[2003] EWHC 60
(TCC)

Try Construction Ltd
V
Eton Town House Group Ltd

Case No: HT−02−370

High Court of Justice Queens Bench Division
Technology and Construction Court

Before: His Honour Judge David Wilcox
For His Honour Judge Richard Seymour QC

Date: 28 January 2003

Mr Marcus Taverner QC (instructed by Knowles Lawyers Ltd) for the Claimant.

Ms Delia Dumaresq (instructed by K. Legal) for the Defendant.

JUDGMENT

His Honour Judge David Wilcox:

1) The Claimant as the main contractor agreed with the Defendant as employer to convert a former bank headquarters building at No. 5 Threadneedle Street in the City of London into a luxury hotel. The contract was a JCT 98 standard form Private With Quantities with Contractors Design Portion Supplement and various bespoke amendments. The contract period was to be 52 weeks with a completion date the 23rd July 2001. Delays occured, the works were not completed until July 2002.

2) The Claimant has issued several claims for extensions of time, for loss and expense and for repayment of LADS already deducted.

3) On the 5th March 2002 the Claimant in Claim No. 1 sought an extension of time for 13 weeks and two days from the 23rd July 2001 to the 24th October 2001 for central core gridlines three−four/−E, loss and expense of £1,170,237.60 and repayment of LADS of £325,000. That claim was rejected by the Architect.

4)On the 22nd March 2002 Claim No. 2 was issued by the Defendant. It claimed a further extension of time for six weeks and one day from the 25th October 2001 to the 6th December 2001 for delay to the raised first

floor works, loss and expense of £489,800 and repayment of LADS of £100,000. This claim was rejected by the architect.

5)These claims became the basis of two Notices of Adjudication.

6)In Notice of Adjudication No. 1 of 10th June 2002 an extension of time of 13 weeks and two days for central core works plus loss and expense of £747,646 and repayment of LADS of £825,000 was sought.

7)On the 14th June 2002 Referral Notice No. 1 was served and on that date Mr C Linnett of Harold Crowter Associates was appointed Adjudicator by the RICS for Adjudication 1.

8)On the 17th June 2002 Notice of Adjudication No. 2 was served. It claimed an extension of time of 19 weeks and three days and was expressed to be based on claim 2 giving credit for any extension granted in Adjudication 1. Loss and expense of £1,187.393.40 was claimed together with repayment LADS of £775,000.

9)On the 19th June 2002 Mr Linnett was appointed by the RICS as Adjudicator for Adjudication No. 2.

10) On the 1st July 2002 at the first meeting with the Adjudicator to discuss Adjudication No. 1 the Adjudicator informed the parties that he would be on holiday from the 15th July and wished to obtain assistance from a programming expert Mr S Lowsley of Harold Crowter Associates. The parties agreed to assistance being given by Mr Lowsley. They now disagree as to the scope of the agreement.

11) On the 10th July 2002 there was a second meeting with the Adjudicator to discuss Adjudication No. 2. The parties agreed to extend the time for his decisions in both Adjudications until the 2nd August 2002 and agreed that Mr Lowsley could independently contact the parties' respective programming experts.

12) On the 31st July 2002 Mr Linnett wrote to the parties saying he would like further time to complete his decisions and the parties agreed to extend time.

13)On the 6th August 2002 the Adjudicator's decisions 1 and 2 were issued.

14) In relation to the first Adjudication he decided that completion was delayed by nine weeks due to delays to the central core, but since the Architect had already granted a nine week extension of time for other matters, no further extension was required. The related loss and expense

was ordered to be put into a trustee stakeholder account in accordance with the contract provisions.

15) The decision in the first Adjudication is not the subject of challenge by the Defendants.

16) The decision in Adjudication No. 2 was that the Claimants were entitled to an extension of time of four weeks in addition to the nine weeks awarded in the first Adjudication. Thus the revised completion date was the 24th October 2001. In addition loss and expense of £169,916 plus interest and repayment of £100,000 LADS plus interest was awarded.

17) The Defendants originally applied for summary judgment but that application was not proceeded with when the Defendants raised factual issues that could not be resolved by summary process. The Part 24 application was therefore adjourned and His Honour Judge Seymour QC on the 18th October 2002 ordered the Defendant to serve a defence by the 25th October 2002 and gave leave for a reply by the Claimant by the 1st November 2002. Provision was made for disclosure and for the filing of signed statements of witnesses of fact by the 15th November 2002.

18) At the outset of the trial the Defendants pleaded defences were as follows:

1. There was no dispute between the parties, which could be referred to the Adjudicator such that the appointment was a nullity (paragraphs 3 and 4 of the defence)

2. Alternatively, if there were disputes between the parties, then they "included matters that have already been referred to Adjudication" such that the Adjudicator had no jurisdiction (paragraph 5 of the defence).

3. Alternatively, if there was a dispute, then it was as to a Claimant's entitlement to a claim for six weeks extension of time: £489,800.64 loss and expense and £100,000 liquidated damages as identified in the claim document, but that the Adjudicator did not determine that dispute but a dispute as to an entitlement to 10 weeks three days (paragraphs 6 and 10 of the defence).

4. In any event "in breach of Clause 41A.2" the Adjudicator delegated his decision as to the extension of time to Mr Lowsley; (paragraphs 6 and 10 of the defence).

5. The Adjudicator used his own methodology without bringing those matters to the attention of the Claimant making his decisions such that such methodology was not in dispute rendering his Decision a nullity (paragraphs 11 and 12 of the defence).

6. The Adjudicator acted in breach of natural justice in using a methodology not relied upon and not considered by the Defendant (paragraph 13 of the defence).

19) The Claimant's case is that at no stage was any complaint made by the Defendant and what appeared on the face of the Referral Notice in Adjudication No. 2 was not in dispute. Further, at no stage did the Defendant ever reserve its position with regard to the Adjudicator's jurisdiction to determine that dispute. On the contrary the Defendant participated throughout the process and co−operated with the Adjudicator's Assistant Mr Lowsley to the point of decision. On receipt of the decision whilst the Defendant complained about one matter no longer the subject of dispute it did not complain that the Adjudicator did not have jurisdiction to decide the issue on the face of the referral notice, neither was any complaint made as to Mr Lowsley's participation nor as to what the Adjudicator did.

20) The Claimant submits that it was only on filing a defence to the enforcement proceedings that the Defendant ever raised jurisdictional and natural justice complaints.

21) In closing submissions the Defendant abandoned the first three pleaded bases of the defence to the enforcement proceedings. As indeed they had to being wholly without merit. The Defendants' defence to the enforcement proceedings has now been reduced to a complaint that the basis of the Adjudication decision was one not argued and thus one in respect of which they had no opportunity to make submissions, it is contended that these matters were of such significance that it constitutes a breach of natural justice.

> Clause 41A.5 of the Contract provides as follows:
> .5 In reaching his decision the Adjudicator shall act impartially and set his own procedure; and at his absolute discretion may take the initiative in ascertaining the facts and the law as he considers necessary in respect of the referral which may include the following:

.1 Using his own knowledge and/or experience;.

2 Subject to Clause 30.9 opening up, reviewing and revising any certificate, opinion, decision, requirement or notice issued, given or made

under this Contract as if no such Certificate, opinion, decision, requirement or notice had been issued, given or made;

.3 Requiring from the Parties further information than that contained in the notice of referral and its accompanying documentation or in any written statement provided by the Parties including the results of any tests that have been made or of any opening up.

.7 Obtaining from others such information and advice as he considers necessary on technical and on legal matters subject to giving prior notice to the Parties together with a statement or estimate of the cost involved;

The scope of the agreement relating to Mr Lowsley

22) At paragraph 8 of the decision the Adjudicator states:
"In view of the nature of the dispute I suggested to the parties that I should obtain technical advice from Mr Stephen Lowsley an experienced programmer and delay analyst who works for Harold Crowter Associates Limited in their Coventry office. The Parties agreed to his appointment and agreed that, if necessary, Mr Lowsley should go beyond the strict confines of the arguments put forward by the Parties relating to the delay in order to establish what event(s) caused the late completion of the project"

23) In a letter dated the 7th November 2002 the Adjudicator says:−
"Knowles [Claimant's solicitor] specifically asked me to: (i) confirm that paragraph 8 of my Second Decision is an accurate record of the agreement reached between the Parties and (ii) release copies of any relevant notes I made during the Adjudicator's meeting.

As regards the first question, I would hardly have included a statement in a signed Adjudication Decision recording an agreement reached between the parties if I thought it was not accurate. I assume the question is effectively asking me to reconsider paragraph 8 and confirm whether, on reflection, I am confident I correctly stated the position.

I have reviewed paragraph 8 and confirm that in my opinion, it accurately and precisely records the agreement made at the Adjudication meeting. I clearly remember asking first Mr O'Connor for Try and then Mr Nash for Eton whether they agreed to the appointment of Mr Lowsley and to what extent his role should be. I remember their responses which I found to be short, to the point and certainly not ambiguous. I also distinctly remember why I took more care than usual ensuring the precise nature and extent of Mr Lowsley's appointment was clear.

I have checked the notes that I made at the meeting but these do not refer to this matter. Therefore, I have no relevant notes to release.

The evidence

24)The Adjudicator met with the parties in relation to Adjudication No. 1 on the 1st July 2002. At that first meeting the Adjudicator expressed the view that all types of delay analyses were flawed and the parties agreed that the Adjudicator could appoint and use Mr Lowsley the programming expert. Mr Gogarty a freelance quantity surveyor working with James Knowles Associates attended that meeting, he had a full contemporaneous note of what had transpired. He was also present at the meeting of the 10th July 2002 when Mr Lowsley's role in the Adjudication was agreed, his note was that in relation to both Adjudications 1 and 2 Mr Lowsley was to use his own expertise in delay analysis−

Agreed POC/SN. POC is Mr O'Connor who was acting on behalf of the Claimant and SN is Mr Nash who was acting on behalf of the Defendant.

Mr Gogarty's evidence was thoroughly tested in cross−examination and I found him to be a reliable accurate and conscientious witness as to what was said on each occasion. In his evidence in chief which remained unshaken he said:−

> The Adjudicator suggested that Mr Lowsley was to use his own expertise and do his own independent analysis if he felt it appropriate in the Adjudications.This was agreed by Mr O'Connor on behalf of the Applicant and Mr Nash on behalf of the Respondent at the end of the meeting I recall nodding and saying "yes that's OK" or words to that effect to Mr O'Connor and that Mr Nash also gave his consent by nodding although I do not recall his exact words.
>
> I note from paragraph 31 of the Adjudicator's second decision that he notes "The parties agreed that Mr Lowsley should use his own expertise to assess the delay, without being restricted by the submissions". This is a correct account of the authority agreed to be conferred on Mr Lowsley and my understanding at the end of the second meeting on the 10th July 2002 with the Adjudicator".

25) Mr Bentley the Claimant's independent programming expert was also present at the meeting on the 10th July:

> "I recall at the end of the meeting on the 10th July the Adjudicator stating that Mr Lowsley would be reporting back to him on the EOT claim and the Adjudicator asking that Mr Lowsley should be allowed to assess the delay in whatever way he felt appropriate. We all nodded in approval. It seemed a reasonable approach in view of the large amount of information and the relatively short period to make the assessment.
>
> Both parties agree that Mr Lowsley could talk to Mr Calteka or to me if he so wished for clarification on any information in the submissions"

26)Mr Julian Sutton the Claimant's construction manager for the project from June 2000 to April 2002 was also present at both meetings, his evidence in chief unshaken in cross−examination was:−

> "I clearly remember at the end of the second Adjudication meeting on the 10th July 2002 following a brief discussion with the Adjudicator, Mr Nash and Mr O'Connor that they agreed that Mr Lowsley was to be given a free hand to use his own expertise to consider the delays"

27) Mr O'Connor's evidence as to the agreement was as follows:−

> "My clear recollection, which is consistent with that of Mr Gogarty, is that Mr Lowsley could be used for the purposes of carrying the evaluation of the delay analysis and he could use his own expertise in the exercise.
>
> It was also agreed that Mr Lowsley was to contact the delay analysis retained by the parties if he had any questions related to his evaluation of the delay analysis itself.

28) Mr O'Connor was not available for cross−examination and his evidence was therefore not tested in cross−examination. It must therefore be considered of limited weight.

29) Mr Stuart Nash the Defendant's advocate in the adjudication made two statements. The second after a trial of the factual issues was ordered by His Honour Judge Richard Seymour QC incorporated references to an internal memorandum dated 10th July 2002 disclosed by him. His first statement preceded that disclosure.

30) In that memorandum Mr Nash reported as follows: −

> " (On this point our expert Tony Caletka knows and has had discussions with Steve Lowsley before and Tony has informed me that in general Steve Lowsley would prefer to do an as−built analysis when to determine delay.)
>
> Because of this, I suspect that any additional questions concerning Try's Delay Analysis and our contentions with regard to Try's Delay Analysis will be factual in nature and Steve's questions will focus on the facts and not the as−planned analysis put forward by Try (see below, Steve Lowsley's role)".

31) Mr Nash in evidence spoke of the conversation he had had with his planning expert, Mr Caletka prior to the 10th July 2002 where reference was made to the risk of the introduction of analysis evidence from Mr Lowsley. By the 10th July when he came to agree the role of Mr Lowsley, he knew that:−

"Lowsley was an as−built delay analyst. I was comfortable that Lowsley understood"

32) Mr Nash in his evidence in chief in commenting on paragraph 7 of the first decision, said that it did not accurately reflect what we agreed to:−

"The parties did not agree that Mr Lowsley should go beyond the strict confines of the arguments put forward by the parties relating to the delay, or that he should use his own expertise to provide an assessment of the delay. We did not agree that Mr Lowsley could use a particular delay methodology and apply this methodology to the facts. In particular I would never have agreed that an Adjudicator could effectively hand over the analysis and decision−making to someone else without being able to see that analysis and comment on it"

33) A witness statement from Bruce Massie, a project architect was served at the beginning of the trial. He confirmed Mr Gogarty's evidence that the adjudicator at the outset stated that all programming methods are flawed. From cross examination it was clear that he had been asked to recollect matters very recently despite the lapse of time since the events he purported to speak of. It was evident that much of the content of his statement was not the product of his unaided recollection, but had been prompted by Mr Nash's conversations over the telephone in the process of formulating the statement. I was not able to give any great weight to the evidence of Mr Massie.

34) The accounts given by Mr Gogarty, Mr Bentley, Mr Sutton and Mr O'Connor were consistent and supported the finding of the Adjudicator as to the scope of the agreement. The evidence of Mr Nash in chief could not be reconciled with those witnesses and it became apparent in the course of cross examination what Mr Nash's true position was.

"Taverner: Page 9 of Bundle 1, para 8 of the Adjudicator's decision,

The parties agreed to his appointment and agreed that if necessary, Mr Lowsley should go beyond the strict confines of the arguments put forward by the parties relating to delay in order to establish what event(s) caused the late completion
of the project" − you read that on 6th August 2002?

Nash: Yes.

Taverner: And you must have been horrified at that?

Nash: Yes but I was more horrified at paragraph 17

Arguably the words he had used at paragraph 8 could be construed to record the agreement

> But if you read on it is clear that not only did he investigate the facts but do his own analysis and then put that to the Adjudicator without coming back to us. I was very annoyed at the decision overall.

Taverner: So when you read paragraph 8, that could be construed as what the agreement was but when you read the whole decision, you were horrified − that's your evidence?

Nash: No − where it says "go beyond" at paragraph 8, that was not agreed.

Taverner: But if that was not agreed, you'd have been horrified on 6th August 2002 but you said not?

Nash: When I read the conclusions and Chart B, you will see that he went well beyond the strict confines and that was not agreed.

Taverner: You did not write to the Adjudicator and say it was not agreed?

Nash: No.

Taverner: You did not write to Try's representatives and say it was not agreed?

Nash: Yes I did.

Taverner: In the paragraph which you say challenges jurisdiction?

Nash: Yes

Taverner: When did you expressly take the point?

Nash: Never, until the Defence.

Taverner: The real explanation is because this was an accurately recorded agreement?

Nash: Wrong, not as in my contemporaneous notes and I had no reason to put it in my slip−rule letter.

35) I am satisfied that the Adjudicator accurately recorded the scope of the agreement as to the use and role of Mr Lowsley and that Mr Nash fully appreciated the extent of the authority that was thereby conferred upon Mr Lowsley by the agreement.

36) I am satisfied that Mr Nash, after the reassurance from Mr Caletka as to Mr Lowsley before the meeting of the 10th July 2002 fully participated in the adjudication process which involved the agreement of a role for Mr Lowsley and contact by Mr Lowsley with the consent of both parties to each of the parties' representatives separately and independently.

37) It is inconceivable that an experienced adjudication solicitor like Mr Nash having seen an agreement recorded which is stated to have been made by him personally on behalf of his client and seeing it acted upon to the detriment of his client in two adjudication decision would not raise the matter at the time stating clearly and unambiguously that this was not the agreement that he had made.

38) Having received the adjudication decisions, he wrote to the adjudicator on the 9th August. He raised matters under the slip rule as the parties had agreed could be done. He told the court that his belief was that the slip rule could be used to raise substantive matters such as jurisdiction. There is no hint or suggestion in that letter that the agreement recorded by the adjudicator went beyond that to which Mr Nash assented.

39) Mr Nash's real complaint is not as to the procedures adopted by the adjudicator but the fact that the decision went against him. I am satisfied that the adjudicator accurately recorded the agreement between the parties as to the role of Mr Lowsley and the scope of his involvement in both of the adjudications.

40) I reject the evidence of Mr Nash in this relation.

41) It is evident that the Defendant participated in the agreed process without demur and knew that Mr Lowsley as an expert programmer would investigate the claim on his terms. There was no request for him to produce a preliminary or draft finding as a basis for making further submissions.

Breach Of Natural Justice

42) The adjudication procedures invoked by the Claimant and fully participated in by the Defendant impose strict time limits upon the Adjudicator. The position was exacerbated, notwithstanding the agreement as to the use of Mr Lowsley, because the Adjudicator as the parties knew, had holiday commitments at the end of July.

43) The two adjudications involved detailed and time consuming examinations of complex programming issues.

44) In the first, the Claimant sought as a result of delay to the Central Core an additional thirteen weeks and two days extension. They were successful to the extent of nine weeks only.

45) In the second, the claimant sought 19 weeks and three days for delay to the first floor services void. All but six weeks and one day ran concurrent with the matters in Adjudication No.1.

46)The Adjudicator found that the first decision related solely to the central core as distinct to the first floor services void, as the defendants belatedly were constrained to accept, upon a consideration of the evidence in this trial, that there was no question of the second claim overlapping the first, or being "a second bite of the cherry".

47) The Defendant argues that the Adjudicator used his own methodology without bringing those matters to the attention of the defendant making his decision thereby a nullity since the methodology was not put into dispute. It was submitted that the adjudicator acted in breach of the principles of natural justice in using a methodology not relied upon and not considered by the Defendant.

48) The process of adjudication under the Housing Grants Construction and Regeneration Act of 1996 is not a finely tuned instrument. Whilst the time constraints may by agreement be slightly relaxed as was the case here, nonetheless the overall requirements as to timing make adjudication a summary and at times blunt instrument for the resolution of disputes.

49) Nonetheless, as HH Judge Humphrey LLoyd QC succinctly expressed the matter in Glencote Development; Design Co. Ltd v Ben Barrett Son (Contractors) Ltd. (2001) BLR 207. at page 218

> "20.It is 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".

50) Miss Dumaresq submits, and I accept, that the principles of procedural fairness (or the need to observe the rules of natural justice) are not to be regarded as diluted for the purposes of the adjudication process. In an individual case, however, they must be judged in the light of such material matters as time restraints, the provisional nature of the decision and any concessions or agreements made by the parties as to the nature of the process in a particular case. The framework and general nature of adjudication under the 1996 Act was summarised by Dyson J. (as he then was) in Macob Civil Engineering Ltd. v Morrison Construction Ltd. (1999) BLR 93 at page 97:

> "The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of Adjudicators to be enforced pending the final determination of disputed by arbitration, litigation or agreement: see Section 108(3) of the Act and paragraph 23(2) of Part 1 of the Scheme. The timetable for Adjudications is very tight (see Section 108 of the Act) many would say unreasonably light and likely to result in injustice. Parliament must be taken to have been aware of this. So far as procedure is concerned, the Adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially (Section 108(2)(e) of the Act and paragraph 12(a) of Part 1 of the Scheme). He is, however, permitted to take the initiative in ascertaining the facts and the law (Section 108)(2)(f) of the Act and paragraph 13 of Part 1 of the Scheme). He may, therefore, conduct an entirely inquisitorial process, or he may as in the present case, invite representations from the parties − Crucially, (Parliament) has made it clear that the decisions of adjudicators are to be binding and are to be complied with until the dispute is finally resolved"

51) Miss Dumaresq placed reliance upon passages in the judgment of HH Judge Humphrey LLoyd QC in Balfour Beatty v London Borough of Lambeth (2002) BLR 288. She submits that there are factual similarities with the instant case.

52) Balfour Beatty Construction Ltd (BB) contracted with Lambeth for the refurbishment and modelling of Falmouth House on the Penrith Manor Estate, Kennington. The contract incorporated JCT Standard form of building contract 1998 Edition, local authorities without quantities incorporating amendments TC/94 and Contractors Designed Portion Supplement 1998. Clause 41s of the conditions expressly dealt with adjudication.

53) Balfour Beatty considered they were entitled to an extension of time relying upon 31 different relevant events. They did not submit a critical path maintaining that this was not a practical proposition due to manifold changes affecting the critical path on a weekly basis. Some time was awarded: less than sought. Balfour Beatty referred the matter to adjudication and an Adjudicator was appointed on 11th December of

2001. An assistant was appointed to assist the Adjudicator. In his decision of 25th January of 2002, the adjudicator identified his own analysis of the critical path and awarded Balfour Beatty 35 days extension of time and recalculated the quantum of damages for delay. Lambeth refused to pay and Balfour Beatty made an application for summary judgment under CPR Part 24. At paragraph 27 of the Judgment on page 301:

> "An Adjudicator is not of course limited to the material presented by the parties. He may obtain further information and may apply his own knowledge and experience. Above all, "he has to take the initiative in ascertaining the facts and the law. He has an "absolute discretion" to do what "he considers necessary".
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> "28.Is the Adjudicator obliged to inform the parties of the information that he obtains from his own knowledge and experience or from other sourced and of the conclusions which he might reach taking their sources into account? In my judgment it is now clear that, in principle the answer may be: Yes. Whether the answer is in the affirmative will depend on the circumstances. The reason lies at least in part, in the requirement the Adjudicator should act impartially. That must mean that he must act in a way that will not lead an outsider to conclude that there might be any element of bias, i.e. that a party has not been treated fairly. In addition, impartiality implies fairness, although its application may be trammelled by the overall constraints of adjudication. Lack of impartiality carries with it overtones of actual or apparent bias when in reality the complaint may be better characterised as a lack of fairness.Judge Bowsher QC put it very well in Discain Project Services Ltd (No.1) when he said at page 405:
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> "I do understand that Adjudicators have great difficulties in operating the statutory scheme, and I am not in any detracting from the decision in Macob. It would be quite wrong for the parties to search around for breaches of the rules of natural justice. It is a question of fact and degree in each case, and in this case the Adjudicator over−stretched the rules
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> 29; in my judgment, that which is applicable in arbitration is basically applicable in adjudication but, in determining whether a party has been treated fairly or in determining whether an Adjudicator has acted

> impartially it is very necessary to bear in mind that the point of issue which has been brought to the attention of the party is one of which is either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant. It is now clear that the construction industry regards adjudication not simply as a staging approach towards the final resolution of the dispute in arbitration or litigation, but as having 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 a fairness in adjudication must be considered in that light. It has become all the more necessary that, within the rough nature of the procedure, decisions are still made in a basically fair manner so that the system itself continues to enjoy the confidence it has now apparently earned. The provisional nature of the decision also justifies ignoring non material breaches. Such areas, if apparent, (as they usually are) will be rectified in any negotiation and settlement based on the decision. The consequences of material issues and points is that the dispute referred to adjudication will not have been resolved satisfactorily by any fundamental standard and the chances of it providing the basis for a settlement are much less and the chances of it proceeding to arbitration or litigation, much greater. 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. Adjudication is closer to arbitration than an expert determination, but it is not the same.

54) At page 303, the judge observed that the Adjudicator did not inform either party of the methodology that he intended to adopt or seek observations from them as to the manner in which it or other methodology might reasonably and properly be used in the circumstances to establish or test Balfour Beatty's case.

> "An Adjudicator is of course entitled to use the powers available to him but he may not of his own volition use them to make good fundamental deficiencies in the material presented by one party without first giving the other party a proper opportunity of dealing both with that intention and the results.The principles of natural justice applied to an adjudication may not require a party to be aware of "the case that it has to meet" in the fullest sense,

> since adjudication may be "Inquisitorial" or investigative rather than "adversarial". That does not, however mean that each party need not be confronted with the main points relevant to the dispute and to the decision.

55) In Balfour Beatty the Adjudicator not only took the initiative in ascertaining the facts but also applied his own knowledge and experience to appreciation of them, and in effect did Balfour Beatty's work for them. It was held that there had been sufficient time for the Adjudicator to present Lambeth with the delay analysis and critical path chart.

56)At paragraph 38 the Judge found:

> "In addition for the purposes of a Part 24 Application the Defendant has satisfied me that he has realistic prospects of demonstrating that, since the Adjudicator's method of analysis which had not been agreed or commented on by either party the decision was itself invalid and it was not one which an architect or an Adjudicator standing in the architect's shoes could have made lawfully and fairly;"
>
> 39; I have therefore come to the conclusion that Lambeth has established that for the purposes of a Part 24 Application it has realistic prospects of success of showing that Mr Richards did not act impartially and that he failed to comply the rules of natural justice in significant respects which cannot be disregarded and that the consequences may be sufficiently serious that they too cannot be disregarded. In my judgment an observer would conclude that by making good the deficiencies in BB's case and by overcoming the absence of a sustainable as built programme with a critical path and the complete lack of any analysis as to which of the relevant events were critical and not critical the Adjudicator moved into the danger zone of being impartial or liable to "apparent bias" as is now recognised. That lack of impartiality or supposed bias can easily be cured by disclosure to the other party of which is being done or thought about"

57) In my judgment the passages that I refer to above exemplify the proper approach to a consideration as to whether Adjudication proceedings have been conducted fairly.

58) The case of Balfour Beatty submitted by Miss Dumaresq as having striking similarities to the present case on close examination differs markedly from it in many respects, for in Balfour Beatty there was no

analysis at all put forward by the Contractor and the Adjudicator without agreement or notice used an entirely independent analysis. Balfour Beatty were unable to identify any critical path and there was no evidence at all to support its as built programme, the Adjudicator therefore had to devise his own critical path. Lambeth sought to make further submissions on the basis of the Adjudicator's new case, but he did not give himself time to consider these submissions before reaching his decision. Lambeth were not given the opportunity to be confronted with the main points relevant to the dispute and decision. Here however the Claimant relied upon events said to delay the first floor services void and put forward programme 4.03 showing delay to the first floor services void. Furthermore the Defendants' acknowledged that the first floor services void which was affected by the delaying events was on the critical path.

59) The decision in Adjudication No. 2 records that Try had put forward five reasons why the first floor void was delayed. The Claimant's programme 5.02 in paragraph 68 of the decision was rejected by the Adjudicator as being a flawed analysis. Of course it was not the only evidence before the Adjudicator, there was a vast amount of documentary material before the Adjudicator and as the Parties had agreed Mr Lowsley was authorised as delay analyst to investigate the facts. It is evident that he approached Mr Caletka the Defendants' programming expert and Mr Bentley the Claimants'. I was satisfied that the questions raised by him all related to information in the submissions that had been exchanged.

60) It is common ground that neither party provided the Adjudicator with a full as built analysis. Mr Caletka accepted that to provide a full as built analysis would have been impractical. Both he and Mr Nash however, expected Mr Lowsley to approach his task as a delay expert informed by the collapsed as built technique insofar as he could on the information available to the Adjudicator and elicited by him. Mr Lowsley's researches and conclusions were demonstrated in Adjudication chart B.
61) The first 30 lines of that chart are not controversial they depict when work was done, how long it took to perform and when events occurred. Based on that information the Adjudicator concluded that the actual period for the additional and varied works to the first floor void was 11 weeks and four days. The Adjudicator however, considered that a reasonable time for doing that work was seven weeks and four days a decision in favour of the Defendant. Mr Calekta accepted in cross−examination that there was an issue as to what was the reasonable time for the work, and that it had been addressed under the heading "reasonable time" at line 31. It was Mr Lowsley looking at the "as built time" and reducing it. Mr Nash in evidence accepted that he had little complaint up until line 30 of the chart accepting that Mr Lowsley had taken on board the Defendants' comments addressing the Claimants' case as to how long the work should have taken them. The Adjudicator in his decision at paragraph 76 noted the Defendants' concession:−

> "At the Adjudication Meeting on the 10th July 2002 Eton confirmed that they thought the first floor was or became critical to the overall completion of the project.

62) It is evident that what the Adjudicator did, was to consider the evidence, then come to a conclusion based on the evidence before him. He reduced the seven weeks four days of actual delay by a period over which the original amended works would have been done (two weeks) and then further reduced the Claimants' entitlement to an extension of four weeks. The decision was clearly in my judgment the product of the process which the Defendant accepts that they agreed to a process which involved the use of Mr Lowsley using his expertise to consider and analyse the entitlement to an extension on an as built basis and the Adjudicator using that analysis taking into account the concessions made by the Defendant as to the criticality of the first floor and the defences raised by the Defendant as to concurrent and culpable delay.

63) It was a transparent process sensibly and pragmatically agreed by the Parties.

64)I have come to the view that on an analysis of the decision no matters were considered outside the arguments developed by the parties.

65)These are clear instances of material being collated by Mr Lowsley which gave rise to favourable conclusions for the Defendant. It is clear that the Adjudicator used the information and received the opinions of Mr Lowsley as he was entitled to do so by virtue of the Agreement and then made his own mind up as to what inferences he was prepared to draw. As for instance when time was reduced from seven weeks and four days to four weeks.
66)I reject the Defendant's submission that the Adjudicator adopted a methodology that the Defendant did not have a chance to consider. They willingly embarked upon Adjudication No. 2 authorising the employment of Mr Lowsley in the role that they agreed he should fulfil.

Conclusion

67) 1. I find the Agreement contended for by the Claimants proved.

2. There was no unfairness in the Adjudication proceedings.