to the gross value of the work had been resolved in a subsequent arbitration and no such arbitration had yet taken place. Moreover, the previous adjudication had not addressed the issue of non-conforming works because that question had not been raised in that earlier adjudication. The adjudicator then concluded that he had not been asked in this subsequent adjudication to place a value on the list of alleged defects nor to consider the issue of liability in respect of any item. However, even if he had been asked to consider the defects and their value, he could not have taken any such valuation into account and CDL had been wrong to have done so in its interim certificate no 34. This was because:
"... any abatement or withholding of amounts otherwise due to the Referring Party can only be made from further sums due and not be retrospective to an amount decided in a previous adjudicator's decision."
17. It is against this background that NWLCM's three grounds of resisting payment of the sum decided upon by the adjudicator must be determined.
18. **4. Late Referral Notice** : NWLCM contends that Verry's referral notice was served one day to late and was, in consequence invalid. This has resulted in an invalid adjudication and decision since the late service deprived the adjudicator of jurisdiction to determine the referred dispute. The decision, NWLCM now contends, is therefore unenforceable.
19. To understand this contention, it is necessary to summarise the relevant provisions of the HGCRA and the contract. Section 108(1) provides that a party to a construction contract, which this contract is, has the right to refer a dispute arising under it for adjudication under a procedure complying with that section. The section then provides that the contract shall:

- "(a) Enable a party to give a 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 ... ;*
- (5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply."*

20. Clause 41A of the contract provides for adjudication. Clause 41A.4.1 provides that:
"When ... a Party requires a dispute or difference to be referred to adjudication then that Party shall give notice to the other Party of his intention to refer the dispute or difference, briefly identified in the notice, to adjudication. If an Adjudicator is agreed or appointed within 7 days of the notice then the Party giving the notice shall refer the dispute or difference to the Adjudicator ('the referral') within 7 days of the notice."
- Thus, two notices are provided for. The first, the adjudication notice, must be issued. This is given to the opposing party. It is followed by a referral notice which must be given to the adjudicator and copied to the opposing party. The question that arises is as to the effect of giving the second referral notice outside the stipulated 7-day period starting from the date of the adjudication notice.
21. Clause 41A.5.5 provides that:
"In reaching his decision the Adjudicator shall ... set his own procedure".
- Clause 41A.5.6 provides that:
"Any failure by either Party ... to comply with ... any provision in or requirement under Clause 41A shall not invalidate the decision of the Adjudicator".
22. In this case, Verry issued an adjudication notice on 3 December 2003. The adjudicator was appointed promptly and faxed the parties on 5 December 2003 that Verry should provide him on or before 11 December 2003 with a referral notice. Verry complied with this direction by faxing its referral notice to both the adjudicator and NWLCM on 11 December 2003. NWLCM now contends that this notice should have been dated and served within 7 days of 3 December 2003 and that, notwithstanding Verry's compliance with the adjudicator's direction, the referral notice was served one day too late.
23. NWLCM's contentions are as follows. The contract clearly provides that the referral notice should be given within 7 days of the adjudication notice in circumstances where, as here, the adjudicator was appointed within 7 days of the adjudication notice. The 7-day period runs from the date on which the notice is issued and not from the date of its service so that the relevant 7-day period expired on 10 December. This contractual provision is a mandatory provision since it is intended to conform to the statutory provision contained in section 108 of the HGCRA. This section provides that the contract is to provide a timetable "with the object of securing the appointment of the adjudicator within 7 days of the [adjudication] notice,..". These words are mandatory and have the meaning *"so as to ensure the appointment of the adjudicator within 7 days of the [adjudication] notice"*.
24. It is true, NWLCM contends, that Verry relies on the adjudicator's procedural direction and Clause 41A.5.5 of the contract to validate the late service of the referral notice. This clause entitles the adjudicator to set his own procedure and, by directing that the notice should be served on 11 December 2003, the adjudicator was setting his own procedure in conformity with his contractual power. However, so NWLCM contends, this power does not enable the adjudicator to extend the 7-day period within which the referral notice is to be issued since if he exercised his procedural powers in that way, he would be able to set a procedure which would contravene the HGCRA and it is not a commercially viable reading of the language giving him the contractual power to set his own procedure to allow him to set a procedure that infringes the mandatory language of section 108. In other words, the words of Clause 41A.5.5 are, by necessary implication, qualified by an implied limitation to the effect that the adjudicator's contractual power to set the adjudication procedure to be followed may not be used in a way that results in an adjudication which infringes the mandatory requirements of section 108.
25. Likewise, NWLCM contends that Clause 41A.5.6 is inapplicable to validate this adjudication. In terms, this clause appears to be applicable since it validates an adjudication where a party does not

comply with the contractual requirements of Clause 41A, including, so it would appear, the requirement that the referral notice should be issued within 7 days of the adjudication notice. However, by necessary implication, that power cannot extend to an infringement of Clause 41A which also infringes the mandatory requirements of section 108.

26. Verry seeks to meet these contentions as follows. It firstly contends that the critical 7-day period runs from the date on which NWLCM received the notice of adjudication and not from its date of issue. The referral notice was therefore served in time. However, section 108 and Clause 41A.4.1 both refer to 117 days of the notice,, and not to "7 days of the service of the notice,,". Thus, the 7-day period runs from the date the adjudication notice was issued and not from the date of service where that date is a later date.
27. Verry secondly contends that the requirement imposed by section 108(1)(b) is not mandatory. That section merely requires that the contractual procedure should allow a referring party such as Verry to serve a referral notice within 7 days if that party wants to serve it within that short timescale. If the contract does allow for service within that timescale, the requirement of that section are not infringed if the contract also allows the adjudicator to extend that timescale and the referring party then elects to make use of that extended period and serve the referral notice outside the 7-day period provided for.
28. In my judgment, Verry's contention is correct. The language of section 108(1)(b) is not rigid. It requires that the contractual timescale should have the object of securing the referral of the dispute to the adjudicator within 7 days of the adjudication notice. Thus, the statute is setting a minimum requirement for the contract. The contract must allow a referring party, if it chooses, to issue a referral notice within the prescribed 7-day timescale. However, there is nothing in the language of section 108(1)(b) to preclude the contract from being drafted so as to provide additionally a machinery that enables the adjudicator to extend that timescale and enable the referring party to refer the dispute outside it if it chooses to. In other words, the language of section 108(1)(b) requires contractual machinery that enables the referring party to refer the dispute within 7 days of the adjudication notice but it does not prohibit a machinery which additionally enables the referring party to refer the dispute outside that timescale if elects to take longer in making the reference.
29. The language of section 108(1)(b) is in stark contrast to the language of section 108(1)(c) which provides that the contract shall:
"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."
Thus, the contract cannot allow the adjudicator to take longer than 28 days to reach a decision in circumstances where the parties do not agree to an extension. Had it been intended that section 108(1)(b) should prohibit the service of a referral notice outside the 7-day timescale even if the referring party chooses to serve late, that section would have been drafted in the same way as section 108(1)(c) and would have required the referral notice to be served within 7 days of the adjudication, notice.
30. It follows that, in the light of Verry's compliance with the adjudicator's procedural direction as to service of the referral notice, that notice was served within time and the subsequent adjudication and the resultant decision of the adjudicator are not invalidated by the referral notice being served out of time.
31. **5. No Dispute or Difference** : NWLCM contends that on the day Verry served its adjudication notice, no dispute or difference at all had arisen or, alternatively, the dispute or difference which Verry referred to adjudication had not arisen. Such dispute as might be shown to have arisen was not one encompassed by Verry's referral.
32. It is therefore necessary first to consider what dispute or difference was referred by Verry. The formal wording of that reference identified the subject-matter of the reference as being:
"Verry's entitlement to the release and payment of the first half of the retention pursuant to Clause 30.4.1.2 and/or 30.4.1.3 of the Contract."

Clause 30.4.1.3 provided that any interim certificate issued, after practical completion should have had deducted from the total amount referred to in clause 30.2 half of the retention percentage provided for in the contract, in this contract being 2½. This amount was defined in clause 30.2 as including “*the total value of the work properly executed*”. This requirement for deducting retention was in contrast to the requirement for retention deduction prior to practical completion which was for the entire retention percentage, in this contract being 5%.

33. The context of this notification was the recent issue of Interim Certificate no 34. This had followed a notification by the contract quantity surveyor of an intended interim valuation, that would reduce the value of work properly executed from that previously certified. That notification, had, in turn, followed an exchange between Verry and the contract architect about alleged outstanding defects and snagging items requiring remedy which Verry had responded to by asserting that no such defects existed or would be remedied by it. Thus, if the words of Verry's adjudication notice are unpicked and set against this background that was known to both parties it can be seen that Verry was indicating in its adjudication notice that the dispute it was seeking to refer to adjudication was one involving the following ingredients:
1. Whether Interim Certificate no 34 had been correctly computed and had correctly certified that nil was due for, payment to Verry or whether, instead, it should have certified that an amount of £67,055.97 retention should be released and paid to Verry.
 2. This question was to be answered in the context of the obvious reduction in the certified gross value of the work to account for alleged defects in the work not previously accounted for, a reduction of a size that precisely avoided the release of the anticipated first half of retention.
 3. This question was also to be answered in the context of the immediately preceding history of exchanges between Verry and the architect including the earlier adjudication, and adjudicator's decision; the subsequent exchanges about alleged defects and the terms and fact of the qualified practical completion certificate.
34. Another way of characterising the subject-matter of the reference is that Verry was asking for a decision from the adjudicator to open up, review and revise Interim Certificate no 34 by replacing the certified figure for the gross value of the works 3 by the gross value decided on by the adjudicator for the previous valuation in his August 2003 decision and then to replace the nil sum certified for payment by the sum £67,055.97.
35. NWLCM contended that the only dispute notified was as to the release of the first half of the retention and that was not a matter of dispute since the certificate already purported to release the first half of retention. However, the notification was a more compendious one, namely as to whether or not the retention release, namely the application of 2½ % to a particular gross value of the work, had been correctly computed, in accordance with Clause 30.4 of the contract. That reference, in turn, as already explained, involved additional ingredients arising out of the parties' immediately preceding dealings with each other.
36. The next question is whether the subject-matter of the dispute was already the subject of a dispute or difference prior, to the giving of the adjudication notice by Verry on 3 December, 2003. It is to be observed that the HGCRA allows disputes or differences to be referred to adjudication. NWLCM contended that a dispute could only have arisen in this case when a claim for, or an intimation of an entitlement of payment of half the retention had been submitted by Verry to NWLCM, had then been discussed by Verry and NWLCM and the claim or intimation had then been rejected. In this case, there had been no claim or intimation by Verry and, in consequence, no rejection by NWLCM.
37. I cannot accept NWLCM's analysis or conclusion. Here, the nil valuation that had been referred to adjudication was the culmination of a lengthy and contentious process which had started when Verry had contended that the works were both satisfactorily complete and practical completion had been achieved whereas NWLCM's agent had asserted that the works contained significant defects which precluded them being regarded as complete or as having achieved practical completion. CDL also asserted that the defective works had been the subject of instructions to Verry requiring Verry to remedy them, that those instructions had been ignored and that NWLCM would in consequence exercise its contractual entitlement to employ others to carry out the remedial works at Verry's

expense. Verry had disputed these contentions in unequivocal terms and had stated that it would not be remedying the suggested defects and that the conduct of NWLCM amounted to a repudiation by NWLCM of the contract.

38. As a response to that developing dispute, NWLCM's agents had certified a qualified practical completion and had revised the value of the works downwards to reflect its evaluation of the value of defective work that had previously been valued as complete and conforming work. Interim Certificate no 34 was, in effect, NWLCM's response to the dispute as to the existence of defects and the need for Verry to remedy them that had arisen when Verry had challenged CDL's letters of 18 and 23 September, 2003. It was that challenge that had created a dispute between the parties and the subsequent adjudication notice sought to refer that dispute and its consequences to adjudication.
39. My conclusion is that the adjudication notice referred an existing dispute that had already crystallised to adjudication. The notice was not premature and the adjudicator was validly appointed.
40. **6. Exclusion of Referred Issues 6.1. Introduction** : NWLCM contended that the adjudicator made four fundamental errors in deciding the dispute referred to him. These were:
- (1) An erroneous conclusion that he had not been requested to consider in the decision questions as to the existence or value of any defect.
 - (2) An erroneous conclusion that the effect of his previous decision was that the gross value of the work that he had determined as due in that decision could not be reduced in a subsequent valuation or adjudication because of an abatement or withholding from that previously determined gross value of the work.
 - (3) An erroneous conclusion that the only way in which effect could be given to any liability that Verry might have for defects could be by way of abatement from further sums first becoming due after that adjudication decision.
 - (4) A failure to adopt the same approach in this decision to the one that he had adopted in his first decision. The effect of that earlier decision was that he had jurisdiction to revisit a valuation contained within an even earlier adjudication decision where, in his first adjudication, new or additional information had come to light since that even earlier adjudication.
41. **6.2. No Defects Referred to Adjudicator** : NWLCM included in its response document sent to the adjudicator during the 28day reference period documents setting out in detail the basis upon which it was being asserted that the value of work not in accordance with the contract was £80,431.22 and that that sum was to be deducted from the gross value of the work decided upon in the earlier adjudication. In those circumstances, NWLCM contended that the adjudicator could and should determine the value of non-conforming works as a first step in a determination of whether any retention release should have been certified. The issue of the existence and value of defects clearly fell within the range of issues encompassed by Verry's adjudication notice and the necessary details needed by the adjudicator to determine that issue were clearly referred to him by NWLCM. The adjudicator's decision to the contrary was clearly erroneous.
42. **6.3. The Previous Decision** : The previous decision of the adjudicator had the effect of determining the content of the last interim certificate - to be issued prior to practical completion being certified. The decision with which I am concerned had the effect of determining the content of the next interim certificate, being the first to be issued after practical completion had been certified. The valuations making up, and the issue of, interim certificates are governed by clause 30. The relevant parts of this lengthy and detailed clause may be summarised as follows:
- (1) The architect is to issue interim certificates monthly. These are to state the amount due to the contractor, and should specify to what the amount relates and the basis on which that amount was calculated. These monthly certificates should be issued whether or not a further sum is due and they should be issued at monthly intervals up to practical completion and thereafter during the defects liability period as and when further amounts are ascertained as payable to the contractor.
 - (2) The amount stated as due in an interim certificate shall be the gross value of the work. The gross value is principally the total value of the work properly executed.
43. It follows that each month and for each monthly valuation and certificate, the works have to be revalued so as to ensure that the total value of the work properly executed as at the relevant date of

valuation is ascertained. Usually, this is not a particularly onerous requirement since the nature of the work and the progress that has been made in the intervening month will be such that only the further work carried out since the previous interim certificate need be valued. If, however, defective work comes to the attention of the architect whose value, valued on the basis that the work properly executed, had been included in full in a previous interim certificate, a downward adjustment of the gross value of the work previously certified will be necessary to give effect to the need to value, and only value, work properly executed.

44. The adjudicator decided that he could not revalue the work to take account any defects or snagging items, even if these were present in the work, because he had previously determined the gross value of the work and no further work had been done since the August 2003 decision had been issued. This decision was based on the adjudicator's understanding of the decision of the Court of Appeal in *Ferson Contractors Ltd. v Levolux, A. T. Ltd.*, [2003] TCLR 5. That case was concerned with an adjudicator's decision in favour of a sub-contractor that had followed a withholding of payment by a main contractor. The adjudicator held that there had not been an appropriate withholding notice served by the main contractor so that the withholding was not contractually justified. Following the withholding, the subcontractor had suspended work and, prior to the adjudicator's decision, the main contractor purported to determine the sub-contract on the grounds of the subcontractor's suspension of work. Once the decision had been issued in favour of the sub-contractor, the main contractor declined to pay on the basis that the clause providing for determination also provided that, on the determination, all sums that then may be due or accruing due to the sub-contractor should cease to be due and that the main contractor was not bound to make any further payment to the sub-contractor. The main contractor contended that that contractual provision trumped the contractual requirement to meet any payment decision of an adjudicator.
45. There were two competing contractual provisions: firstly the provision already referred to that appeared to remove the obligation to pay sums accruing due and secondly the provision that required "*the contractor and the sub-contractor shall comply forthwith with any decision of the adjudicator and shall submit to summary judgment in respect of all such decisions*". The Court of Appeal held that the effect of section 108 of the HGCRA was to give primacy to the second provision so that the adjudicator's decision had to be paid rather than being subject to the contractual provisions relating to the effect of a determination that had occurred after the adjudication notice had been served.
46. In this case, the adjudicator's August 2003 decision had been paid in full so that the *Ferson* case is not directly in point. The adjudicator must have had in mind that the *Ferson* case was relevant in an indirect way. His reasoning must have been that the gross value of the work had been determined by the first decision and that any revision of that sum in a later decision would depart from the statutory requirement that the first decision was to be binding until revised in a subsequent adjudication.
47. However that reasoning overlooks the contractual basis of an interim valuation under the contract condition applicable to the work in this case. The gross value of the works and the valuation included in a particular interim certificate or adjudicator's decision concerned with an interim valuation relate to the works as they existed on the date of the certificate or decision. It does not relate to the final value of the work or to the value of the work on a subsequent date. If, at a later interim certificate valuation, the state of the work has changed, either by virtue of further work or by the discovery of defects showing that previously valued work had not been properly executed, the contractor is entitled to a fresh valuation. The subsequent valuation does not supersede the earlier valuation since that earlier valuation defined the value of the works, in this case, on 12 August 2003 whereas the later valuation valued them afresh on 24 November 2003. The two valuations, and any adjudication decisions that follow, are therefore compatible and can stand side by side.
48. This principle was given effect to by the same adjudicator in his first, August 2003, decision. Faced with an argument that he lacked jurisdiction in that adjudication to value the work because the adjudicator in the even earlier adjudication had valued that work, he decided:

"[NWLCM] asserted that I had no jurisdiction to revisit those items where the previous adjudicator made a decision on the value. I concur with this assertion, except in so far as the items concerned are not based on the same information, in instances where additional or new information has now been provided, I consider I have jurisdiction to consider the items afresh."

49. The reason why, in the second adjudication, this adjudicator had such jurisdiction was because a new dispute had arisen as to the valuation of items where additional or new information had been provided because, in a later valuation and certification exercise, that new information had to be applied afresh to the relevant work item and the resulting new value given effect to. Where, however, no new or additional information had come to light, the first decision stood since there would be no basis for a revaluation of that item in any subsequent valuation exercise.
50. It follows that the adjudicator was in error in concluding that the effect of the *Ferson* case was to preclude him from revaluing the work in respects where it emerged that work previously valued as having been properly completed was in fact not complete or not properly complete. What this third adjudication was seeking was a further valuation of the work taking into account and giving appropriate effect to the list of defects and snagging items in so far as these showed that the previous valuation had overvalued those work items. No consideration of defects had previously occurred and no information about the nature or value of these defects had previously been given by NWLCM. Thus, the adjudicator both could and should have considered the defects and their alleged value as contended for by NWLCM in its response document submitted in this third adjudication.
51. **6.4. Abatement** : The adjudicator's further error was in his holding that the only abatement open to NWLCM was against sums becoming due after the August 2003 decision. This error arose as a result of his misunderstanding of the decision in the *Ferson* case. However, the principle that he enunciated was wrongly applied by him in this case since the abatement in question was being sought against the first half of retention. This would, but for any proved value of defects, have become due in the sum of £67,055.97. Thus, even if the adjudicator had been correct that the gross value of the defects could not be given effect to in a revaluation of the gross value of the work, he was still incorrect in not considering the claimed abatement since this would have been, on the basis of the adjudicator's reasoning, applied against the first half of retention which was a "further sum due" that had first become due after the earlier adjudication decision had been issued and paid.
52. **6.5. Inconsistency** : The adjudicator's error in not considering afresh the value of those work items where he now had information about the nature and value of possible defects was not only an error of law but was also unfair to NWLCM since it constituted the opposite procedure to that he had adopted adversely to their interests in the earlier adjudication. In that earlier decision, as already stated, he undertook a further valuation of items previously valued by the first adjudicator where new or additional information had been provided. In this adjudication, he declined to reconsider the valuation of items valued in his first decision. The earlier decision was therefore one in which he had given effect to a revaluation procedure yet he declined to adopt the same procedure when asked in his second decision to revisit his own revaluation exercise in his first decision even though new or additional information not previously put before him had now been placed before him.
53. **6.6. Conclusion** The effect of the adjudicator's errors is that he has failed to consider the existence or value of alleged defects in the work even though the dispute referred to him involved, if it had been decided in full, a consideration of both matters as part of his determination of whether Interim Certificate 34 should be opened up, reviewed and revised.
54. **7. Jurisdictional Error** : The difficult question that arises is whether the errors of law I have outlined were errors made within jurisdiction or were so fundamental that their effect was to transform his consideration of the referred question or dispute into a consideration and determination of a different question or dispute and which therefore left undecided the referred question. I sought to explain this critical distinction in *Joinery Plus Ltd. (in administration) v Laing Ltd.*, [2003] TCLR 4 where, at paragraph 51, I stated:

"The effect of the relevant decisions relating to errors by an adjudicator is as follows:

- 1. The precise question giving rise to the dispute that has been referred to the adjudicator must be identified.*

2. If the adjudicator has answered that referred question, even if erroneously or in the wrong way, the resulting decision is both valid and enforceable. If, on the other hand, the adjudicator had answered the wrong question, the resulting decision is a nullity."

55. The difficulty in this case is that the referred dispute was not clearly or fully identified in the wording of the dispute inserted into the adjudication notice. I have already sought to show that the stated dispute as defined by Verry: "[Verry's] entitlement to the release and payment of the first half of retention" involved, in reality, disputes as to the existence and valuation of defects and snagging items, as to the precise valuation exercise involved in preparing Interim Certificate 34 and as to the extent, if at all, Verry was entitled to have the issued Interim Certificate 34 opened up, reviewed and revised. In answering and deciding these disputes, the adjudicator concluded that a revaluation of the issued certificate was needed to give effect to his conclusion that the certificate and the valuation it certified should have been based on a gross value of the works that was identical to that previously determined and that he was not entitled to consider defects or their value, even if these were present and had not previously been valued. In consequence, the previously certified figure for the gross value of the work could not be revised and could not take into account the value of any defects so that the currently certified gross value was to be revised.
56. Thus, the errors of the adjudicator would appear to be ones made as part of his answering the right question wrongly rather than in answering the wrong question. However, these errors were crucial in that they had the effect of shutting out from consideration the crucial and core dispute amongst a bundle of disputed issues referred to him as part of a compendious exercise of considering whether to open up, review and revise interim certificate no 34. These errors were compounded by his procedural error in concluding that defects had not been referred to him. That error did not effect the overall result because, on the basis of his reasoning, he could not have considered them even if he had concluded that they had been referred to him. However, this further error heightened the unsatisfactory nature of the decision if considered from NWLCM's standpoint. Certainly, NWLCM's overall submission was to the effect that these errors cumulatively were so fundamental that the adjudicator could not, on any rational basis be said to have answered the question that was referred to him but, in reality, had answered a different question.
57. The identification of jurisdictional error that has occurred when an error of law has been made by an inferior tribunal during a consideration of the substance of a referred dispute is one of the most difficult tasks a court has to undertake in the context of its supervisory and enforcement roles. The identification of the threshold between reviewable and unreviewable error is one which continues to trouble courts at all levels whether in a public law context when judicially reviewing an inferior tribunal, or in a private law context when enforcing one of its decisions.
58. In this case, the parties did not have the opportunity of going through all the relevant cases or in developing all the relevant arguments that would enable a clear cut conclusion to be drawn as to whether the errors in question were within or outside the adjudicator's jurisdiction. They cannot be criticised for this since the court was considering a summary judgment application over two hours in circumstances where the relevant legal considerations would reasonably require much more detailed and sustained argument. My present inclination, based on necessarily curtailed argument, is that the errors were just, but only just, ones within jurisdiction but that the exclusion of any consideration of the defects on the manifestly erroneous ground that this issue had not been referred to the adjudicator potentially vitiated the adjudicator's decision and prevented NWLCM's entitlement to a fair hearing because NWLCM's contentions on a core issue were not considered at all by the adjudicator.
59. That leaves me with three options: to enforce the decision, to give leave to defend the application and direct a full hearing of the application or to dismiss the application and give a defendant's summary judgment in favour of NWLCM. I am mindful of the procedural realities of this case. These are that NWLCM could start a fresh adjudication by serving an adjudication notice forthwith and have the dispute about defects resolved in a fresh adjudication within about six weeks of the handing down of this judgment. If NWLCM do not take such a course, if it is offered to them, that

would suggest that their claimed abatement has little merit. On the other hand, if such a course is taken and a decision in NWLCM's favour is obtained, that adjudicator's decision could be set against the current decision in favour of Verry.

60. I therefore conclude that the adjudicator's decision should be enforced since, on the basis of the arguments developed on the summary judgment application, the decision was both valid and enforceable. However, I propose to direct that the resulting judgment is not to be drawn up for six weeks from the date of handing down and give permission to apply so that if a subsequent adjudication decision in favour of NWLCM is issued or an agreement as to the defects and their value is reached in that period, effect can be given to those developments so that one decision can be set against the other and only a balancing figure paid to the net winner. This way of proceeding best gives effect to the overriding objective that any court must have in mind and seek to give effect to, namely to decide disputes in a way which most expeditiously, economically and fairly resolves all disputes between the parties.
61. **8. Overall Decision** : I therefore decide that there should be judgment in favour of Verry but that that judgment should not be drawn up for 42 days from the date of handing down of this judgment. Thus the judgment may not be drawn up until, at the earliest, Monday 26 July 2004. There shall be permission to each party to apply on giving the opposing party at least 2 clear days' notice of such an application.