13

A FAIR HEARING

> It is now well established that the purpose of adjudication is not to be thwarted by an overly sensitive concern for procedural niceties . . . Adjudication under the 1996 Act is necessarily crude in its resolution of disputes . . . It is now clear that the construction industry regards adjudication not simply as a staging post towards the final resolution of the dispute in arbitration or litigation but as having in itself considerable weight and impact that in practice goes beyond the legal requirement that the decision has for the time being to be observed. Lack of impartiality or fairness in adjudication must be considered in that light. . . . It has become all the more necessary that, within the rough nature of the process, decisions are still made in a basically fair manner so that the system itself continues to enjoy the confidence it now has apparently earned. . . . However the time limits, the nature of the process and the ultimately non-binding nature of the decision, all mean that the standard required in practice is not that which is expected of an arbitrator.
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> His Honour Judge Humphrey Lloyd QC in *Balfour Beatty Construction Ltd v The Mayor & Burgesses of the London Borough of Lambeth*[1]

Introduction

13.01 Having dealt with bias in the preceeding chapter, the references below to 'natural justice' should be taken to be synonymous with the requirement that, within the constraints of

[1] [2002] EWHC 597 (TCC); [2002] BLR 288.

construction adjudication, the parties are entitled to a fair hearing. In his judgment in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*[2] Chadwick LJ said that it was only too easy in a complex case for a party who was dissatisfied with the adjudicator's decision to comb through his reasons and identify points upon which to present a challenge under the labels 'excessive jurisdiction' or 'breach of natural justice'. He went on to say that to seek to challenge the adjudicator's decision on either of these grounds was likely, save in the plainest cases, to lead to a substantial waste of time and expense. The specific warning in relation to allegations of unfairness echoed that of Dyson LJ in *AMEC v Whitefriars*,[3] who said that it will only be in the rarest cases that a court will refuse to enforce an adjudicator's decision because there was a real risk that the adjudicator was either biased or failed to act impartially.

13.02 The mere fact that the decision itself might be unfair is not a ground for resisting enforcement. That is a fundamental principle of adjudication enforcement. The best example of this is still *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*,[4] where the adjudicator's error was not in respect of a small sum; the retention fund was in the region of £350,000, with the result that the adjudicator erroneously awarded a sum to Dahl-Jensen when, had he made the proper deduction for retention, a similar sum would in fact have been due to Bouygues. Despite all of that, the Court of Appeal ruled that, because the adjudicator had the jurisdiction to reach that decision, the unfair result would not prevent enforcement of the decision. In other words, any attempt on an enforcement application to extend the concept of fairness from procedural to substantive matters, such as Lord Denning's unsuccessful effort noted at paragraph 11.24 above, will be unsuccessful.

13.03 Two fundamental points must be noted at the outset. First, time is of the essence in adjudication: because the adjudicator must produce his decision within the specified time, he or she has to put the parties under pressure to ensure that they provide the necessary information just as promptly. Whatever feelings of unfairness this may cause, it is an integral feature of adjudication and will not, at least in the ordinary case, amount to a breach of natural justice. As the TCC judge put it in *Edenbooth Ltd v Cre8 Developments Ltd*,[5]

> adjudication does not work if the parties take too long to provide information to the adjudicator. The corollary of that is that parties often feel under pressure to do things more quickly than they would like. However, as I have said, that is simply an inevitable consequence of the adjudication process.

Secondly, a party alleging a breach of natural justice must also be able to demonstrate that the breach relied on was material: that it had or would have had a significant effect on the outcome of the adjudication. This important qualification is explored in more detail in paragraphs 13.10–13.12 below.

13.04 It must always be acknowledged that the nature of the adjudication process carries with it a risk of unfairness, both in respect of the way in which the adjudication is conducted, and in the result. There are two particular reasons for this. The first, of course, is the speed with which an adjudication has to be completed. In such circumstances, with the need to have the 'right'

[2] [2005] EWCA Civ 1358; [2006] BLR 15. The relevant comments are cited at paragraph 7.113.
[3] [2004] EWCA Civ 1418; [2005] BLR 1.
[4] [2000] BLR 49; Court of Appeal: [2000] BLR 522.
[5] [2008] EWHC 570 (TCC); [2008] CILL 2592, paragraph 17.

answer subordinated to the need to have an answer quickly,[6] there will always be a greater risk that both the process and its end product will or might be unfair, certainly compared to an arbitration or a court hearing. Secondly, under the Scheme and many of the standard forms of contract, the adjudicator is entitled to 'take the initiative in ascertaining the facts and the law necessary to determine the dispute'.[7] Most adjudicators are not lawyers. Thus there is the risk that the adjudicator, in taking the initiative as he is entitled to do, may adopt a procedure that is or might be unfair. Provided that it can be shown that, within the limitations of the adjudication process, the adjudicator acted generally in accordance with the usual rules relating to bias and natural justice, his decision is likely to be enforced. The potential limitations on the adjudicator's role as an inquisitor rather than a referee are identified below.

The Application of the Rules of Natural Justice to Construction Adjudication

13.05 Many of the standard form contracts, and the Scheme for Construction Contracts, expressly require the adjudicator to act impartially. The authorities make clear that this is broadly the same as acting without bias (see Chapter 12 above) and in accordance with the rules of natural justice. Thus the expressions 'impartial' and 'in accordance with natural justice' have been used synonymously in the reported cases.

13.06 There was originally some doubt as to whether the rules of natural justice applied to adjudications. It will be recalled that, in *Macob Civil Engineering Ltd v Morrison Construction Ltd*[8] Dyson J said that a decision could not be impeached even if the adjudicator 'in reaching his decision . . . made a procedural error which invalidates the decision' provided that he had the jurisdiction to do so. The fact that a procedural error would not invalidate the decision was echoed by Sir Murray Stuart-Smith in *C & B Scene*[9] when he said at paragraph 26 that 'errors of procedure . . . are not sufficient to prevent enforcement of an adjudicator's decision by summary judgment'. In consequence of these comments, it was argued in some quarters that the adjudicator could act in breach of natural justice with impunity, and his decision would still be enforced.

13.07 This argument was expressly rejected by HHJ Bowsher QC in *Discain Project Services Ltd v Opecprime Development Ltd.*[10] Having said, at paragraph 31 of his judgment, that he was not sure what was meant by the word 'procedural' in Dyson J's judgment, he went on to say that he certainly rejected any submission that Dyson J was holding that the rules of natural justice did not apply to adjudication.[11] He also rejected the submission that a breach of natural justice was to be regarded as a 'procedural error':

> One can test that proposition by thinking the unthinkable, going to an extreme and asking what would be the approach if it were shown that an adjudicator refused to read the written

[6] See paragraph 86 of the judgment of Chadwick LJ in *Carillion Construction v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358; [2006] BLR 15. This contrasts with the usual approach, set out in paragraph 11.36.

[7] See Part 1, paragraph 13 of the Scheme for Construction Contracts.

[8] [1999] BLR 93.

[9] [2002] BLR 93.

[10] [2001] BLR 287.

[11] See Chapter 2.

> submissions of one party because they were typed with single rather than double spacing. It would never happen. But if it did, his decision would not be enforced. So there must be some breaches of natural justice that would persuade the court not to enforce the decision of an adjudicator. How is that line to be drawn?[12]

The judge referred to the decision of HHJ Lloyd QC in *Glencot Development and Design Co Ltd v Ben Barratt & Sons (Contractors) Ltd*[13] where the judge had said that it was accepted that the adjudicator 'has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit'. Judge Bowsher expressly agreed with that statement.

13.08 Judge Bowsher's judgment in *Discain*, referred to above, was actually his second judgment on the issues created in that adjudication, reached after a full trial. The trial arose because of the judge's earlier decision to refuse summary judgment, in the course of which he also considered the applicability of the rules of natural justice within the limited timescale of the average adjudication. In the judgment in which he gave the defendant permission to defend, he said:[14]

> . . . I do understand that adjudicators have great difficulties in operating this statutory scheme, and I am not in any way detracting from the decision in *Macob*. It would be quite wrong for parties to search around for breaches of the rules of natural justice. It is a question of fact and degree in each case . . . The Scheme [for Construction Contracts] makes regard for the rules of natural justice more rather than less important. Because there is no appeal on fact or law from the adjudicator's decision, it is all the more important that the manner in which he reaches his decision should be beyond reproach. At the same time one has to recognise that the adjudicator is working under pressure of time and circumstances which make it extremely difficult to comply with the rules of natural justice in the manner of a court or an arbitrator. Repugnant as it may be to one's approach to judicial decision making, I think that the system created by the [1996] Act can only be made to work in practice if some breaches of the rules of natural justice which have no demonstrable consequence are disregarded.

Although this formulation has been the subject of minor refinement in subsequent cases, it is submitted that it still remains the most practical guide, for parties and adjudicators alike, as to the requirement to act in accordance with natural justice to the extent that, within the constraints of adjudication, such conduct is possible. It was cited with approval by HHJ LLoyd QC in *Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth*[15] where he stressed that the purpose of adjudication is not to be thwarted 'by an overly sensitive concern for procedural niceties'. He also said that, where the complaint was that some important material was not drawn to the attention of the parties by the adjudicator prior to the eventual decision, that material had to be either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant. He reiterated, however, that, within the rough nature of the process, decisions still had to be made in a basically fair manner so that the whole process of adjudication continued to enjoy the confidence

[12] Judge Bowsher also quoted with approval an article by Mr Ian Duncan Wallace QC in the Construction Law Journal (2000) 16 Const LJ 102 in which the author said that it was a 'startling proposition' that an adjudicator's decision, if arrived at in serious breach of a principle of natural justice, 'must as a matter of law nevertheless be enforced in circumstances where payment under an invalid decision could easily turn out to be irretrievable and precipitate to the insolvency of the party affected . . .'

[13] [2001] BLR 207.

[14] [2000] BLR 402.

[15] [2002] EWHC 597 (TCC); [2002] BLR 288.

which it had now earned.[16] The facts of this case are analysed in greater detail in paragraph 13.42 below.

13.09 In *RSL (Southwest) Ltd v Stansell Ltd*[17] it was argued that the adjudicator's decision was not binding because it had been reached in breach of the rules of natural justice. Stansell's complaint was that the adjudicator had failed to give the parties an opportunity to comment upon the report, which the adjudicator himself had commissioned, and which dealt with the delay and loss and expense claims that lay at the heart of the adjudication. RSL argued that there can have been no breach of the rules of natural justice because the report was not made available to them either. HHJ Seymour QC said this:

> The introduction of systems of adjudication has undoubtedly brought many benefits to the construction industry in this country, but at a price. The price, which Parliament, and to a large extent the industry, has considered justified, is that the procedure adopted in the interests of speed is inevitably somewhat rough and ready and carries with it the risk of significant injustice. That risk can be minimised by adjudicators maintaining a firm grasp upon the principles of natural justice and applying them without fear or favour. The risk is increased if attempts are made to explore the boundaries of the proper scope and function of adjudication with a view to commercial advantage . . . The duty to act impartially is, in its essence, a duty to observe the rules of natural justice. It is not simply a duty not to show bias.

The judge concluded that the adjudicator should not have had any regard to the final report that he had commissioned without giving both parties the chance to consider the contents of that report and to comment upon it. If an extension of time was necessary to allow such a process, then the adjudicator should have explained that to the parties and sought their consent to such an extension. This case is analysed further in paragraph 13.43 below.

The Materiality of the Alleged Breach

13.10 The point made by Judge Lloyd in *Balfour Beatty*, to the effect that it must be demonstrated that the alleged breach of the rules of natural justice was significant and/or causative of potential prejudice, has been emphasised in a number of later cases. The first was *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*.[18] At first instance, Jackson J had concluded that an adjudicator's decision to decline to consider evidence which, on his analysis of the facts and/or the law, was irrelevant, was not a breach of the rules of natural justice and had not been shown to be significant. That conclusion was expressly approved by the Court of Appeal.[19] Furthermore in *Kier Regional Ltd (t/a Wallis) v City & General (Holborn) Ltd* [20] the same judge reached the same conclusion despite the fact that he saw 'considerable force' in the contention that the adjudicator ought to have taken into account two experts' reports which he had declined to read, on the basis that they had not been available to the contract administrator when he had produced the relevant evaluation. However, Jackson J went on to

[16] Other cases where the courts have summarised the general applicability of the rules of natural justice to the adjudication process include *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd* [2004] EWHC 888 (TCC); [2004] TCLR 6; and *Palmac v Park Lane Estates* [2005] EWHC 919 (TCC); [2005] BLR 301.

[17] [2003] EWHC 1390 (TCC).

[18] [2005] EWHC 778 (TCC); [2005] BLR 310.

[19] See paragraph 84 of the judgment of Chadwick LJ.

[20] [2006] EWHC 848 (TCC); [2006] BLR 315.

say that it was unnecessary for him to decide that point, because the error allegedly made by the adjudicator was not one that could invalidate his decision. He found that, on the basis of the adjudicator's decision as a whole, he had considered each of the arguments advanced by City & General in its written response. At worst, it was an error of law that caused him to disregard two pieces of relevant evidence but, in the light of the decision of the Court of Appeal in *Carillion*,[21] that error would not render the adjudicator's decision invalid.

13.11 In *Cantillon Ltd v Urvasco Ltd*[22] Akenhead J said that, for it to make any difference on enforcement, a breach of the rules of natural justice must be more than peripheral; it must be a material breach. He said that, in cases where the adjudicator failed to bring to the attention of the parties a point or issue which they ought to have been given the opportunity to comment upon, a breach would be material if it was one that was either decisive or of considerable potential importance to the outcome of the resolution of the dispute, and was not peripheral or irrelevant. Whether the issue was decisive or of considerable importance (or, conversely, was peripheral or irrelevant), involved a question of degree that had to be assessed by the judge.

13.12 Accordingly, it is safe to conclude that, whilst an argument that the adjudicator has failed to comply with the rules of natural justice will be considered with a certain amount of scepticism by the court,[23] where elementary and basic principles of natural justice have not been observed, with a resulting serious effect upon the decision in question, the court will be prepared to refuse to enforce summarily that decision. Due allowance will be given to the adjudicator's obligation to take the initiative to find the relevant facts and the law, and the constraints of the tight timetable in which he is operating. Furthermore, any such prima facie failure to comply with the rules of natural justice must be both obvious and important. It is therefore instructive now to go on to consider some specific instances in which the courts have considered an alleged failure to comply with the rules of natural justice.

Size/Nature of Claim

13.13 One feature of adjudication and enforcement disputes, which in a number of the reported cases sits like the proverbial elephant in the room, obvious to all and mentioned by no-one, concerns the use of the adjudication process to obtain decisions in complex factual and legal disputes and multi-million pound final account claims. The (usually unexpressed) concerns to which this situation can give rise are obvious: adjudication was intended for simple, straightforward, singular disputes that could be properly dealt with and decided within 28 days. The adjudication process was not designed for the consideration of complicated, multi-million pound claims that rely on scores of lever arch files, which have taken the claiming party months to prepare, and which the responding party is then obliged to deal with in a matter of days, in order to allow the adjudicator sufficient time to consider both the claim and the response, and then provide his (lengthy) decision in writing. It might be said with

[21] [2005] EWCA Civ 1358; [2006] BLR 15.

[22] [2008] EWHC 282 (TCC); [2008] BLR 250.

[23] A typical example of this approach can be found in the decision of HHJ Wilcox in *South West Contractors Limited v Birakos Enterprises Limited* [2006] EWHC 2794 (TCC) where the judge reiterated that it was 'not permissible for this court to minutely examine the reasons for an award to see if an adjudicator might have made a mistake'.

some force that such a situation was not what the framers of the 1996 Act had in mind when creating the adjudication process, and that the use of the adjudication process to resolve such claims is demonstrably wrong and unfair.[24] The complaint is, therefore, that the mere reference of such a claim to adjudication is unfair, and any decision resulting from such an adjudication must also be unfair, and therefore unenforceable.

13.14 In *London & Amsterdam Properties v Waterman Partnership Ltd*[25] HHJ Wilcox said, at paragraph 146 of his judgment, that there may be some disputes, particularly arising at the end of a project, which are too complex to permit a fair adjudication process within the time limits of the scheme. On the facts of that case, he refused to enforce the adjudicator's decision, but that refusal was apparently based, not on the grounds of complexity, but instead on the specific ground that material had been served late upon the responding party which they had not had an opportunity to address. There was therefore a triable issue as to whether the adjudicator had acted impartially. Similarly, in *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd*[26] HHJ Toulmin CMG QC, at paragraph 123 of his judgment, raised the possibility that there may be disputes that are so complex, and the advantages so weighted against a defendant, that there was a conflict between the adjudicator's duty to provide a decision and his duty to act impartially. Again, however, the judge refused to enforce the adjudicator's decision, not on this ground, but on the alternative basis that the adjudicator's decision dealt with and relied on matters that were not properly the subject of the notice of adjudication, and that there had been a serious procedural failure, in that AWG did not have a sufficient opportunity to consider the new issues and new material belatedly introduced by the referring party.

13.15 However, in *CIB Properties Ltd v Birse Construction Ltd*,[27] HHJ Toulmin said in terms that his earlier view in *AWG* about size/complexity had been 'erroneous'. In that case, the first adjudicator decided in August 2002 that CIB had been entitled to terminate Birse's contract. Almost a year later, in July 2003, CIB demanded consequential payment in a sum in excess of £16.6 million. The claim was referred to adjudication in November 2003, and consisted of about 50 lever arch files. During the adjudication, both Birse and CIB provided extensive further disclosure of documents so that, in the end, there were somewhere in the region of 150 lever arch files relevant to the adjudication. The adjudicator's time for reaching a decision was extended on a number of occasions and the decision itself was not provided until 24 February 2004, when CIB were awarded £2,164,892 out of a claim for approximately £16 million. One of the grounds for the challenge to the adjudicator's decision was that the size and complexity of the dispute made it impossible for it to be resolved fairly by adjudication.

13.16 Judge Toulmin said that the test was not whether the dispute was too complicated to refer to adjudication, but whether the adjudicator was able to reach a fair decision within the time limits allowed by the parties. He said that the adjudicator had asked himself the right questions, namely that he could only reach a decision if he had sufficiently appreciated the nature of any

[24] It is noteworthy that, at the end of his lengthy judgment in *Carillion* explaining how and why the adjudicator's decision should be enforced, Chadwick LJ doubted whether 'Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme; or whether such disputes are suitable for adjudication under the scheme'.

[25] [2004] BLR 179.

[26] [2004] EWHC 888 (TCC); [2004] TCLR 6.

[27] [2004] EWHC 2365 (TCC); [2005] 1 WLR 2252.

issue referred to him (including the submissions of each party) before giving a decision on that issue, and that he was satisfied that he could do 'broad justice' between the parties. On the facts, the judge concluded that the adjudicator was able to reach such a decision, notwithstanding the size and complexity of the claim and the supporting documentation. He found that the adjudicator was, at all stages, careful to consider how he could conduct the adjudication fairly and he succeeded in doing so, discharging fully his duty not only to act fairly but to reach a fair determination on the evidence. At all times the adjudicator had given the parties a fair opportunity to deploy their cases before him. For these reasons, the judge said at paragraph 199 of his judgment, the size and nature of a claim would only be relevant if it meant that the adjudicator could not discharge his duty to reach a decision impartially and fairly within the time limit and, on the facts of *CIB v Birse*, the adjudicator had been able to discharge that duty. It should also be noted that this was a case where the responding party had agreed to various extensions of time to the statutory period in which the decision had to be completed. As Judge Toulmin makes plain, a responding party is not bound to agree to extend time beyond the time limits laid down in the 1996 Act, even if such a refusal renders the adjudicator's task impossible, as would apparently have been the position in *CIB v Birse*.

13.17 Subsequently, the courts have followed the approach in *CIB v Birse*. Thus, in *The Dorchester Hotel Ltd v Vivid Interiors Ltd*[28] the TCC judge refused the responding party's application under CPR Part 8 for a declaration that the size and complexity of the final account claim, and the limited time that the responding party had to address it, meant that there was 'a serious risk of a breach of natural justice in the conduct of the adjudication'. There was no doubt that the claim was large and was accompanied by 37 lever arch files. It was also served very shortly before Christmas 2008. However, having set out the authorities, the judge concluded that the declaration should not be granted. There were four reasons for that. First, the adjudicator had said in clear terms that he could fairly determine the adjudication within the agreed timetable and that, in circumstances where the adjudicator had expressed such a view, it should not ordinarily be for the court, in any but the most obvious case, to reach a different conclusion. Secondly, the judge observed that, although the timetable was tight, it could not be said, at the outset, that it was incapable of giving rise to a fair result. Thirdly, the judge could not say on the facts whether the new material that was served with the adjudication notice was of any real significance. Finally he noted that if, during the course of the adjudication, it became apparent that it was impossible for the matter to be properly dealt with within the timetable, the responding party would be able to rely on such matters to resist enforcement of any decision made against them.

13.18 In *HS Works Ltd v Enterprise Managed Services Ltd*[29] Akenhead J stressed that, in considering submissions made on enforcement about the size or complexity of the claim, the most important factor was whether, and if so upon what basis, the adjudicator had felt able to reach his decision in the time permitted. He said that the court should look at the opportunities available to the responding party to address the claim being made before the adjudication started. He also made the point that it was inevitable, given the restricted timetable, that there would be an element of 'rough justice' in construction adjudication and that one should not nessarrilly equate an adjudicator's approach over 28 days with that of a judge or

[28] [2009] EWHC 70 (TCC); [2009] Bus LR 1026.
[29] [2009] EWHC 729 (TCC); [2009] BLR 378.

arbitatror who may have available a period of up to 18 months to undertake the same task. In that case, he concluded that the adjudicator 'did a thorough and conscientious job' in addressing the numerous items in dispute, and had been entitled to use spot checks to verify the overall credibility of parts of the evidence. It was not necessary (indeed, in a 28-day adjudication, it was not possible) to assess individually the individual final account items and the contra charges.

13.19 In *Amec Group Limited v Thames Water Utilities Ltd*[30] the TCC judge summarised the law on this subject in these terms:[31]

1. The mere fact that an adjudication is concerned with a large or complex dispute does not of itself make it unsuitable for adjudication: see *CIB v Birse.*
2. What matters is whether, notwithstanding the size or complexity of the dispute, the adjudicator had: (a) sufficiently appreciated the nature of any issue referred to him before giving a decision on that issue, including the submissions of each party; and (b) was satisfied he could do broad justice between the parties: see *CIB v Birse.*
3. If the adjudicator felt able to reach a decision within the time limit then a court, when considering whether or not that conclusion was outside the rules of natural justice, would consider the basis on which the adjudicator reached that conclusion (*HS Works).* In practical terms, that consideration is likely to amount to no more than a scrutiny of the particular allegations as to why the defendant claims that the adjudicator acted in breach of natural justice.
4. If the allegation is, as here, that the adjudicator failed to have sufficient regard to the material provided by one party, the court will consider that by reference to the nature of the material; the timing of the provision of the material; and the opportunities available to the parties, both before and during the adjudication, to address the subject matter of that material.

On the facts of that case the judge concluded that the responding party had had sufficient opportunity to deal with the claim, largely because the issues in the adjudication arose out of the responding party's own withholding notice. As the judge said, the responding party should have known from the outset precisely how they could justify every item in that withholding notice and could not now complain that they had insufficient time to deal with the detailed claim, to which the withholding notice had been their initial response. Accordingly, the challenge on natural justice grounds failed.

13.20 It is not uncommon for contractors and sub-contractors to identify the entirety of their final account claim as the single dispute that they want the adjudicator to decide. It is sometimes thought that a claiming party has a distinct advantage in adopting the adjudication procedure to pursue such a final account claim or (which is just as common) a claim based upon his last interim application for payment. Whilst the claiming party might have spent weeks and months preparing his final account claim, or the last interim application, an adjudication reference following hard on the heels of the submission of the claim itself allows the responding party very little time to deal with the detail. Again, the authorities demonstrate that, provided that the claim can be dealt with fairly by the adjudicator, the adoption of such a procedure will not, of itself, be regarded as unfair or lead to an unenforceable decision. It is part of what

[30] [2010] EWHC 419 (TCC).
[31] Paragraph 60 of the judgment in *Amec*.

was called in *Camden v Makers Ltd*[32] 'the commercial advantage and lever' that accompanies the right to adjudicate.

13.21 Of course, the adjudication process can involve significant risks to the referring party as well. For example, in *William Verry (Glazing Systems) Ltd v Furlong Homes Ltd*[33] Furlong, the main contractor, had its own reasons for thinking that it was to its advantage to refer to adjudication the entirety of its sub-contractor (Verry's) final account claim. This had the effect of requiring the adjudicator, during the statutory 28 days, to reach decisions about disputed variations, extensions of time, loss and expense, and liquidated damages—in other words, all the potential disputes which can arise under a building contract. The TCC judge described that as a 'kitchen sink' final account adjudication. The result rebounded on Furlong, because the adjudicator's decision was not in its favour and instead found sums and an extension of time due to Verry that Furlong had opposed. As the judge said, 'a referring party should think very carefully before using the adjudication process to try and obtain some sort of perceived tactical advantage in final account negotiations and, in so doing, squeezing a wide-ranging final account dispute into a procedure for which it is fundamentally unsuited'. Another, related point that arose in *Verry* stemmed from the adjudicator's comment in his decision that there had been so much material provided to him that, in the timescale required by adjudication, even with the extensions of time that had been granted to him, it had not been possible for him to make a full analysis of that evidence, of the kind that would have been appropriate in litigation or arbitration. The judge accepted the proposition that, if an adjudicator runs out of time and cannot produce a fair decision within the statutory time limit, he should say so, and not go on to reach an unfair decision. However the judge also concluded that, on the facts in *Verry*, the adjudicator had patently not reached an unfair result, and his comment about the absence of a full analysis was merely demonstrative of the difference between the speedy adjudication process and the more considered (and slower) business of arbitration or litigation. It was held that the adjudicator had produced a detailed and painstaking decision that properly reflected all the material with which he had been provided.

13.22 It is not uncommon for a party to maximise the restricted timetable in an adjudication by commencing the process at a time when it knows that the responding party may be under particular pressure. A common example is the issue of a notice of adjudication just before Christmas. This can create particular difficulties if the claim is large and complex. At paragraph 51 of his judgment in *Bovis Lend Lease Ltd v The Trustees of the London Clinic*,[34] Akenhead J took the hypothetical example of a reference on 24 December. He said that, although that could give rise to an assertion that there had been an ambush, given the Christmas break common in the construction industry, it had to be noted that, for better or for worse, Parliament did not give the adjudicator the power to extend the 28 days by reason of such difficulties. That said, he went on to say that there was a sensible school of thought that suggested that, in such circumstances, an adjudicator could in effect decline to accept the appointment on the grounds that justice could not be done. It was in fact common in such circumstances for an adjudicator to accept the appointment on condition that an extension of time was granted.

[32] [2009] EWHC 605 (TCC); [2009] 124 Con LR 32.
[33] [2005] EWHC 138 (TCC).
[34] [2009] EWHC 64 (TCC); [2009] 123 Con LR 15.

13.23 In *The Dorchester Hotel Ltd v Vivid Interiors Ltd*[35] the TCC judge was dealing with a real example of a claim, involving 37 lever arch files, which was commenced on 19 December 2008. The judge said that it appeared that this decision had been made in order to obtain the greatest possible advantage from the summary adjudication prodecure and that such conduct was not uncommon. Although he said that it was a matter of regret that the adjudication process was now regularly exploited in this way, the 1996 Act and the standard forms of building contract made plain that the claims could be made 'at any time', so it was not necessarily impermissible to start an adjudication at such a time: again, the point is dealt with if the adjudicator asks himself the questions identified in *CIB v Birse.*

13.24 It has been pointed out in a number of the reported cases that no adjudicator's decision has failed at the enforcement hurdle because of the underlying size or complexity of the claim. It is suggested that this is principally because, following *CIB v Birse,* adjudicators have risen to the challenge of taking the adjudication by the scruff of the neck, working out whether they can deal with it within the set time (as extended with the consent of the parties), and then fixing a clear timetable to which the parties have then been oblidged to comply. However, there is one recent case where this did not happen. In *Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd*[36] the adjudicator's decision was not enforced for a variety of jurisdictional reasons, so the argument as to the size and complexity of the claim did not arise directly for decision. However, between paragraphs 91 and 99 of his judgment, the TCC judge commented adversely on the adjudicator's failure to adopt the approach outlined in *CIB v Birse.* That was a case where the claim was for a final account said to be worth £7 million and where there were numerous disputes. The supporting material for the claim alone filled 40 lever arch files. There were also cross-claims with similarly large volumes of material. Instead of getting to grips with the issues as to size and complexity, and the necessary timetable required to deal fairly with the dispute, the adjudicator appeared to abdicate all responsibility for the process, and instead operated a series of piecemeal extensions of time. The judge said that this put the responding party in an extremely difficult position and that 'piecemeal extensions in large and paper-heavy Final Account disputes are not what the 1996 Act was designed for. The enthusiasm on the part of some adjudicators to permit "creep" in these cases should be curbed.' The judge expressed the view that, on the material before him, the claim did not appear to be suitable for adjudication, and that the adjudicator ought to have made that plain at the outset. He compounded his failure by refusing to address the jurisdictional points that were subsequently decided in favour of the responding party on the enforcement application.

13.25 Accordingly, although this is a complaint that has arisen from time to time, there is no reported case in which the court has concluded that the claim advanced in the adjudication was so complicated and/or so large that, for that reason alone, it was inherently unsuitable for the adjudication process from the outset. Validity and enforcement would appear always to boil down to whether or not the adjudicator had been able to deal fairly with the dispute referred to him. *Enterprise v McFadden* is an example of a situation where the adjudicator wrongly abdicated this vital consideration, but where it was held that, for other reasons, the adjudicator did not have the necessary jurisdiction in any event.

[35] [2009] EWHC 70 (TCC); [2009] Bus LR 1026.
[36] [2009] EWHC 3222 (TCC); [2010] BLR 89.

Addressing the Issues

13.26 The reported cases demonstrate three different situations in which the essential criticism is that the adjudicator has wrongly dealt with a matter that he should not have done, or failed to deal with a matter that he should have done. Sometimes these arguments are put on a jurisdictional basis, to the effect that the adjudicator dealt with something that was outside his jurisdiction, or failed to deal with something that was within his jurisdiction and therefore wrongly restricted that jurisdiction. However, as the following analysis makes plain, it is thought that these criticisms fit more comfortably under the general rubric of natural justice and, in particular, the alleged denial to one party or the other of a fair hearing. The cases are dealt with under three headings below: where the adjudicator addresses an issue outside the scope of the original dispute; where the adjudicator fails to address an issue that is within the referred dispute; and where the adjudicator fails to have regard to a final or further submission or rejoinder.

Addressing a Matter Outside the Scope of the Original Dispute

13.27 An unsuccessful responding party will often complain that the adjudicator wrongly took into account new material, or a new point, advanced by the referring party that was not raised at the outset and to which it never had a proper opportunity to respond. The cases show that this contention has not generally found favour with the courts. In *PT Building Services Ltd v ROK Build Ltd*[37] one of the complaints put forward by the responding party, ROK, was that the notice of adjudication included additional material to supprt PT's variation claims that was new and so extensive that ROK had been unable to provide a line-by-line response during the adjudication. It was said that this rendered the process unfair and a breach of natural justice. Ramsey J did not accept that submission; although he accepted that ROK had to respond to new material, he considered that the process adopted by the adjudicator, including the provision of a written response by ROK and a meeting attended by both parties, gave them a fair opportunity to present their case in the context of the adjudication.

13.28 An unsuccessful responding party will often complain that the claiming party has made a new claim, or put an old claim in an entirely new way, in its reply document. Again, complaints of this type have regularly been rejected by the courts. Thus in *VGC Contruction Ltd v Jackson Civil Engineering Limited*[38] the complaint was that, although VGC were making a claim for £300,000 for delay and disruption, they did not put forward a detailed basis for that claim until their reply, when they introduced a calculation based on the Hudson formula. Although Akenhead J found that this was undoubtably a new way of putting the claim, because no such calculation had been produced before, the reply had been provided in response to the assertion by Jackson, the responding party, that there was no calculation or support for the claimed figure of £300,000. In the absence of any suggestion that there was insufficient time fror the responding party to address the claim based on the Hudson formula, and given that the responding party had actually addressed various quantum arguments which anticipated VGC's claim that overhead and profit was recoverable, there could be no suggestion of unfairness or breach of natural justice. Similiarly, in *Amec Group Limited v*

[37] [2008] EWHC 3434 (TCC).
[38] [2008] EWHC 2082 (TCC); [2008] 120 Con LR 178.

Thames Water Utilities Ltd[39] the TCC judge was unimpressed with the submission that the detail of the claiming party's case as to the correct hourly rate for remedying defective work was set out in the reply rather than in the original claim. But these cases must be contrasted with the situation where the adjudicator decides something that neither party asked him to decide (*R. Durtnell & Son ltd v Kaduna Ltd*[40]) or decides something that both parties agreed that he should igmore (*Primus Build Ltd v Pompey Centre and Another*[41]). In those instances, the decisions were not enforced, not because of a breach of natural justice, but because the adjudicator wrongly exceeded his jurisdiction.

Failing to Address a Matter in Issue

13.29 It has become increasingly common for the losing party to complain that the adjudiactor failed to address the issue that was referred to him and that his decision was therefore outside his jurisdiction or unfair. However, care needs to be taken to differentiate between the dispute referred to the adjudicator that it is said he wholly failed to answer, and his alleged failure to answer one of numerous sub-issues raised by one or other party. In the former case, it will follow that he has not addressed the dispute referred to him and/or that he has failed to hear one party's case, such that the decision will not be enforced. But where he may have failed to deal with one of numerous sub-issues in a lengthy and complex adjudication, the courts will be much slower to refuse enforcement.

13.30 Cases where it was found that the adjudicator wrongly restricted the scope of the adjudication, and therefore failed to have regard to the responding party's legitimate defence (and thus breached the rules of natural justice), include *Broadwell v k3D*[42] and *Thermal Energy Construction ltd v AE and E Lentjes UK*.[43] In *Broadwell*, HHJ Raynor QC refused to enforce the adjudicator's decision because he had wholly failed to address the responding party's counter-claim. Since the set-off of that cross-claim formed the basis of the responding party's legitimate defence, he held that the adjudication had not been conducted in accordance with the rules of natural justice and the decision was not enforced. Similarly, in *Thermal Energy*, HHJ Stephen Davies found that the adjudicator's failure to deal anywhere in his decision with the set-off and counterclaim raised by the responding party again meant that there was a failure to comply with the rules of natural justice and the responding party had been significantly prejudiced as a result. By contrast, in *Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd*[44] the TCC judge rejected the referring party's submission that the adjudicator had failed to consider a secondary defence to the effect that, if there had been a variation, it was not to be paid for until the end of the contract. The judge concluded that the adjudicator had addressed the point sufficiently so as to mean that there was no breach of natural justice.

13.31 The high watermark of this line of authority is the decision of HHJ Stephen Davies in *Quartzelec Ltd v Honeywell Controls Systems Ltd*.[45] In that case the adjudicator had misunderstood the legal position and, as a result, had decided that he could not address what was referred to as the responding party's 'omissions defence'. The judge refused to enforce the adjudicator's decision,

[39] [2010] EWHC 419 (TCC).
[40] [2003] EWHC 517 (TCC); [2003] BLR 225.
[41] [2009] EWHC 1487 (TCC); [2009] BLR 437.
[42] [2006] ADJCS04/21.
[43] [2009] EWHC 408 (TCC).
[44] [2008] EWHC 3029 (TCC); [2009] CILL 2660.
[45] [2008] EWHC 3315 (TCC); [2009] BLR 328.

even though the omissions defence was worth only about 25 percent of the sum awarded by the adjudicator to the claiming party. It appears that one factor of particular significance in that case was that the adjudicator's mistake had been induced by the referring party, who encouraged him, on spurious grounds, to ignore that element of the responding party's defence. Commentators have, however, reacted with surprise to a result that denied a claim worth £135,000 simply because one aspect of the defence, worth £36,500, was wrongly not taken into account.[46] In *Pilon Ltd v Breyer Group PLC*[47] the TCC judge expressed his unease about the decision in *Quartzelec*, pointing out that, even if there had been a breach of natural justice, it was difficult to say, in accordance with the usual test, that it was properly material. He concluded that *Quartzelec* should therefore be treated as something of a special case.

13.32 Two decisions of Akenhead J are much more in line with the standard approach. In *HS Works Ltd v Enterprise Managed Services Ltd*,[48] the complaint relating to the first adjudication was that, although the adjudicator had upheld HS's case that there were no effective withholding notices from Enterprise, Enterprise argued that the adjudicator ought in any event to have gone on to consider the merits of each of their contra charges and that his failure to do so was a breach of natural justice. The judge rejected that contention saying that, as a matter of logic, because the primary case about the invalidity of the withholding notices was upheld, there was no need for the adjudicator to consider the alternative case on the detail. He said that it was not incumbent upon an adjudicator to include in his or her decision a commentary, let alone findings, upon every issue that arose in the reference, save to the extent that it was necessary to provide reasons and explanations for what he or she decided. In relation to the argument that, if the adjudicator had dealt with the merits of the contra charges, he might have reached a different view on the issue as to the need for withholding notices, the judge was dismissive, saying that it was fanciful to speculate that the adjudicator, having formed a view that in principle the primary case should succeed, would then have played some form of mental gymnastics so, having considered the merits of the contra charges, he could then reach an opposite conclusion on the same issue.

13.33 In similar vein, in *Jacques and Another v Ensign Contrators Ltd*[49] the adjudicator had concluded that the employer owed the contractor just under £100,000. He made plain that his reasoned decision was limited to essentials but that he had carefully considered all the relevant material. The suggestion was that there had been a breach of natural justice because the adjudiactor had failed expressly to consider specific submissions on particular topics put forward by the contractor. Akenhead J rejected that submission saying that, although the adjudicator had to consider defences properly put forward by the responding party, it was within his jurisdiction to decide what evidence was admissible and helpful and what was not, and therefore what matters he dealt with in detail in the decision, and what he did not. If he, within jurisdiction, decided that certain evidence was inadmissible, such a conclusion would rarely (if ever) amount to a breach of the rules of natural justice. He said that it was important to distinguish between the adjudicator's failure to consider and address substantive (ie factual or legal) defences, and an actual or apparent failure or omission to address all aspects of the evidence that went to support that defence. The former might give rise to a breach of natural justice; the latter would not.

[46] The comments of the editors of the Building Law Reports are at [2009] BLR 329–330.
[47] [2010] EWHC 837 (TCC); [2010] BLR 452.
[48] [2009] EWHC 729 (TCC); [2009] BLR 378.
[49] [2009] EWHC 3383 (TCC).

13.34 It is submitted that Akenhead J was right to distinguish between a failure to consider and address a substantive defence and a failure to address some particular aspect of the evidence or element of the submission. Put another way, this will be the difference between the adjudicator's deliberate decision to ignore a critical element of the responding party's defence, and an inadvertent failure to have regard to some particular submission or evidence that made up that defence. In *Amec Group Ltd v Thames Water Utilities Ltd*[50] TWUL argued that the adjudicator failed to deal with the vast majority of their streetworks cross-claim. He dealt with the 'big ticket' items on the face of his decision but did not make express reference to, or obvious allowance for, the numerous smaller items. The TCC judge rejected the suggestion that there was a breach of natural justice. At paragraphs 87 and 88 of his judgment, he pointed out the difference between an adjudicator making an inadvertent mistake, which led to a failure to address some particular issue (which would not be a breach and was permissible in accordance with *Bouygues*)[51] and, on the other hand, a deliberate decision by an adjudicator not to have regard to a significant element of, say, the set-off and counterclaim, which might, if it was material, amount to a breach of natural justice and prevevnt enforcement.

13.35 A number of the authorites referred to above were summarised by the TCC judge in *Pilon Ltd v Breyer Group PLC*.[52] In that case, encouraged by Pilon, the adjudicator, who had to decide what was due on batches 26–62, decided that he could not have regard to Breyer's defence of set-off based on an alleged overpayment on batches 1–25. The judge found that the adjudicator had been wrong to reach that conclusion, because any consideration of what (if anything) was due to Pilon in respect of batches 26–62 necessarily involved a consideration of any overpayment on earlier batches. The overpayment defence alone was worth in excess of 70 percent of the total sum claimed and the judge found that the decision not to consider the overpayment might also have had an effect on his consideration of other aspects of the claim. He therefore found a material breach of natural justice. In relation to the applicable principles the judge summarised the correct approach as follows:

> 22.1 The adjudicator must attempt to answer the question referred to him. The question may consist of a number of separate sub-issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question, then, whether right or wrong, his decision is enforceable: see *Carillion v Devonport*.
>
> 22.2. If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice: see *Ballast, Broadwell,* and *Thermal Energy.*
>
> 22.3 However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable: see *Bouygues* and *Amec v TWUL.*
>
> 22.4 It goes without saying that any such failure must also be material: see *Cantillon v Urvasco* and *CJP Builders Ltd v William Verry Ltd* In other words, an error must be shown to have had a potentially significant effect on the overall result of the adjudication: see *Kier Regional v City and General (Holborn) Ltd.*

[50] [2010] EWHC 419 (TCC).
[51] [2000] BLR 522.
[52] [2010] EWHC 837 (TCC); [2010] BLR 452.

22.5 A factor which *may* be relevant to the court's consideration of this topic in any given case is whether or not the claiming party has brought about the adjudicator's error by a misguided attempt to take a tactical advantage. This was plainly a factor which, in my view rightly, Judge Davies took into account in *Quartzelec* when finding against the claiming party.

Failure to Consider a Further/Final Submission or a Rejoinder

13.36 The final failure in this context arises out of the service of pleadings or written submissions in the adjudication process. It has become commonplace for referring parties to claim an entitlement to serve a reply, and equally common for the responding party then to seek to have the last word by serving a rejoinder. It is submitted that, whilst a reply can often be useful as a means of identifying and focusing on the key issues, it cannot be regarded as automatic in every case. Even more importantly, even if there is a reply, a responding party is certainly not permitted as of right to put in a rejoinder and, even if such a rejoinder is served, it is inevitable that the adjudicator will only have a short amount of time to consider it before producing his decision. Complaints by responding parties that the adjudicator failed to have proper regard to their rejoinder, or did not let them provide a rejoinder at all, have usually failed to give rise to an arguable case on natural justice. But, again echoing the potential difference between an inadvertent failure to consider some particular sub-issue and a deliberate erroneous exclusion of a critical matter, a breach of natural justice has been found where the adjudicator wrongly believed that he did not have jurisdiction to look at any part of a late formal submission.

13.37 The three cases dealing with rejoinders, or the lack of them, within the timetable of an adjudication each resulted in the rejection of the submission that there had been a breach of natural justice. In *Balfour Beatty Construction Northern Limited v Modus Corovest (Blackpool) Ltd*[53] there was a complaint by Modus that the adjudicator wrongly considered Balfour Beatty's reply without seeking a rejoinder from Modus. The TCC judge rejected that submission as untenable. The adjudicator had provided a timetable that allowed for a reply and made no reference to a rejoinder. Modus did not query or challenge that timetable at any time during the adjudication, and neither did they ask the adjudicator for permission to serve any such rejoinder. On that basis alone, the judge concluded that the point was not open to them. Moreover, he went on to find that, because Modus subsequently failed to identify any significant new points raised by Balfour Beatty for the first time in the reply that they had not had an opportunity to answer, they had also failed to demonstrate how the alleged breach of natural justice could possibly be material. In *GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd*,[54] Ringway argued that there was a breach of natural justice because, although they had put in a rejoinder despite the adjudicator's refusal to allow one, the adjudicator did not subsequently take it into account. Ramsey J rejected that submission, noting that the reply was confined to matters raised in the response, and therefore did not contain anything new. He said that, in the context of a rapid summary procedure leading to a temporarily binding decision, the adjudicator was entitled to limit the number of rounds of submissions. As the adjudicator in that case had observed, parties to adjudication often feel the need to keep making further comments on what the other party has said, but the timescale in adjudication simply does not permit this. The judge held that Ringway's desire to serve a rejoinder two days before the date that the decision was due was something that the process

[53] [2008] EWHC 3029 (TCC); [2009] CILL 2660.
[54] [2010] EWHC 283 (TCC); [2010] BLR 377.

did not and could not allow. The adjudicator's timetable was a fair one and he was entitled to refuse Ringway permission to serve a rejoinder.

13.38 The final case setting out what might be termed the orthadox view is *Amec Group Limited v Thames Water Utilities*.[55] In that case, TWUL alleged that there had been a breach of natural justice because the adjudicator had not taken into account matters noted in their further response document, provided just over two days before the timetable expired. The judge concluded that the adjudicator could not ignore that further response altogether because, although he had refused permission for a formal further response, he had invited final submissions. The judge said that, in an adjudication on a tight timetable, the adjudicator was not oblidged to consider in detail a second round submission or pleading, served very late in the adjudication process. His overriding obligation was to complete the decision in the stipulated time period. If that meant that he could not read or digest in detail a document provided just over two days before that decision had to be finalised and provided to the parties, then that was simply one of the consequences of the adjudication process. In adjudication, a requirement to consider every round of the parties' submissions in detail, which might be required of a judge or an arbitrator pursuant to the rules of natural justice, would always be tempered by the adjudicator's overriding obligation to comply with the time limit. As the judge put it, 'TWUL were not entitled to a further bite of the cherry, and even if they chose to avail themselves of such an opportunity, the adjudicator was not obliged to wade through their further submissions in microscopic detail.'

13.39 As noted above, very different considerations may apply if the adjudicator deliberately but erroneously failed to have regard to a pleading at all which, although provided late, was still served some time before the adjudicator had to produce his decision. In *CJP Builders Ltd v William Verry Ltd*[56] the contract required the response to the referral to be served seven days thereafter. The substantial part of the response was in fact served five to six hours late. The adjudicator decided that the particular contract under which the dispute arose meant that he had no discretion to permit any extension of time and told the parties that he could have no regard to the contents of the response. Verry contended there had been a breach of natural justice. Akenhead J said that, on a proper construction, the clause of the contract did not prevent the adjudicator from granting appropriate extensions of time to either party for the service of documents, responses and evidence. Thus the adjudicator had made a wholly honest but ultimately wrong decision to exclude from his consideration Verry's substantive defence to the claims made. The effect was devastating, because it meant that, essentially, he had to treat the claim as uncontested. Accordingly, Akenhead J concluded that the adjudicator had failed to apply the rule of natural justice that entitled each party to be heard and to have his evidence and arguments considererd by the tribunal. He had no doubt that the breach was material, and thus the decision was not enforced.

Communications with and Indications to the Parties

Unilateral Communications

13.40 The importance of avoiding any unilateral contact between the adjudicator and one of the parties has already been stressed: see paragraphs 12.16–12.19 above.

[55] [2010] EWHC 419 (TCC).
[56] [2008] EWHC 2025 (TCC); [2008] BLR 545.

Failure to Consult

13.41 A more significant problem may arise out of the adjudicator's failure to consult with the parties, either about a communication he has received from one party, or about a view or approach he has formed independently of both sides. Thus in *Discain Project Services Ltd v Opecprime Development Ltd (No 1)*[57] one of the claimant's personnel contacted the adjudicator and had a conversation in which some of the substantive issues in the adjudication were discussed. That conversation was neither recorded by the adjudicator, nor was its substance communicated to the defendant. There was a later conversation, also between the adjudicator and the claimant's employee. HHJ Bowsher QC considered that there was a very serious risk, if not of bias, then at least of a failure on the part of the adjudicator to follow the rules of natural justice, namely a failure to consult with one party on important submissions that had been made by the other party. He said that he found such a situation 'distasteful' and could not bring himself to enforce an adjudication decision that had been arrived at in that way. When the matter was fully tried out[58] the judge concluded on the evidence that he should decline to enforce the decision because it had been reached after a substantial and relevant breach of natural justice.

13.42 A number of the reported cases concern an adjudicator who has failed to share with the parties his approach to the particular dispute he has to resolve. Thus, in *Balfour Beatty Construction Ltd v The Mayor & Burgesses of the London Borough of Lambeth*[59] the adjudicator was concerned with a dispute as to extensions of time. The dispute was complicated, and involved various debates about the proper approach to the critical path. The adjudicator sought help from a programming expert, who adopted a particular methodology when analysing the delay, which was then included by the adjudicator in his decision. It was a methodology that had not been agreed, or even commented on, by either party; in fact, neither party was aware of the particular approach taken by the adjudicator until they saw his decision. In particular, the adjudicator failed to invite the parties' comments on whether his as-built programme was a suitable basis from which to derive a retrospective critical path analysis. In the circumstances, the HHJ LLoyd QC held that the decision was invalid and that the adjudicator had not acted impartially. He said that an observer would conclude that, by making good the deficiencies in the contractor's case, and by overcoming the absence of a sustainable as-built programme (and the complete lack of any analysis by the contractor as to which of the relevant events were critical and non-critical) with his own analysis on which he had not even asked the parties to comment, the adjudicator moved into the danger zone of being partial, or at least liable to the accusation of 'apparent bias'. The judge said that the burden of proof remained on the contractor who was claiming the extension of time, so that the defendant employer was entitled to have the dispute decided on the contractor's own terms, namely on the material that it had provided, and not on a basis devised by the adjudicator that had not been made known to the parties. That perceived lack of impartiality or apparent bias could have been cured by disclosure to the parties of what the adjudicator was doing, and what he considered to be the right approach to the critical path. He should have told both parties what he had in mind so as to give them an opportunity of either endorsing his approach or

[57] [2000] BLR 402.
[58] *Discain Project Services Ltd v Opecprime Development Ltd* [2001] BLR 287.
[59] [2002] EWHC 597 (TCC); [2002] BLR 288.

deflecting him from his chosen course.[60] His failure to do so was fatal to the validity of his decision.

13.43 Similarly, in *RSL (Southwest) Ltd v Stansell Ltd*[61] the adjudicator had relied on the report of a separate independent expert which he had commissioned. HHJ Seymour QC concluded that the adjudicator should not have had any regard to the final report without giving both parties the chance to consider the contents of that report and to comment upon it. His failure to do so was a breach of natural justice. It was also a relevant breach because, so the judge concluded, the evidence demonstrated that the adjudicator took into account the report in reaching his decision in relation to extensions of time for completion of the sub-contract works. Also in similar vein, the TCC judge in *Pring & St Hill Ltd v C J Hafner (T/A Southern Erectors)*[62] found that the adjudicator carried forward from an earlier adjudication (between different parties) not merely what he had seen or been told, but also the judgments that he had formed and the opinions that he had reached, all of which led him to reach a particular conclusion in that other adjudication. The judge concluded that the adjudicator should have made available to the defendant his thought processes as to why some of his earlier conclusions in the previous adjudication were relevant, and that his failure to do so was a breach of the principles of natural justice.[63] In addition, it should also be noted that the adjudicator's directions in respect of the final submissions were a complete muddle, with each party sending their final submissions to the adjudicator but not providing them to one another. The judge described such a procedure as 'very unwise' although he added that it was 'one of the hazards of adjudication and one which was self-inflicted'. That point alone, therefore, would not have amounted to a breach of the rules of natural justice.

13.44 It will be a matter of fact as to whether the adjudicator adopted his own methodology in determining the dispute between the parties, and the extent, if at all, to which he was obliged to share that approach with the parties. This will often require a very detailed analysis of the issues by the court. Thus, in *Multiplex Constructions (UK) Limited v West India Quay Development Company (Eastern) Limited*,[64] it was said that the adjudicator's decision on the contractor's extension of time claim decided a case not put to him, and adopted an approach that the parties were not given an opportunity to address. Ramsey J considered in detail the issues in the adjudication and the adjudicator's determination of those issues, and concluded that, unlike the adjudicator in *Balfour Beatty*, he had not adopted his own methodology, but had instead carefully assessed the contractor's own programming analysis, and made due allowance for his concerns about their claim and the basis for it. There had been no breach of the rules of natural justice.

13.45 One of the many disputes in *Cantillon Limited v Urvasco Limited*[65] was that the adjudicator had acted unfairly because, although Cantillon had claimed specific preliminary costs for a particular 13-week period of delay, the adjudicator had awarded them costs for a different

[60] This is one of a number of cases where it might be said that the adjudicator was trying too hard to be helpful. A good example of this trend is *McAlpine PPS Pipelines Systems Joint Venture v Transco Plc* (TCC, unreported, 12 May 2004) referred to at paragraphs 3.65–3.66.

[61] [2003] EWHC 1390 (TCC).

[62] [2002] EWHC 1775 (TCC); (2004) 20 Const LJ 402.

[63] As the judge put it, 'it is always going to be difficult for a party in the position of SE to challenge an award made off stage in another adjudication . . .'.

[64] [2006] EWHC 1569 (TCC); [2006] 111 Con LR 33.

[65] [2008] EWHC 282 (TCC); [2008] BLR 250.

and later 13-week period, without giving Urvasco the opuurtunity to deal with that claim. Akenhead J concluded that the adjudicator had the juridisdiction to find that a later period of delay than that claimed had in fact occurred. The claim was not, and should not have been considered to be, limited to a loss and expense claim for 13 specific calendar weeks. Urvasco could not say that they had not had the opportunity to address the financial ramifications of there being a finding that reflected their own assertion that any prolongation occurred during the later, not the earlier, period. The judge found that they had deliberately decided not to take up that opportunity. He also found that the adjudicator had not, deliberately or otherwise, misled the parties as to what he was or was not going to do. Indeed, the adjudicator had hinted broadly that he might be finding that any delay could relate to the later period, rather than the earlier period that had originally been claimed. Akenhead J also rejected the submission that the adjudicator was making Cantillon's case for them and found instead that he was properly assessing what was due to Cantillon, and investigating the facts as the evidence was presented. Urvasco's failure to respond to this emerging possibility did not convert what had happened into a breach of natural justice.

13.46 The result in *Cantillon v Urvasco* can be catorgorised as one where the adjudicator was dealing with complex factual issues and arrived at a result that was or should have been envisaged, at least as a possibility, by both sides. The opposite was the case in *Primus Build Ltd v Pompey Centre Ltd and Another*.[66] In that case the contractor, Primus, claimed in adjudication the loss of profit which they allegedly suffered when the office building element of a larger project was omitted from their scope of work. Primus claimed over £100,000, whilst Pompey argued that, on the evidence, no loss had been identified at all. Neither party's position relied on or took any point about Pompey's accounts: indeed, although those accounts had been introduced by Primus as part of their reply, the parties were agreed that the profit figures in those accounts should be ignored for the purposes of calculating the loss of profit, if any, arising out of the omission. The adjudicator, without consulting the parties, and without giving them any notice of what he intended to do, produced a decision that awarded Primus about half of their claim, on the basis of a calculation based on certain figures in the accounts.

13.47 Pompey's contention was that the adjudicator's unheralded decision to use figures from documents, which both sides had told him to ignore, amounted to a breach of natural justice. The TCC judge agreed. He said that the reason why the adjudicator had to do his own calculations was because he had rejected Primus's own calculations, and therefore agreed with Pompey that the claim as submitted was unarguable. As to the issue as to whether the adjudicator should have consulted with the parties, the judge said that, where an adjudicator considered that the referring party's claims as pleaded could not be sustained, yet he himself identified a possible alternative way in which a claim of some sort could be advanced, the adjudicator would normally be obliged to raise that point with the parties in advance of his decision. The judge went on to find that this principle must apply *a fortiori* in circumstances where the adjudicator had been told by both sides to ignore the documents from which the alternative approach was to be derived. Common sense demanded that, before reaching any conclusion, the adjudicator must ask the parties for their submissions on that alternative approach. The judge had no difficulty in concluding that, since the entire decision was founded on the adjudicator's calculation, the breach of natural justice was significant and material. The decision was therefore not enforced.

[66] [2009] EWHC 1487 (TCC); [2009] BLR 437.

Taking Advice from Others

13.48 Another related theme, which arose (for example) in *RSL*, concerns the not uncommon practice adopted by some adjudicators of seeking third party assistance in order to arrive at a decision on the dispute. The first reported instance of this was the case noted in paragraph 13.42 above, *Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth*.[67] There the adjudicator employed somebody else to carry out a critical path analysis. His failure to invite the parties' comments on his new methodology led to his decision being unenforceable. In paragraph 41 of his judgment, the judge also dealt with the use of third party assistance. HHJ Lloyd QC concluded that the adjudicator had sought and obtained assistance from others in a manner which was not authorised by the original agreement or the JCT rules. However, although this was therefore a breach of the rules, the judge could not draw the conclusion that this breach had any material effect on the decision itself, or that there was any material prejudice to the employer, or substantial injustice as a result. Thus, if the natural justice point had been limited to the unauthorised use of third party assistance (as opposed to the failure to consult the parties) the judge would have enforced the adjudicator's decision.

13.49 There are a number of other cases on this topic, often concerned with disputed claims for extensions of time. In *Try Construction Ltd v Eton Town House Group Ltd*[68] the adjudicator obtained assistance from a programming expert. The parties agreed to such assistance being provided and also agreed that the programming expert could contact the parties' respective programming experts independently. Eton's defence to the subsequent enforcement application of the adjudicator's decision was based on the particular methodology adopted by the programming expert. HHJ Wilcox said that there had been no breach of natural justice during the adjudication, because the parties had agreed to the appointment of the expert, and took a full part in the process that gave rise to the decision. Importantly, he found that both parties had had the opportunity to respond to all issues arising out of the methodology used in the expert's analysis, and that therefore there had been no breach of the principles of natural justice. Judge Wilcox distinguished the situation in *Balfour Beatty* on the basis that, in that case, no analysis at all had been put forward by the contractor, and the adjudicator, without agreement or notice, used an entirely independent analysis and devised his own critical path. Furthermore, unlike the situation in *Try*, the responding party in *Balfour Beatty* had not had the opportunity to deal with the relevant points. Indeed, in *Try*, both parties had had a proper opportunity to deal with the analyst's exercise; it was a wholly transparent process and was therefore entirely legitimate. As noted in paragraph 13.43 above, *RSL* was, on the facts, more akin to the situation in *Balfour Beatty* than the events which occurred in *Try*.

13.50 In *BAL (1996) Ltd v Taylor Woodrow Construction Ltd*[69] the adjudicator obtained his own legal advice without telling the parties when he was going to meet with his legal advisers, what material he would provide to them, or even if the advice he received would be in writing. His decision was in the referring party's favour but did not disclose the advice that he had received. HHJ Wilcox concluded that, on these facts, there had been a breach of natural justice. Furthermore, he rejected the argument that, in some way, the responding party had acquiesced in the proposed procedure, saying that the significance of the procedure might

[67] [2002] EWHC 597 (TCC); [2002] BLR 288.
[68] [2003] CILL 1982.
[69] [2004] All ER (D) 218 (Feb).

not have been immediately apparent and the rapid time limits in adjudication left little time to consider the full implications of that which the adjudicator had suggested. The judge said that acquiescence had to be clear, informed and unambiguous and there was no suggestion of that in the case under review. The decision was therefore not enforced.[70]

Indication of Preliminary View

13.51 The authorities make clear that the adjudicator is not generally obliged to indicate to the parties that he has formed a particular preliminary view, in order to seek their express comments upon it, unless (as explored above) his view is based on a new approach, which neither party could have anticipated.[71] Whether the failure to share his preliminary views will amount to a serious breach of the rules of natural justice on the part of the adjudicator will always depend on the facts. If, for example, the referring party contends that the delay was due to reason A, and the responding party claims that it was due to reason B, then, if the adjudicator forms a strong preliminary view that the referring party is right and the delay was caused by reason A, he will not need to make that view known to the other side; the responding party is already aware, and has prepared a case to meet, the allegation that the delay was due to reason A. If, on the other hand, the adjudicator has considered all the material and reached the conclusion that, in truth, the cause of the delay was reason C, it is thought that he would be obliged to make that plain to the parties, in order to get them to deal with it. Thus, in *Shimizu Europe Ltd v LBJ Fabrications Ltd*[72] the parties had agreed that their contractual relationship was based on a letter of intent. The terms of the contract were not, therefore, in issue. However, the adjudicator decided that LBJ's entitlement to payment was not capped by reference to the letter of intent but could be ascertained in a different way. HHJ Kirkham decided that the adjudicator did not have jurisdiction to reach such a conclusion, because it went outside the parameters agreed by the parties. However, in the alternative, the judge said that at the very least, prior to his decision, the adjudicator should have made clear to the parties that, although they had agreed that they had contracted on the basis of the letter of intent, he was proposing to decide whether or not that was so, and he should have given them the opportunity to make submissions on the question of contract formation. By not doing so, the adjudicator acted in breach of the rules of natural justice, with the consequence that the court would be slow to give summary judgment to enforce his decision.

13.52 Two further examples should be noted of situations where the court concluded that the adjudicator should have indicated to the parties, in advance of his decision, the basis of his conclusions, and where his failure to do so amounted to a breach of natural justice.

1. In *Ardmore Construction Ltd v Taylor Woodrow Ltd*[73] the part of the claim in the adjudication concerned with overtime was based solely on the construction of a particular letter. The eventual decision on the point, however, was based upon the adjudicator's summation

[70] For an example of a situation where the adjudicator obtained legal advice from counsel, and there was no breach of natural justice, see *Michael John Construction v Golledge and Others* [2006] EWHC 71 (TCC); [2006] TCLR 3.

[71] In *Carillion*, Chadwick LJ, citing Jackson J at first instance, reiterated that it is often not practicable for an adjudicator to put his provisional views to the parties and it would only be in an exceptional case, like *Balfour Beatty*, that a failure to share provisional conclusions with the parties will amount to a breach of natural justice.

[72] [2003] BLR 381.

[73] (2006) CILL 2309.

of discussions that had taken place at a meeting that the adjudicator had convened, and that the court described as 'more of an open-ended discussion than a controlled, structured meeting'. Notwithstanding that, the adjudicator had used those discussions to make findings of acquiescence and verbal instructions wholly independent of the letter. The defendant had been given no opportunity to investigate such matters or to place relevant evidence before the adjudicator. The Outer House of the Court of Session, although indicating that it was mindful of the dangers of picking over decisions and adjudicators' procedures too critically, held that this was a clear breach of natural justice, with the result that that part of the decision dealing with the overtime claim was reduced. The alternative approach should have been put to the defendant in advance of the decision.

2. The same criticism was upheld in *Humes Building Contracts Limited v Charlotte Homes (Surrey) Ltd*,[74] where the adjudicator based his decision on a view of the law which had not been argued by or put to either party. The TCC judge found that whether the interests of fairness required an adjudicator to put a matter to the parties for comment that had not previously been raised would depend on the circumstances, and no hard-and-fast rule could be laid down. In that case, he concluded that the adjudicator's failure to put to the parties his view that the absence of a withholding notice meant the defendant could not rely on a set-off based upon extensive evidence of defective work carried out by the claimant was a breach of natural justice. It meant that the adjudicator had excluded a substantial part of the defence without consideration of its merits, for reasons that were wrong in law. The decision was not summarily enforced.

13.53 A topic inextricably linked to the adjudicator's duty in certain circumstances, to share and invite comments upon his preliminary views is the question of his or her own expertise and the role that it might play in the decision-making process. In many technical cases, the adjudicator will have been chosen for his or her particular knowledge and experience in that specialist field. If the adjudicator then brings that knowledge and experience to bear on the evidence that is presented, then it has been held that, unsurprisingly perhaps, such a process cannot on its own be a legitimate ground for complaint. In *Dr Rankilor v Perco Engineering Service Ltd and Another*,[75] the dispute concerned ground conditions. The contractor said that they were unexpected; the employer disagreed, contending that the tender indicated that the ground would be clay, and that was what was encountered on site. The adjudicator, who was an expert, concluded that the particular conditions were unexpected. He reached that view by relying, at least in part, on his own geological expertise and applying it to the evidence. HHJ Gilliland QC held that it was for the adjudicator to share all his preliminary views with the parties, particularly in circumstances where they were based entirely upon the technical data that had been provided in the course of the adjudication. His conclusions were not at odds with the evidence, and his decisions were summarily enforced. In addition, as the judge pointed out, it was inevitable that the adjudicator's decision would be influenced/guided by his personal knowledge, experience and understanding, such that this could never be, of itself, a legitimate ground for complaint.

[74] 4 January 2007, a decision of HHJ Gilliland QC sitting at the TCC in Salford. For a case in which the adjudicator informed the parties in advance of what he proposed to do, and then did it, so that no unfairness could result, see *Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd* [2009] EWHC 2218 (TCC); [2009] 127 Con LR 110, para 72, discussed at paragraph 13.65(2).

[75] [2006] Adj LR 01/27.

Procedural Difficulties

Ambush

13.54 Another theme related to those discussed above is the question of ambush, and in particular the provision, late in the 28-day period, of further information (often by the referring party) that the adjudicator may take into account without giving the responding party an opportunity to deal properly with that information. This has been dealt with, in the context of large and complex claims, at paragraphs 13.13–13.25 above, and in the context of late submissions, at paragraphs 13.36–13.39 above. It is submitted that the position now is that an ambush argument is, without more, unlikely to succed, and the older cases suggesting otherwise should be treated with caution. The best-known is *London and Amsterdam Properties Ltd v Waterman Partnership Ltd*,[76] where substantial information and evidence was provided to Waterman for the first time during the latter stages of the adjudication. This material, which related to important aspects of the quantum of the claim, was served late, with the result that Waterman did not have an opportunity to address it. Despite the fact that Waterman had not been given that opportunity, the information was used as the basis for important elements of the adjudicator's decision. It was found that the responding party had therefore demonstrated a substantial, live and triable issue as to the impartiality of the adjudicator.

13.55 There are a number of other cases on this same point. In *McAlpine PPS Pipeline Systems Joint Venture v Transco plc*,[77] the facts of which are set out at paragraphs 3.65–3.66 above, HHJ Toulmin CMG QC found that Transco had a realistic prospect of arguing at trial that it was not afforded a fair opportunity to respond to the evidence about the compensation events, which had been served at a late stage of the adjudication process. He therefore concluded that the adjudicator had acted unfairly and that, since that unfairness created a real prospect of prejudice, he would not enforce the adjudicator's decision. Similarly, although HHJ Seymour QC's decision in *Edmund Nuttall Ltd v R G Carter Ltd* [78] was principally concerned with whether or not the dispute that the adjudicator decided was the dispute that had crystallised between the parties at the time of the notice of adjudication, the judge also dealt with the underlying fairness of the situation in which the responding party found itself facing, for the first time in the adjudication, a claim that the judge considered was radically different to that which had been debated between the parties prior to the adjudication.

13.56 Notwithstanding these particular decisions, the general approach in the TCC is that, even in larger claims, there are certain features of adjudication that, however unsatisfactory they might be, are inherent in the process. These include the likelihood that not all of the material served by the referring party in the adjudication will have been seen before; that the volume of material served with the referral notice might be very extensive and may very well not be capable of being responded to item-by-item, either during the 7 or 14 days in which the response is required or even during the entire adjudication; and that any timetable for the responding party's response, let alone any reply and any rejoinder, will be very limited.

[76] [2004] BLR 179.
[77] TCC, unreported, 12 May 2004.
[78] [2002] BLR 312.

13.57 Thus, in *Bovis Lend Lease Ltd v The Trustees of the London Clinic*[79] Akenhead J rejected the defendant's contention that the nature and volume of the new material and the timetable imposed amounted to an ambush and therefore a breach of the rules of natural justice. At paragraph 68 of his judgment, he observed that not once during the course of the adjudication had the defendant or its professional advisors complained or even made the assertion that it had had insufficient time to address the referring party's case. He also noted that the responding party had been able to give consideration to the detailed claim, such that its response had led to the adjudicator reducing the claim by over 40 percent. In short, he concluded that sufficient time had been requested and taken by the responding party to address the issues in the adjudication in sufficient detail, and that there had been no ambush of any sort.

Effect of Earlier Adjudications

13.58 It is often difficult for an adjudicator, appointed in a subsequent adjudication, to work out what, if any, limits or restraints have been placed upon him as a result of earlier decisions. A review of the authorities suggests that adjudicators can be caught between two inflexible rules: on the one hand, they must not reach a decision that qualifies or alters, even implicitly, any earlier adjudication decisions but, at the same time, they cannot always assume that the mere fact that a point has or may have arisen in an earlier adjudication means that they cannot consider it afresh. If they do purport to decide something which has already been decided in a previous adjudication, they may well be taken to have acted unfairly in so doing.

13.59 The difficulties are well illustrated in the case of *Quietfield Ltd v Vascroft Construction Ltd*,[80] the facts of which are set out in detail in paragraphs 14.39–14.41 below. In short, in a second adjudication, an employer claimed liquidated damages for a period of delay for which an application by the contractor for an extension of time on particular grounds had been refused by the first adjudicator. The contractor defended himself by reference to an entitlement to an extension of time that relied on material ('Appendix C') that had not been referred to in the first adjudication. Jackson J referred to a number of authorities, including the decision in *William Verry (Glazing Systems) Ltd v Furlong Homes Ltd*[81] in which the TCC judge had held that where a claim was made in adjudication, the responding party could employ all available defences to that claim. Jackson J decided that Vascroft's alleged entitlement to an extension of time, as set out in Appendix C, was substantially different from the claims for an extension of time which were advanced, considered and rejected in the first adjudication. He concluded that Appendix C ought to have been considered in the third adjudication and that, as a result, the decision in that adjudication could not be enforced because the adjudicator failed to abide by the rules of natural justice.

13.60 Quietfield appealed, but their appeal was dismissed.[82] May LJ said that it was as clear as may be that the dispute referred to the first adjudication was Vascroft's disputed claim for extension of time on the grounds advanced in their two earlier letters. Since Vascroft's Appendix C in

[79] [2009] EWHC 64 (TCC); 123 Con LR 15.

[80] At first instance, this case is reported at [2006] EWHC 174 (TCC); 109 Con LR 29. In the Court of Appeal, this case is reported at [2007] BLR 67.

[81] [2005] EWHC 138 (TCC); see paragraph 13.21.

[82] [2007] BLR 67.

the third adjudication identified a number of causes of delay that did not feature in the two letters and were substantially different from the claims for extension of time that were advanced, considered and rejected in the first adjudication, the adjudicator was wrong in the third adjudication not to consider Appendix C. Dyson LJ delivered a concurring judgment.[83]

13.61 The decision in *Quietfield* was considered by Ramsey J in *HG Construction Ltd v Ashwell Homes (East Anglia) Ltd*,[84] the facts of which are set out in paragraphs 14.42–14.43 below. In that case, the second adjudicator acted outside his jurisdiction and/or unfairly, because the dispute about the liquidated damages provisions that he purported to decide was substantially the same as the dispute that had already been decided by the first adjudicator. And in *Benfield Construction Ltd v Trudson (Hatton) Ltd*,[85] the second adjudicator decided that practical completion had been reached on the date alleged by the contractor, despite the fact that the first adjudicator had decided that it had not. The decision of the second adjudicator was therefore unfair and unenforceable.

13.62 In *Jacques and Another v Ensign Contractors Ltd*[86] there were a number of adjudications. In adjudication 4, decided by Mr Sucliffe, he directed that the contractor should pay the employer some £28,000, but rejected the bulk of the employer's claim for defects. That decision was never enforced and the parties subsequently reached a written agreement that it was null and void. In adjudication 5, Mr Paul Jensen was appointed as the adjudicator. Questions of defects again arose and the contractor relied on various passages in Mr Sucliffe's decision that suggested that the defects claim was considerably overstated. The employer objected to the reference to the fourth adjudication decision, because it had been agreed that it was null and void, and the adjudicator said that he would have no regard to it. His decision was in favour of the employer. The contractor said that there had been a breach of natural justice by the adjudicator in failing to have regard to the earlier decision. Akenhead J rejected that submission: the earlier decision was was not binding on Mr Jensen, so that decision could not inherently be a defence to the claim in adjudication 5. Moreover, he found that, even if Mr Jensen had decided that he could have regard to the substantive decision in adjudication 4, that would have been a decision within his jurisdiction, provided that he did not go on to abdicate his own responsibility to decide the dispute referred to him. The adjudicator's function was to consider the evidence and argument placed before him and his view that the earlier adjudicator's decision was irrelevant and inadmissible was a respectable one and was not a breach of natural justice.

Miscellaneous

13.63 There are a number of other decisions that are useful pointers to the limits of a natural justice argument arising out of an adjudicator's decision. At one end of the spectrum is *J W Hughes Building Contractors Ltd v G B Metalwork Ltd*[87] where Forbes J rejected the submission that the failure on the part of JWH's solicitors to provide their own clients with documents served

[83] The decision in *Quietfield* is also important on the extent to which a subsequent adjudicator is bound by the findings of an earlier adjudicator. This is a point dealt with at paragraphs 7.97–7.106.

[84] [2007] EWHC 144 (TCC); [2007] BLR 175.

[85] [2008] EWHC 2333 (TCC); [2008] CILL 2633.

[86] [2009] EWHC 3383 (TCC).

[87] [2003] EWHC 2421 (TCC).

during the course of the adjudication somehow resulted from unfairness on the part of the adjudicator. He found that there was nothing in the adjudicator's decision that gave any indication that the adjudicator was aware of any embarrassment being experienced by JWH in dealing with the matter due to the failure of JWH's own solicitors to provide them with a copy of the original referral documentation. The judge pointed to the strict timetable that applied in adjudications and observed that the adjudicator had to deal with the case as best he could within the constraints of that timetable. Although the adjudicator was aware that JWH had some problems with regard to missing paperwork, he satisfied himself that GBM had done what they were required to do by way of service of documentation on JWH's solicitors. JWH had been invited to raise the matter further some six days in advance of the adjudication meeting, but they did not do so. In those circumstances, there was simply nothing more that the adjudicator could have done.

13.64 At the other end of the spectrum is the decision of HHJ Seymour QC in *A & S Enterprises Ltd v Kema Holdings Ltd*.[88] In that case the adjudicator suggested a meeting. Because of the short notice, a Mr Overend of Kema was unable to attend that meeting, although the suggestion had been made that he join the meeting by way of conference call. In fact the meeting went ahead with another representative of Kema attending by telephone. The adjudicator's decision, which was in favour of A & S, criticised Mr Overend for 'choosing not to make himself available by telephone' and therefore playing no part in the meeting. The adjudicator described his failure to take part in the meeting as 'very unhelpful' and he said that he had viewed Kema's submissions and arguments that they had put forward 'in this light'. Judge Seymour had no difficulty in concluding that the adjudicator's conduct revealed both a real possibility of bias and a breach of natural justice. He found that the adjudicator did not make clear to the parties at any stage before his decision that Mr Overend's attendance was necessary or that his non-attendance would prejudice the defendant. If the adjudicator felt that it was important that Mr Overend attend the meeting, then he had to make that clear to Kema, in order to give them an opportunity to deal with it. His failure to do so meant that his decision did not comply with the requirements of natural justice and was therefore unenforceable.[89]

13.65 Three recent cases illustrate the wide-ranging nature of the matters which have been alleged (but not found) to constitute a breach of natural justice by the adjudicator:

1. In *Gipping Construction Ltd v Eaves Ltd*[90] the claimant contractor was seeking to enforce an adjudicator's decision against the defendant developer. The dispute in the adjudication had concerned whether the bungalows in question were complete and free of defects and, if so, what sums were due to the claimant. In the enforcement proceedings, the defendant claimed that there had been a breach of natural justice because the adjudicator had not undertaken an on-site inspection and so therefore had no first-hand knowledge of the defects that were at the centre of the dispute. Akenhead J rejected that argument, saying

[88] [2004] CILL 2165.

[89] In *Vaultrise v Paul Cook* [2004] ADJCS 04/06 the adjudicator ruled that a meeting previously arranged for 12 February would go ahead on that date because otherwise he did not have sufficient time to produce the decision. The defendant was represented at the hearing although his solicitor was not available. The defendant subsequently alleged that this procedure was unfair. The court concluded that, because the defendant was represented and had plenty of opportunity to arrange alternative representation, the adjudicator could not be criticised for going ahead with the meeting and not adjourning it to a later date when the first-choice solicitor was available. Again, the reason for this was the adjudicator's statutory deadline.

[90] [2008] EWHC 3134 (TCC).

that there was no obligation on the adjudicator to have a site inspection, which would always be a matter for his or her discretion in all the circumstances. He went on to say that the adjudicator had sufficient material before him to conclude that the defects were matters of design, and therefore not the claimant's responsibility in any event. Akenhead J said that a court should not criticise an adjudicator for deciding not to have a site visit in circumstances where it had not been, and could not be, established that it was essential that such a visit take place.

2. One of the issues that arose in *Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd*[91] concerned the adjudicator's decision to draw an adverse inference against Shepherd as a result of their failure to produce documents that the adjudicator considered to be relevant. Akenhead J concluded that there had been no breach of natural justice. He said that adjudicators were not bound by the usual rules of evidence and so could draw such inferences if they believed them to be warranted. He went on to say that, in such a situation, it may well be appropriate for an adjudicator to give advance notice of at least the possibility that he might draw such an inference, and obsevered that this was precisely what the adjudicator had done in that case. Accordingly, the adjudicator had acted fairly.
3. In *Rok Building Ltd v Celtic Composting Systems Limited (No 2)*[92] the defendant, Celtic, argued that the adjudicator's decision contained an obvious error and that, pursuant to the express terms of the procedure which the parties had adopted (which allowed the correction of accidental errors and omissions), his failure to apply the slip rule correctly amounted to a breach of natural justice. However, the difficulties with Celtic's argument were encapsulated in the fact that, at the relevant time, they had not themselves identified some simple slip or error, but had instead put before the adjudicator a complex calculation which, to the extent that it was comprehensible, seemed to go to the heart of the decision. In such circumstances, Akenhead J had little difficulty in concluding that, on the facts, the adjudicator was best placed to determine whether there really had been an accidental error or ommisson and that, on the evidence before him, there was no evidence of any such error. The alleged breach of natural justice was therefore not made out. As a matter of logic, it would seem to follow that, if an adjudicator was expressely entitled and obliged to correct accidental errors, and refused to correct an error that was both obvious and significant, he might be in breach of the general rule to act fairly.

Human Rights

13.66 When the 1996 Act came into force, there was a lingering uneasiness as to whether the swift and summary nature of the adjudication process was entirely compatible with the European Convention on Human Rights. Article 6 of the Convention provides that:

> In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be announced publicly . . .

In some ways, a comparison between the adjudication process and this entitlement demonstrates two completely opposite imperatives in operation. If Article 6 does not apply to

[91] [2009] EWHC 2218 (TCC); [2009] 127 Con LR 110.
[92] [2010] EWHC 66 (TCC); [2010] 130 Con LR 74.

adjudications, because the adjudicator's decision is only of temporary effect, then it might be argued that Article 6 does not apply to any orders of the court, such as interim custody orders, that are not intended to have a permanent effect. If that were right, Article 6 would be significantly reduced in scope. If, on the other hand, Article 6 applied to adjudication, there would be numerous challenges to the adjudicator's decision on the basis that, very often for reasons inherent in the adjudication process itself, there had not been 'a fair trial'. In *Elanay Contracts Ltd v The Vestry*[93] the defendant claimed that the adjudicator's decision was unenforceable because it had not been provided with a fair hearing. In particular it was said that the principal person involved in the relevant events on behalf of the defendant spent most of the 28 days in hospital, visiting his dying mother, which difficulties were compounded by the late delivery of documents produced by the claimant. HHJ Havery QC noted that the procedure had to be completed within the required period, and whilst that may well be inherently unfair, it was the time limit pursuant to which the adjudicator had to comply. As to Article 6, Judge Havery pointed out that the proceedings before an adjudicator were not in public. More significantly, he concluded that Article 6 did not apply to an adjudicator's decision or to proceedings before an adjudicator because, although the adjudicator was concerned with a decision or determination of civil rights, the decision was not in any sense a final determination. Thus, he said, the fact that the procedure before the adjudicator is very much a rough and ready procedure cannot, of itself, be regarded as a reason for not ordering summary judgment. He also made the point that, if Article 6 did apply to adjudications, then 'it is manifest that a coach and horses is driven through the whole of the 1996 Act'.

13.67 A much fuller consideration of the correlation between Article 6 of the Convention on the one hand, and the adjudication process on the other, was provided by HHJ Bowsher QC in *Austin Hall Building Ltd v Buckland Securities Ltd*.[94] Austin Hall, with an adjudicator's decision in their favour, took steps to enforce that decision. Buckland resisted the application, complaining that, as the responding party, they had had no proper and equal opportunity to respond the claims made in the adjudication, that the time allowed for the adjudication had been insufficient, and that there was no public hearing and pronouncement of the decision. Therefore, they contended that the adjudication had been conducted in breach of Article 6 of the Convention. Judge Bowsher rejected all of those points. He concluded that adjudication proceedings were not legal proceedings and did not result in a judgment that, in itself, could be enforced. A decision of an adjudicator was not itself enforceable; the successful party had to issue a separate application in court in order to enforce the decision. Moreover, the judge said, an adjudicator under the 1996 Act was not a public authority and was not bound by the Human Rights Act.

13.68 Perhaps more importantly, the judge concluded that, even if the adjudicator was a public authority under the Human Rights Act, all the requirements of Article 6 of the Convention were satisfied, if the adjudication process was looked at in the round. At paragraph 45 of his judgment, he said:

> If one considers the whole of that process, including the court proceedings necessary to enforce the decision then there is necessarily a public hearing before the decision is enforced (if enforcement be necessary) and all the other requirements of Article 6 are satisfied. To illustrate the principle behind that decision one need look no further than consider the long standing

[93] [2001] BLR 33.
[94] [2001] BLR 274.

> process of the court granting an interim injunction without notice, or *ex parte* as it used to be said. An injunction granted without notice to the defendant, if viewed on its own, is made in breach of the rules of natural justice and in breach of Article 6 of the Convention. To test whether there is a breach of Article 6 or of the rules of natural justice, one must look at the process as a whole, including the urgency of the situation, the safeguards ordered by the court including a cross-undertaking in damages, and, more importantly, an order limiting the length of the injunction in time until an early public hearing on notice to the defendant. One has to balance against those safeguards the consideration that the rights of the citizen, such as the rights of a newspaper's rights of freedom of expression, may be seriously limited and the short period of the limitation of those rights may be very important . . .

The judge went on to find, on the facts of that case, that the adjudicator's conduct was not unlawful and there was no breach of the Convention. Part of the reasoning behind that conclusion was, of course, the short period in which the adjudication was required by statute to be carried out and completed. The time limits that the adjudicator had set for the proper disposition of the adjudication were tight, but they were necessary in order for him to comply with the 28-day time limit for his decision, and that was imposed upon him by the 1996 Act.

13.69 A further factor in Judge Bowsher's decision was his re-statement of the principle that he had set out in *Discain* (and Judge Lloyd had repeated in *Glencot*), to the effect that the rules of natural justice applied to adjudications. Thus, said Judge Bowsher, in practice adjudications were governed by the rules of natural justice, which were not very different from Article 6 of the Convention, except for the requirement of a public hearing and the public pronouncement of the decision. The time limits that were the subject of Buckland's attack were also generally subject to the rules of natural justice, but as the judge pointed out, there could be no question of an Act of Parliament being attacked in the courts as being itself in breach of the rules of natural justice. Since the adjudicator was constrained by the 1996 Act to impose the time limits that he did, he could not be criticised for breaching the rules of natural justice in so doing.

13.70 It would appear that, certainly for the moment, Judge Bowsher's judgment in *Austin Hall* has dealt comprehensively with the suggestion that adjudication itself is contrary to the Human Rights Act. Indeed, the only subsequent decision in which the point has arisen was *R G Carter Ltd v Edmund Nuttall Ltd (No 2)*[95] in which Judge Bowsher referred to his own decision in *Austin Hall* and reiterated his view that he did not believe that the Human Rights Act 1998 applied to adjudication but that, even if it did, there was no breach of the Act. He concluded that he did not believe that the Human Rights Act made any difference in that case. It is, perhaps, a source of some surprise that, given the sheer volume of litigation in the last decade concerning the European Convention on Human Rights and the Human Rights Act, the compatability of the 1996 Act with those statutory requirements has not been tested in a higher court.

Unfair Terms in Consumer Contracts Regulations

13.71 As their names suggest, the Unfair Terms in Consumer Contracts Regulations ('UTCCR') are designed to provide a measure of protection to consumers in their dealings with larger commercial organisations. Regulation 5(i) provides that:

[95] [2002] BLR 359.

> A contractual term which has not been individually negotiated should be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the party's rights and obligations arising under the contract to the detriment of the consumer.

Regulation 5(ii) goes on to say:

> A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has, therefore, not been able to influence the substance of the terms.

13.72 There have been a number of cases in which an employer, who has found himself on the receiving end of an adjudicator's decision in favour of the contractor, has sought to rely on the UTCCR in order to resist enforcement and strike down the adjudication provisions. Before turning to the adjudication cases, it should be noted that the test of 'significant imbalance', which is a vital ingredient of any attack based on the Regulations, was the subject of consideration by the House of Lords in *Director General of Fair Trading v First National Bank plc*.[96] Lord Bingham of Cornhill said that:

> The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretional power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. . . This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer.

13.73 The first case in which the UTCCR were considered in the context of adjudication was *Picardi v Cuniberti & Cuniberti*.[97] In that case the architect claimed that he had been engaged by the defendants pursuant to the RIBA Conditions of Engagement, which included an adjudication clause. The subsequent fee dispute was referred to adjudication and the adjudicator awarded the sum of about £50,000 in favour of the claimant architect. The TCC judge refused to enforce the decision on the basis that, on the evidence before him, the contract between the parties did not include the RIBA Conditions, and therefore did not include any express adjudication provisions. Since the work involved the employer's own residence, the 1996 Act did not apply (by operation of s106), so the Scheme for Construction Contracts could not be implied into the contract either. That, of course, was sufficient to deal with the case. However, the judge went on to consider the operation of the UTCCR. He concluded that, because the work in question involved a private dwelling house that was excluded from the 1996 Act, a contractual provision that, despite this exclusion, adjudication was to be the initial method of dispute resolution, was clearly an unusual provision that had to be brought to the specific attention of the lay party if it was later to be validly invoked. He concluded that a procedure that the consumer was required to follow, and that would cause irrecoverable expenditure in either prosecuting or defending a claim brought pursuant to it, was something that may hinder the consumer's right to take legal action. The fact that, in this particular case, the consumer, as a residential occupier, was excluded from the 1996 Act, reinforced that view. The judge also referred to the fact that the RIBA Guidance required their members individually to negotiate adjudication clauses with their employer. Although he thought that they were right to recommend the giving of such guidance, the architect in the instant case had not done so. Accordingly the judge concluded that if, contrary to his view, the adjudication

[96] [2002] 1 AC 481.
[97] [2003] BLR 487.

provisions had been incorporated into the contract with the defendants, they would have been excluded by reason of the UTCCR.

13.74 The decision in *Picardi* was considered almost immediately by HHJ Moseley QC in *Lovell Projects Ltd v Legg & Carver*.[98] The facts were superficially similar, in that the defendants were the employers and the claimant, who was successful in the adjudication, was the contractor. The contract incorporated the JCT Minor Works Form, and therefore included a set of express adjudication provisions. The defendants sought to resist the enforcement by reference to the UTCCR. Judge Moseley rejected the argument that the adjudication provisions were unfair. He said that, to be unfair, the terms must cause a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer. Furthermore, that significant imbalance had to be caused by the adjudication provisions contrary to the requirement of good faith. He concluded that neither requirement was satisfied in the instant case. This was because the adjudication terms in the JCT Form applied equally both to contractors and employers, and that there had been no breach of the requirement of openness, because the adjudication terms were fully, clearly and legibly set out in the contract and contained no concealed pitfalls or traps. As for the requirement of fair dealing, the contractor did not, either deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in the Schedule to the Regulations. The judge also pointed to a factor, which will commonly be present and which will often be decisive of this point, namely that the contract form containing the adjudication provisions had been required by the architect acting on behalf of the employer himself. It was very difficult to argue that the employer was prejudiced by contract terms proffered by his own agent.

13.75 This important point was one of the reasons which led Judge Moseley to distinguish the factual situation in *Lovell* from that in *Picardi*. He pointed out that the adjudication provisions in *Picardi* had not been the subject of clear advice from the employer's architect; indeed, his dispute was with the architect who should have provided that advice. Judge Moseley said that, whilst he entirely accepted the correctness of that decision, it had no application to a case where the form of contract was insisted on by the employers, who had available both advice from solicitors and from the architect, who was their nominated contract administrator. It is respectfully submitted that Judge Moseley was right, on the facts of *Lovell*, not to follow Judge Toilmin's *obiter* remarks in *Picardi*. Furthermore, the facts of *Lovell* are more likely to recur in the future than those in *Picardi*, which is perhaps best regarded as a case on its own particular facts.

13.76 Judge Moseley's approach has been followed in a number of subsequent cases. In *Westminster Building Co Ltd v Beckingham*[99] the employer engaged the claimant contractor to carry out works to his house. The principal contract document was a specification, which contained a provision that the contract would be the JCT IFC form, a standard form of building contract that included a set of express adjudication provisions. The contractor signed the form that had been sent to him by the defendant's surveyors and, although the defendant never signed it, he did not inform his surveyors that he had any objection to its form or content. HHJ Thornton QC concluded that those contractual provisions applied. As to the attack based on

[98] [2003] BLR 452.
[99] [2004] BLR 163.

UTCCR, the judge rejected it. He said that, although the contract terms were not individually negotiated, they were couched in plain and intelligible language. Moreover, those terms had been decided upon by the surveyors who were Mr Beckingham's agents, and thus Mr Beckingham had available to him competent and objective advice as to the existence and effect of the adjudication clause before he proffered and entered into the contract. Westminster did no more than accept the contract terms offered, and had no reasonable need to draw to Mr Beckingham's attention the potential pitfalls to be found in the adjudication clause and its operation during the course of the work. The clause did not therefore contravene the requirement of good faith. Furthermore, the judge agreed with Judge Moseley that the adjudication provisions did not constitute a significant imbalance as to Mr Beckingham's rights, and did not significantly exclude or hinder the consumer's right to take legal action or other legal remedy, or restrict the evidence available to him.

13.77 In *Bryen & Langley Ltd v Martin Rodney Boston*,[100] HHJ Seymour QC reached a similar view. In that case, the judge pointed out that one of the important features in *Picardi* was that the form of contract that contained the provisions that the judge considered to be unfair was put forward by the architect claimant, who was then seeking to rely on them if he established the contract for which he contended. That was not the case in either *Lovell* or *Westminster*. Judge Seymour concluded that, on the facts in *Bryen & Langley*, the UTCCR were of no application. He stressed the importance of the professional advice that would have been given to the employer as to the proposed form of contract, saying that, in English law, it was not normally the function of a party negotiating a contract to protect the other party in the negotiations from the consequences of his own folly, or from the negligence of third parties, such as the professional advisers to the other party. Thus, the judge reasoned, it would be an unusual case in which it would not be a complete answer, to any suggestion that a building contractor had acted in bad faith in letting a consumer choose to use a particular standard form of building contract, to point out that the consumer had made his own decision, with or without the advice of a third party.

13.78 For other reasons, Judge Seymour did not enforce the adjudicator's decision on jurisdiction grounds. When the case went to the Court of Appeal, that other part of his judgment was overturned.[101] However, on the points arising under the UTCCR, the Court of Appeal agreed with Judge Seymour's analysis. Rimer J, who gave the principal judgment in the Court of Appeal, said that it was necessary to consider not merely the commercial effects of the term on the relative rights of the parties but, in particular, whether the term had been imposed on the consumer in circumstances which justified a conclusion that the supplier had fallen short of the requirements of fair dealing. Thus, he said, Mr Boston faced exactly the same difficulties as did the consumers in the *Lovell* and *Beckingham* cases: the relevant provisions were not imposed upon him by the supplier; instead it was Mr Boston, the consumer, acting through his agent, who imposed those conditions on the supplier. Even on the assumption that Mr Boston played no part in the preparation of the invitation to tender and did not receive advice as to the adjudication provisions, he had had the opportunity to influence the terms on which the contractors were being invited to tender. Rimer J concluded that, since it was Mr Boston (by his agent) who had imposed the terms, the suggestion that there was any lack of good faith or fair dealing by the contractor, with regard to the ultimate incorporation of those terms into the contract, was 'repugnant to common sense'.

[100] [2004] EWHC 2450 (TCC); [2005] BLR 28.
[101] [2005] EWCA Civ 973; [2005] BLR 508.

13.79 The more recent cases on this point have followed this approach.[102] In *Steve Domsalla (t/a Domsalla Building Services) v Kenneth Dyason*,[103] HHJ Thornton QC held that the adjudication provisions themselves did not substantially alter the balance of the parties' rights and obligations and so were not caught by the Regulations. However, because Mr Dyason was the employer in name only, the contract having been negotiated and administered by his insurers or their agent, the judge concluded that the withholding notice provisions were unfair and not binding. He said that Mr Dyason was unable to avoid the effect of an adverse adjudication decision relating to unpaid certificates, even where there were good cross-claims for defects and delay, because (through no fault of his) no withholding notices had been served. The adjudicator's decision, which had given effect to the withholding notice provisions, and had therefore ignored the detail of Mr Dyason's cross-claim, was not summarily enforced. Permission to appeal against this judgment was granted, but the matter was resolved by agreement and the appeal was never heard.

13.80 It is therefore submitted that, unless it can be demonstrated as a matter of fact that the adjudication provisions were imposed by the contractor on the employer, the UTCCR argument will be difficult to get off the ground. Moreover, from a wider perspective, it might be difficult to argue that, even then, the incorporation of the adjudication provisions was somehow to the detriment of the consumer. It is thought that possibly only in cases where the consumer would otherwise fall outside the sphere of adjudication altogether (because, for example, the works were concerned with a private dwelling house, as in *Picardi*) will such an argument even be available. Thus, for the vast majority of cases, it would appear that a party who has been unsuccessful in adjudication will be unable to avoid the consequences of that failure by reference to the UTCCR. It is perhaps noteworthy that, in the last three years, no such attempt has been identified in any of the reported cases.

[102] See, for example, *Cartwright v Fay* (unreported, 9 February 2005, Bath County Court) and *Allen Wilson Shopfitters v Mr Anthony Buckingham* [2005] EWHC 1165 (TCC); 102 Con LR 154.

[103] [2007] EWHC 1174 (TCC); [2007] BLR 348.