

Neutral Citation Number: [2005] EWCA Civ 1358

Case No: 2005/1070

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
(MR JUSTICE JACKSON)
TCC 30/05 HT-05-82

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 16/11/2005

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE CHADWICK
and
LORD JUSTICE MOORE-BICK

Between :

CARILLION CONSTRUCTION LIMITED

**Claimant/
Respondent**

- and -

DEVONPORT ROYAL DOCKYARD LIMITED

**Defendant/
Appellant**

Mr Stephen Furst QC and **Miss Louise Randall** (instructed by Herbert Smith of Exchange
House, Primrose Street, London EC2A 2HS) for the Appellant
Mr Nicholas Dennys QC and **Mr Simon Lofthouse** (instructed by Pinsent Masons of 100
Barbican Square, Manchester M2 3SS) for the Respondent

Hearing dates : 4 and 5 October 2005

Judgment

Lord Justice Chadwick:

1. This is the judgment of the Court on an application for permission to appeal – and on the appeal in so far as permission is granted - from an order made on 28 April 2005 by Mr Justice Jackson in proceedings in the Technology and Construction Court.
2. The proceedings followed an adjudication, made on a referral pursuant to section 108 of the Housing Grants, Construction and Regeneration Act 1996, of a dispute arising under a construction contract made between Devonport Royal Dockyard Limited (“DML”) and Carillion Construction Limited (formerly Tarmac Construction Limited but, for convenience, “CCL” or “Carillion”).
3. For the reasons which he set out in a written decision dated 17 March 2005 the adjudicator made a substantial award in favour of CCL. On 4 April 2005 CCL commenced proceedings in the Technology and Construction Court (under reference TCC 30/05) to enforce that decision. By an application made on the same day, CCL sought summary judgment under CPR Part 24. DML commenced proceedings in the Technology and Construction Court (under reference HT-05-82), also on 4 April 2005, seeking declarations that the adjudicator’s decision was invalid and unenforceable. Both proceedings came before Mr Justice Jackson in the week commencing 18 April 2005. He gave judgment, [2005] EWHC 778 (TCC), on 26 April 2005.
4. The judge upheld the adjudicator’s decision. He dismissed DML’s proceedings. In CCL’s proceedings he gave summary judgment for £12,376,454.54 inclusive of interest and value added tax. He ordered that that sum be paid by DML by 10 May 2005. He refused permission to appeal from his order.

The underlying facts

5. The circumstances in which the parties entered into contractual relations are described by the judge in paragraphs 8 to 13 of his judgment:

“8. Devonport Royal Dockyard refits and refuels warships and nuclear submarines for the Royal Navy. In March 1997, DML purchased the dockyard from the Secretary of State for Defence. At the time when the dockyard was privatised, it was decided that the existing facilities should be upgraded and new facilities should be provided.

9. Part of the purpose of these works was to enable the dockyard to refit and refuel Vanguard class submarines, as well as Swiftsure and Trafalgar class submarines. The Secretary of State engaged DML to carry out the whole of these works under a modified engineering contract which contained a target cost mechanism.

10. DML engaged Carillion as subcontractor to carry out one part of the works, namely the upgrading of 9 Dock. The works to be carried out at 9 Dock included replacing the dock walls and base and constructing four new buildings. These works would provide facilities for refitting and refuelling Vanguard submarines. One of the new buildings was a decontamination building which would contain apparatus for removing nuclear contamination.

Carillion started work on 9 Dock under the provisions of a written instruction to proceed dated 18 November 1998. On 10 March 1999, DML and Carillion entered into a written sub-contract under

seal, whereby Carillion undertook to carry out the works at 9 Dock as subcontractor. . . .

. . . .

13. At the same time as entering into the subcontract, DML and Carillion also entered into a written agreement called the 'Alliance Agreement' dated 10 March 1999. The Alliance Agreement supplemented and in part superseded the provisions of the subcontract."

6. As appears from that summary, DML was engaged under a contract which contained a target cost mechanism. The concept of payment by reference to a target cost was carried into the subcontract with CCL; and, in particular, into the provisions for payment in respect of the subcontract works which are set out at clause 10 of the Alliance Agreement. Put shortly, the amount payable to CCL on satisfactory completion of the subcontract works was to be calculated by combining three distinct elements: (i) the final actual cost, (ii) an element described as "gainshare" and (iii) a subcontractor's fee.
7. The final actual cost was to be determined by reference to appendix C to the Alliance Agreement, which defined the "actual costs" which CCL was entitled to recover from DML. The "gainshare" element was a proportion of the difference between the final actual cost and "target cost". If target cost exceeded the final actual cost – so that, in effect, the project came in under budget – DML and CCL shared the unspent difference in the proportions 30:70. In such a case the gainshare element in the amount payable to CCL was 70 per cent of the excess of target cost over final actual cost. But if the final actual cost exceeded target cost – so that there was an overspend on budget – the difference was shared in the proportions 60:40. In such a case CCL bore 40 per cent of the excess of final actual cost over target cost: the gainshare element became a "painshare".
8. "Target Cost" was defined in the Alliance Agreement as the sum of "Base Cost" and "Contingency". Base cost was the parties' estimate of final actual cost. Contingency was a sum agreed between the parties in respect of the project risk. Clause 10.1 of the Alliance Agreement provided that "subject to further adjustment in accordance with Clause 13" target cost was to be £56,034,567. That figure was the aggregate of £48,034,567 in respect of base cost and £8,000,000 in respect of contingency. Base cost comprised CCL's cost estimate (£41,065,067) and "Provisional Sums" (£6,969,500). The third element – the subcontractor's fee – was quantified in clause 10.1 of the agreement at £3,165,433.
9. Clause 13 of the agreement provided for adjustment to target cost – and to the subcontractor's fee – in the event that DML issued a variation order arising from one or other of the following: (i) adjustment of provisional sums (£6,969,500) to firm prices, (ii) variation to the subcontract works arising from circumstances under which DML had the right to specific recovery from the Ministry of Defence ("MoD" or "the Authority") and (iii) variation to the subcontract works resulting from "scope swapping" (authorised by DML) between the various subcontractors working in and around 9 Dock. The amount of the adjustment to target cost was to be calculated "in accordance with the Schedule of Cost Components as defined in the Subcontract". In effect, therefore, adjustment to target cost reflected an adjustment to base cost – that is to say, an adjustment to the parties' agreed estimate of final actual cost. Adjustment to target cost led to a consequential adjustment to the subcontractor's fee. The fee was to be increased by 6.2 per cent of the increase in the agreed estimate of the actual cost.
10. It can be seen, therefore, that target cost was integral to the calculation of the amount payable to CCL on satisfactory completion of the subcontract works. First, target cost was the basis of the reward/risk incentive underlying the gainshare/painshare element. Second, the

subcontractor's fee was based on one of the elements (base cost) which was comprised in the calculation of target cost.

11. The judge described the circumstances in which adjustments were made to target cost at paragraph 17 of his judgment:

"17. Substantial delays occurred during the course of the works as a result of design matters for which Carillion was not responsible. Whether some lesser part of the delays can be blamed upon Carillion may be an issue between the parties for future resolution. Suffice it to say that during the course of the works a series of six amendments were made to the Alliance Agreement, which reflected the delays and cost overruns and which provided for additional payments to be made to Carillion."

12. Nothing turns on the amounts by which target cost was adjusted under the first two amendments. Amendment 3, dated 24th August 2001, was subject to a proviso - set out in a covering letter from DML to CCL of the same date - which is of importance:

"1. This amendment to the Target Cost and the Total Alliance Cost Provision is made 'on account' for the purposes of providing an interim uplift. It is provided on a 'without prejudice basis' and is subject to review arising out of the final agreement reached with the authority and DML and in accordance with this Alliance Agreement."

Amendment 3 was made at a time when DML was in negotiation with MoD for a substantial increase to the pricing of the main contract. In a letter to CCL of 3 July 2001, DML had written that, in the event that it negotiated a financial settlement with MoD, then the target cost in CCL's subcontract would be adjusted accordingly. A worked example was then set out, showing how the target cost might be increased. By amendment 3, target cost was increased to £81,715,695. The subcontractor's fee was increased to £4,780,273. The aggregate of those sums (the Total Alliance Cost Provision) was £86,495,968.

13. Amendment 4 to the Alliance Agreement was dated 16th October 2001. That amendment, also, was made against the background of ongoing negotiations between DML and MoD. These were referred to by DML in a letter to CCL of 12 October 2001 in which DML indicated that if MoD's current offer were accepted then the subcontract target cost would become £97,717,515. By the amendment itself, target cost was increased to £89,794,515; but that figure was subject to the same provision for review as had appeared in amendment 3.

14. On 30th October 2001, CCL wrote to DML a letter which was later to assume some importance. It was in these terms, so far as material: "

"Further to your letter . . . dated 12 October, we confirm receipt of your Calculation Sheet for the 'Carillion Alliance Final Option'.

The target cost of £97,717,515 is not agreed for the following reasons:

1. The Carillion Re-Price Value of £107,255,000 (excluding risk) that you have used is based on a Target Cost to Completion at the end of March 2001.
2. The amount included for 'Carillion Statistical Risk' is £1,931,579 whereas we advised DML on the 15 March 2001 of £5,069,940 as

per the Risk Register. The Statistical risk using a 70 Percentile gives £5,464,000.

3. We do not accept the pro rata formula as we are not responsible for the cost growth and delays to the project. Since March 2001 we have been tasked to carry out works not anticipated nor included in the March 2001 cost forecast. The Combined Challenge Register of Threats, Opportunities and Variations entered on the Challenge Register since 2 April 2001 shows an estimated £9.266 million of extra cost.
4. On a regular basis since March 2001 we have been notifying you of the likely cost increases to enable you to take full account of them in your discussion with the MoD. . . .

These cost increases have been caused by instructions from your Project Manager, Variations, Scope Swaps, continuing Design Changes and further accelerative measures. The £9.255 million includes for some £3.830 million of additional work and scope swaps instructed by your Project Manager alone since March 2001.

Using the March Re Price Value and adding these costs we arrive at the following Target Cost.

Re Price Value March 2001	107.255
Less bonus	(1.500)
	105.755
Add Capex	1.964
Add Statistical Risk	5.464
Total Value March 2001 including Fee	113.183
Add for changes since March 2001	
Estimated costs as Challenge Register	
April to October 2001	9.266
Less Risk Register March 2001	(5.464) 3.802
	116.983 (sic)
Less Fee @ 6.2%	(6.830)
Target Cost (excluding fee and bonus)	110.153

There are further risks to the Target Cost as shown on the current risk register of £3.8 million which needs to be taken account of for the purpose of gain share.

. . . "

15. Amendment 5 to the Alliance Agreement was dated 20 November 2001. By that amendment target cost was increased to £95,793,174. That figure was subject to the same provision for review as had appeared in amendments 3 and 4. Amendment 6 was dated 19 December 2001. Target cost was increased to £100,370,103.66. [The figure to which the judge refers in paragraph 30 of his judgment (£105,150,376) is the Total Alliance Cost Provision, and includes the subcontractor's fee]. The provision for review in amendment 6 was in terms which differed in one respect from those in the previous three amendments:

"This amendment to the target cost and the total Alliance cost provision is made 'on account' for the purposes of providing an interim uplift. It is provided on a 'without prejudice' basis and is subject to review arising out of the final agreement reached with the

authority and DML, and *DML and Carillion* in accordance with this Alliance Agreement.” [emphasis added]

16. During December 2001, DML's negotiations with MoD came to a conclusion. One of the complaints made by CCL is that it was not given proper details of, or documentation relating to, the settlement negotiated with MoD.
17. The subcontract works were not fully completed by February 2002. It had been agreed at the time of amendment 1 that CCL would be paid a bonus of £1.5 million if “prime contract stage 1 completion” were achieved by 31 January 2002. The object of that incentive bonus was to secure that the works would be sufficiently advanced to enable HMS Vanguard to undertake a refit in February 2002. In the event the submarine was able to enter 9 Dock on 9 February 2002. CCL maintained that it was entitled to be paid the £1.5 million bonus.
18. The subcontract works were completed in August 2002. By that date CCL had received payment under the subcontract and the Alliance Agreement of £110 million. The parties were unable to agree what, if any, further monies were due to CCL either under the Alliance Agreement or by way of damages for alleged breach of that agreement by DML. Clause 9 of the Alliance Agreement, read with appendix B, provided an internal procedure for resolving disputes between the parties. That procedure was invoked; but it did not achieve a resolution. It was in those circumstances that, on 4 January 2005, CCL served notice of adjudication under the 1996 Act.

Adjudication under the statutory scheme

19. Section 108(1) of the Housing Grants, Construction and Regeneration Act 1996 provides that a party to a construction contract has the right to refer a dispute arising under the contract for adjudication. If the contract does not itself contain a procedure for adjudication, the adjudication provisions of the Scheme for Construction Contracts – to be made by regulations under section 114(1) of the Act – apply. That was the position in the present case. The scheme for adjudication is set out in Part I of the schedule to the Scheme of Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649).
20. Paragraph 1 of the statutory scheme provides for a party to a construction contract to give notice to the other party or parties of his intention to seek adjudication:
 - “1 (1) Any party to a construction contract (the 'referring party') may give written notice (the 'notice of adjudication') of his intention to refer any dispute arising under the contract, to adjudication.
 - (2) The notice of adjudication shall be given to every other party to the contract.
 - (3) The notice of adjudication shall set out briefly -
 - (a) the nature and a brief description of the dispute and the parties involved,
 - (b) details of where and when the dispute has arisen,
 - (c) the nature of the redress which is sought, and
 - (d) the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices).”

21. Paragraphs 2, 5 and 6 of the scheme provide for the selection of a person who is to be requested to act as adjudicator. Paragraph 3 requires that a request to act is to be accompanied by a copy of the notice of adjudication. A person requested to act as adjudicator is required to indicate whether or not he is willing to do so within two days of receiving the request – paragraphs 2(2), 5(3) and 6(2). Two features in those provisions need to be kept in mind. First, the request is made on the basis that the dispute is as described in the notice of adjudication. Second, the person to whom the request is made is given only a short time in which to decide whether or not to accept appointment as adjudicator. It is important, therefore, that the notice of adjudication should identify and describe the dispute in terms which enable him readily to decide whether the dispute is within his expertise and competence.

22. Paragraph 7 of the scheme is in these terms:

“7(1) Where an adjudicator has been selected in accordance with paragraphs 2, 5 or 6, the referring party shall, not later than seven days from the date of the notice of adjudication, refer the dispute in writing (the ‘referral notice’) to the adjudicator.

(2) A referral notice shall be accompanied by copies of, or relevant extracts from, the construction contract and such other documents as the referring party intends to rely upon.

(3) The referring party shall, at the same time as he sends to the adjudicator the documents referred to in paragraphs (1) and (2), send copies of those documents to every other party to the dispute.”

When paragraph 7(1) is read with the earlier paragraphs of the scheme to which we have referred it is plain that it is the notice of adjudication, rather than the referral notice, which is intended to identify and describe the dispute.

23. Paragraphs 12 to 19 of the scheme set out the powers and duties of the adjudicator in relation to the adjudication. In particular, paragraph 12 requires that he act impartially and in accordance with the applicable law; and that he avoid incurring unnecessary expense. Paragraphs 13 and 14 contain the following provisions (so far as material):

“13. The adjudicator may take the initiative in ascertaining the facts and the law necessary to determining the dispute, and shall decide on the procedure to be followed in the adjudication. In particular he may -

(a) request any party to the contract to supply him with such documents as he may reasonably require including, if he so directs, any written statement from any party to the contract supporting or supplementing the referral notice and any other documents given under paragraph 7(2),

...

(f) obtain and consider such representations and submissions as he requires, and, provided he has notified the parties of his intention, appoint experts, assessors or legal advisers,

(g) give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with, and,

(h) issue other directions relating to the conduct of the adjudication.

14. The parties shall comply with any request or direction of the adjudicator in relation to the adjudication."

Paragraph 19 imposes a time-frame within which the adjudicator is to reach his decision:

"19(1) The adjudicator shall reach his decision not later than --

- (a) 28 days after the date of the referral notice mentioned in paragraph 7(1), or,
- (b) 42 days after the date of the referral notice if the referring party so consents, or,
- (c) such period exceeding 28 days after the referral notice as the parties to the dispute may, after the giving of that notice, agree.

(2) . . ."

24. Paragraphs 20 to 22 of the scheme ("Adjudicator's decision") are in these terms:

"20. The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute. In particular, he may –

- (a) open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive,
- (b) decide that any of the parties to the dispute is liable to make a payment under the contract . . . and, . . . , when that payment is due and the final date for payment,
- (c) having regard to any term of the contract relating to the payment of interest, decide the circumstances in which, and the rates at which, and the periods for which simple or compound rates of interest shall be paid.

21 In the absence of any directions by the adjudicator relating to the time for performance of his decision, the parties shall be required to comply with any decision of the adjudicator immediately on delivery of the decision to the parties in accordance with this paragraph.

22. If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision."

25. Paragraph 23(2) – which reflects a requirement in section 108(3) of the 1996 Act – lies at the heart of the statutory scheme. It is in these terms:

“23(2) The decision of the adjudicator shall be binding on the parties and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties.”

26. The purpose for which the provisions in Part II of the 1996 Act (“Construction Contracts”) were enacted – and the 1998 Regulations made – is not in doubt. It was explained by Mr Justice Dyson in *Macob Civil Engineering Limited v Morrison Construction Limited* [1999] BLR 93, 97, (1999) 64 Con LR 1, 6 (para 14), in a passage to which the judge referred at paragraphs 58 and 59 of his judgment:

“ . . . 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 final determination of disputes 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 tight, 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 (s 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 (s 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. It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.”

That passage was cited and approved by Lord Justice May in *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* [2003] EWCA Civ 1750, para [8], [2004] 1 All ER 818, 821j-822d.

The referral to adjudication

27. As we have said, CCL served notice of adjudication under the 1996 Act on 4 January 2005. The notice was addressed to DML and was in these terms:

- “1. By this document Carillion Construction Limited (“Carillion”) as Referring Party gives written notice of its intention to refer a dispute arising under the Alliance Agreement to adjudication.
2. The Alliance Agreement is an agreement in writing executed by the parties on 10 March 1999 and is a supplement to a Subcontract between the parties also executed on 10 March 1999. The Alliance Agreement has been subject to six written amendments executed by the parties (Amendments 1 to 6).

3. The subcontract works to be carried out by Carillion comprised the civil engineering elements of the substantial refurbishment and development of 9 Dock at Devonport Royal Dockyard which subcontract works formed part of Main Contract works being carried out by the Responding Party, Devonport Royal Dockyard Limited ("DML"), under contract to the Ministry of Defence ("MoD"). Carillion commenced the subcontract works in or around January 1999 and completed all works required of it by in or around August 2002.
4. Pursuant to clause 10 of the Alliance Agreement Carillion is entitled following completion to be paid Actual Cost (as defined) subject to a 70% 'gainshare' or 40% 'painshare' for under or overspend against a Target Cost. Carillion is further entitled to payment of a Fee. Clause 13 of the Alliance Agreement sets out the basis on which adjustments might be made to the Target Cost and Fee. Carillion contends that the parties amended the target cost machinery of the Alliance Agreement and in particular clause 10 such that there was to be a 'review' of the Target Cost arising out of an expected renegotiation of the terms of the Main Contract between DML and the MoD. Alternatively, Carillion contends that the target cost machinery (as amended) broke down and/or become inoperable such that Carillion is now entitled to be reimbursed Actual Cost together with a Fee. Finally, Carillion contends that the parties agreed Carillion would be paid a bonus of £1,500,000 for completion of Carillion's work sufficient to enable the first submarine to enter 9 Dock by a given date. Carillion contends that it has earned this bonus.
5. DML has, to date, paid to Carillion the sum of £110,000,000 excluding VAT in respect of the subcontract works carried out by Carillion.
6. The Alliance Agreement provides for disputes to be referred, inter alia, to an Alliance Board and Star Chamber, each comprising equal numbers of representatives from Carillion and DML, for resolution if that is possible.
7. A dispute has arisen between Carillion and DML as to whether any further sum is due to Carillion in respect of the subcontract works either pursuant to and/or as damages for breach of the Alliance Agreement (as amended by Amendments 1 to 6) and/or the Subcontract. The dispute and the constituent parts of it have been referred to the Alliance Board on, inter alia, 6 October 2003 and 9 November 2004 and to the Star Chamber on, inter alia, 28 October 2003 and 1 December 2004. The Alliance Board and Star Chamber have failed to resolve the dispute which Carillion now intends to refer to adjudication
8. The redress sought by Carillion is a decision that:
 - 8.1 DML shall pay to Carillion the sum of £10,451,237.61 in respect of further amounts due (excluding bonus) pursuant to the Alliance Agreement (as amended by Amendments 1 to 6) and/or the Subcontract or such other sum as the Adjudicator may determine together with VAT thereon as applicable within 7 days of the Adjudicator's decision (or

within such other period as the Adjudicator may decide);
alternatively

- 8.2. DML shall pay to Carillion the sum of £10,451,237.61 (excluding bonus) as damages for breach of the Alliance Agreement (as amended by Amendments 1 to 6) and/or the Sub-contract or such other sum as the Adjudicator may determine together with VAT thereon as applicable within 7 days of the Adjudicator's decision (or within such other period as the Adjudicator may decide); and
- 8.3. DML shall pay to Carillion in respect of bonus the sum of £1,500,000 or such other sum as the Adjudicator may determine together with VAT thereon as applicable within 7 days of the Adjudicator's decision (or within such other period as the Adjudicator may decide); and
- 8.4. DML shall pay to Carillion interest on the above at such rates and for such periods as the Adjudicator shall determine or alternatively on the basis that Carillion is entitled to recover interest as part of Actual Cost.
- 8.5. DML shall pay the Adjudicator's fees and expenses and the fee charged by the nominating body in the sum of £250 plus VAT.

9. Carillion requests reasons for the adjudicator's decision."

28. Neither the subcontract nor the Alliance Agreement contained provisions for the selection or nomination of an adjudicator. CCL applied to The Institution of Civil Engineers, as an adjudicator nominating body for the purposes of paragraph 2(3) of the scheme. On 5 January 2005, Mr Gwyn Perdur Owen MSc BSc CEng FICE FConstE FCI Arb was appointed as adjudicator.

29. On 6 January, CCL served a referral notice. That document (which comprised sixty seven pages) set out CCL's case. It was accompanied by seven lever arch files of contractual documentation, witness statements, correspondence, reports and authorities. Section 2 ("the Dispute Referred") included the following paragraph:

"2.3 The dispute relates to the further sum(s) due and payable to Carillion under the Alliance Agreement, or as damages for breach of the Alliance Agreement and the underlying subcontract. Carillion considers that the resolution of the dispute raises the following issues:

- 2.3.1 What is the correct evaluation of final Actual Cost?
- 2.3.2 Whether the Target Cost can now be properly calculated and, if so, in what sum?
- 2.3.3 What is the correct evaluation of gainshare or painshare?

- 2.3.4 Is Carillion entitled to be paid the £1.5 million bonus?
- 2.3.5 How is the Fee to be calculated and in what sum?
- 2.3.6 Is Carillion entitled to details of the settlement that DML reached with the MoD?"

There followed nine paragraphs - paragraphs 2.4 to 2.12 – in which the attempts to implement the internal dispute resolution (and the failure of those attempts) are described. The relevance, in the present context, is the reference to the dispute notices – in which, it was said, “The parties set out the parties’ respective cases in relation to these points [meaning the points identified at paragraphs 2.3.1 to 2.3.5]” - served in connection with the Alliance Board meeting of 9 November 2004 and to the minutes of that meeting.

30. In paragraphs 5.25 and 5.26 of the referral notice CCL set out the computation upon which the amount claimed in the notice of adjudication (£10,451,237.61) was founded:

“5.25 . . .

Final Actual Cost £112,983,839.00

70% of the difference between the Actual Cost and the Target Cost (70% (£113,953,000 - £112,983,839)) [if applicable] £678,412.70

100% of the Fee £6,788,985.91

Total £120,451,237.61

5.26 Allowing for £110m paid by DML Carillion’s net entitlement is £10,451,237.61.”

The computation to support the figure (£112,983,839.00) for Final Actual Cost was set out in the preceding paragraph – paragraph 5.24. The basis upon which the figures for Target Cost and the Fee were computed was set out at, respectively, paragraphs 4.33 and 5.18 of the referral notice.

31. The figure for Target Cost (£113,953,000) is based on the letter of 30 October 2001, to which we have already referred. At paragraph 4.33 of the referral notice it was said that:

“4.33 . . . Carillion’s letter of 30 October 2001 and the discussions which took place in the Alliance Board on the same day during which Carillion made clear to DML that in concluding its negotiations with the MoD DML should take account of the updated information which Carillion was providing to DML namely that taking into account Carillion’s projections from March 2001 and adjusting them for additional costs incurred or anticipated for the period April to October 2001 the appropriate figure for the Target Cost would be £110,153m (the ‘October Cost Projection’). Furthermore, in relation to further risks and uncertainties the current risk register held by the 9 Dock Alliance indicated a further £3.8m risk which needed to be taken account of. Thus, acting reasonably DML ought to have anticipated likely outturn costs of £113.953m (ie £110.153 plus £3.8m).”

32. The figure for the subcontractor's fee (£6,778,985.91) was based on the assumed target cost of £113,953,000. The computation was set out at paragraph 5.18 of the referral notice:

"5.18 As set out above Carillion contends that it is entitled to a Target Cost of £113,953,000. The difference between this Target Cost and the Target Cost set in Amendment No 3 is £32,237,305.00. 6.2% of this figure equates to £1,998,712.91. Carillion's entitlement to Fee is therefore as follows:

Fee on Amendment 3	£4,780,273.00
Fee at 6.2% of increase in Target Cost from Amendment 3	
	<u>£1,998,712.91</u>
Total Fee	£6,778,985.91"

33. We have set out the computations (as they appear in the referral notice) in some detail because they demonstrate with clarity the basis upon which CCL was claiming the sum (£10,451,237.61) claimed in paragraphs 8.1 and 8.2 of the notice of adjudication. Put shortly, CCL was contending that that was the sum that would have been found to be due if DML had carried out the review first contemplated by proviso 1 to amendment 3 to the Alliance Agreement. That, it was said, was the basis upon which amendments 4, 5 and 6 had been made. The contention is expressed in paragraph 4 of the notice of adjudication, to which we have already referred:

"Carillion contends that the parties amended the target cost machinery of the Alliance Agreement and in particular clause 10 such that there was to be a 'review' of the Target Cost arising out of an expected renegotiation of the terms of the Main Contract between DML and the MoD."

In substance CCL's primary claim was to be paid what (as CCL alleged) would have been payable if the amended target cost machinery had been given effect. It was DML's rejection of that claim which was said to have given rise to the dispute – as appears from paragraph 7 of the notice of adjudication:

"A dispute has arisen between Carillion and DML as to whether any further sum is due to Carillion in respect of the subcontract works either pursuant to and/or as damages for breach of the Alliance Agreement (as amended by Amendments 1 to 6) and/or the Subcontract."

And it was on the basis of that claim that redress was sought in the amount (£10,451,237.61) specified in paragraphs 8.1 and 8.2 of the notice of adjudication.

34. CCL's secondary, or alternative, claim was to be reimbursed Actual Cost together with a Fee. That claim, also, was expressed in paragraph 4 of the notice of adjudication:

"Alternatively, Carillion contends that the target cost machinery (as amended) broke down and/or become inoperable such that Carillion is now entitled to be reimbursed Actual Cost together with a Fee."

That claim is quantified at paragraph 5.27 of the referral notice:

"5.27 Alternatively, if Carillion is entitled to be paid its Actual Cost plus Fee of 6.2% then Carillion would be entitled to be paid £119,988,837 (£112,983,839 plus £7,004,998.02) which after

allowing for £110,000,000 already paid would leave a net entitlement to £9,988,837.”

As we have said, the computation to support the figure (£112,983,839) for Final Actual Cost was set out in paragraph 5.24. The Fee (£7,004,998) is 6.2% of that figure. [$£112,983,839 \times 6.2\% = £7,004,997.50$].

35. Both primary and secondary claims were computed net of the £1.5 million bonus. That bonus was claimed separately, under paragraph 8.3 of the notice of adjudication. The basis of that claim formed section 6 of the referral notice. The claim for interest – paragraph 8.4 of the notice of adjudication – formed section 7 of the referral notice – read with the computations in appendices 18 and 19. Paragraphs 8.1 to 8.5 of the notice of adjudication were reproduced in section 8 (“Remedies”) of the referral notice.

The course of the adjudication

36. The course of the adjudication was described by the judge at paragraphs 36 to 40 of his judgment:

“36 In correspondence, DML's solicitors, Herbert Smith, disputed the jurisdiction of the adjudicator. However, they did not issue proceedings at that stage in order to resolve the matter. On 21st January, DML served its response in the adjudication, running to some 75 pages. In that response, DML disputed Carillion's various claims and also sought to set off damages for defects. DML included in its response a request that the adjudicator should give reasons for his decision.

37. On 28th January, Carillion served its reply, which ran to 56 pages. On 11th February, DML served a rejoinder, which was 76 pages long.

38. The parties also sent lengthy and detailed letters to the adjudicator. They served numerous witness statements, expert reports and appendices. In all, the adjudicator was furnished with 29 lever arch files of materials.

39. Perhaps unsurprisingly, the adjudicator proposed an oral hearing in order to bring matters into focus. For reasons which are in dispute, that oral hearing did not take place. By letter dated 22nd February, the adjudicator proposed that in those circumstances the parties should provide written summaries of their cases. Wisely, the adjudicator directed that each summary should be limited to four pages in length. Each party duly served a written summary of its case.

40. The adjudicator requested and was granted two extensions of time totalling 42 days. Thus in all the adjudicator was allowed a period of ten weeks in which to consider the issues and produce his decision.”

The adjudicator's decision

37. The adjudicator issued his decision on 17 March 2005. The decision itself was preceded by three sections – introduction, issues and remedies. At paragraph 4 in the introduction the

adjudicator identified the dispute which had been referred to him in terms which echoed those in paragraph 7 of the notice of adjudication:

"4.A dispute has arisen between the Parties as to whether any further sum is due to CCL in respect of the subcontract works either pursuant to and/or as damages for breach of the Alliance Agreement as amended by Amendments 1 to 6 and/or the Subcontract."

He set out the issues which (as he thought) he had been asked by CCL to decide:

- Issue 1:** Is CCL entitled to be paid an amount in excess of £110 million representing any sums due under the Alliance Agreement as amended, or alternatively by way of damages?
- Issue 2:** If so, what is the correct evaluation of any amount due to CCL?
- Issue 3:** Is CCL entitled to the payment of an amount of £1.5 million representing a bonus?
- Issue 4:** Is CCL entitled to the payment of a fee and if so what is the evaluation of that fee?"

Issues 1 and 2 may be seen as a re-formulation (without change in substance) of the issues which had been identified by CCL at paragraphs 2.3.1 to 2.3.3 of its referral notice:

- " 2.3.1 What is the correct evaluation of final Actual Cost?
- 2.3.2 Whether the Target Cost can now be properly calculated and, if so, in what sum?
- 2.3.3. What is the correct evaluation of gainshare or painshare?"

Issues 3 and 4 are a restatement of the issues identified at paragraphs 2.3.4 and 2.3.5 of the referral notice. The remedies are those set out at paragraphs 8.1 to 8.5 of the notice of adjudication and at section 8 of the referral notice

38. The adjudicator gave his answers to the four issues which he thought he had been asked to decide:

- Issue 1:** CCL is entitled to be paid an amount in excess of £110 million representing sums due under the Alliance Agreement as amended.
- Issue 2:** The correct evaluation of the amount due to CCL in excess of £110M due to the undertaking of the Works is £1,167,436.00 plus any applicable VAT, exclusive of the Fee.
- Issue 3:** CCL is entitled to the payment of an amount of £1,500,000.00 representing a bonus.
- Issue 4:** CCL is entitled to the payment of a fee in the sum of £6,778,986.00 plus any applicable VAT."

He directed that DML pay to CCL within seven days of his decision the sum of £9,446,422, being the aggregate of (i) £7,946,422 (£1,167,436 + £6,778,986) and (ii) £1,500,000; and the further sum of £1,199,905 by way of interest on that sum. The total amount to be paid by DML to CCL under the adjudicator's decision was thus £10,646,327 (exclusive of VAT).

39. The adjudicator gave reasons for his decision – as he had been requested to do by the parties. The three determinative elements which led him to his decision under issue 2 – and (by extension) to his decision under issue 4 – were (i) Target Cost, (ii) Final Actual Cost and (iii) Defects. In relation to Target Cost the adjudicator accepted the figure advanced by CCL (£113,953,000) – paragraph 3.4 of the Reasons. Acceptance of that figure led him to accept the figure advanced by CCL in respect of the Fee (£6,778,986). His reasoning – set out at paragraph 5.3 of the Reasons – adopts that advanced at paragraph 5.18 of the referral notice.
40. In the course of the adjudication CCL had reduced its figure in respect of Final Actual Cost from £112,983,839 to £112,514,757 – paragraph 14 of CCL's summary of submissions dated 2 March 2005. The difference lies in an increase in the costs accepted as inadmissible – as appears from a comparison of the computation at paragraph 5.24 of the referral notice with the computation in the letter dated 17 February 2005 from CCL's solicitors to the adjudicator. The adjudicator accepted CCL's revised figure for Final Actual Cost (£112,514,757) – paragraph 3.10 of the Reasons. That led him to value gainshare at £1,006,770 (70% of {£113,953,000 - £112,514,757}). Accordingly, but for the defects claim advanced by DML, he would have reached the conclusion that the amount payable under the Alliance Agreement as amended (exclusive of the Fee and bonus) was £3,521,527.
41. It is that figure (£3,521,527) which falls to be compared with the figure for unpaid primary cost (£3,662,251) claimed in the referral notice (paragraph 5.25). The comparison is set out below:

	Claim	Award
Final Actual Cost	£112,983,839	£112,514,757
Gainshare	<u>£678,412</u>	<u>£1,006,770</u>
Primary cost	£113,662,251	
£113,521,527		
Paid	<u>£110,000,000</u>	
	<u>£110,000,000</u>	
Unpaid primary cost	£3,662,251	£3,521,527

The difference is attributable, solely, to the reduction in the figure for Final Actual Cost – which leads necessarily to a consequential increase in the figure for gainshare. As we have said, the reduction was conceded by CCL in the course of the adjudication.

42. The third determinative element which led to the adjudicator's decision under issue 2 was an allowance of £2,354,091 in respect of defects. A defects claim in the amount of £20,000,000 had been advanced by DML by way of set-off - paragraphs 4.39 to 4.57 and section 11 of DML's response of 11 February 2005. The adjudicator addressed that claim at paragraphs 3.11 to 3.19 of the Reasons annexed to his decision. He pointed out (at paragraph 3.14) that the dispute notice submitted by DML to the Alliance Board for consideration in November 2004 had evaluated defective items at £2,942,614. He accepted that figure as a realistic estimate, but took the view that he should "apply a reduction factor of 20% to the stated costs in an attempt to more accurately reflect the regular and routine nature of the intended works and their actual cost" – paragraph 3.19. On that basis he valued the cost of defects at £2,354,091.

43. It followed that the adjudicator's evaluation of the total amount due to CCL in respect of the works (exclusive of bonus and subcontractor's fee) was £111,167,436. After taking account of the £110 million already paid, the amount found due to CCL under issue 2 was £1,167,436. That amount was, of course, equal to the difference between the unpaid primary cost (£3,521,527) and the amount of the provision for defects (£2,354,091). The computation was set out in appendix 1 to the adjudicator's reasons:

Final Actual Cost	£112,514,757
Gainshare : (70% x (£113,953,000 - £112,514,757))	£1,006,770
[Primary cost	£113, 521,527]
Less provision for defects	£2,354,091
	£111,167,436
Less already paid	£110,000,000
	£ 1,167,436

44. As we have said, the three determinative elements which led the adjudicator to his decision under issue 2 were (i) Target Cost, (ii) Final Actual Cost and (iii) Defects. In relation to Target Cost and Final Actual Cost he accepted the figures advanced by CCL. It is necessary to examine the process of reasoning which led him to do so.
45. At paragraph 2.5 of the Reasons annexed to his decision the adjudicator referred to the statement of Mutual Objectives at clause 4 of the Alliance Agreement. At paragraphs 2.6 and 2.7 he said this:

"2.6 In line with these Objectives I am persuaded that it was the Parties' intention and by further agreement to revise Target Cost estimates as the project progressed and that this Objective was evidenced by progressive agreements to amend the Alliance Agreement principally by Amendments 1 to 6. It appears to me that these amendments were agreed and executed after exhaustive dialogue relating to costs and other issues between the Parties at the time, always with the provision that they were '*. . . made "on account" for the purposes of providing an interim uplift . . .*'

2.7 The Parties are in agreement that the works programme and costs changed during the life of the project and that many of those changes were outside the scope of the Alliance Agreement. In any event it is agreed that certain of the cost increases and delays were not the responsibility of CCL and do not form part of this Referral. It is the case that since late 2001 the Parties were involved in extensive dialogue with respect to what they considered to be necessary further amendments to both Actual Costs and Target Costs over and above those Amendments already agreed. I am not convinced by any argument that the relevant dialogue undertaken, as evidenced to me in these proceedings, changed the basic philosophy of the original Alliance Agreement at any stage. The relevant dialogue concerned both the Actual Costs and Target Costs. Any further agreement relating to those issues would have resulted in a

further amendment to the Agreement and a revised adjustment of the Costs. However it is evident that the relevant dialogue did not produce a further agreement nor amendment to the Agreement. The failure to agree became a dispute which as I have mentioned above was presented to both the Alliance Board and the Star Chamber and now to this Adjudication.”

46. At paragraph 2.8 the adjudicator explained why he took the view that it would be inappropriate for him to “enter into the merits or otherwise” of discussion between DML and MoD. It was sufficient for him to conclude, for the purposes of the Referral, that:

“2.8 . . . the Parties were involved in a dialogue with respect to Actual Costs and Target Costs. Furthermore any review of the Agreement contemplated by any ‘... *final agreement reached with the Authority and DML...*’ did either not take place as agreed or alternatively did not culminate in agreement but actually in a dispute. Accordingly any further amendment of the Alliance Agreement as contemplated by Amendments 1 to 6 did not take place.”

It was that reasoning that led the adjudicator to conclude, at paragraph 2.9 and in answer to the issue which he had identified as Issue 1, that:

“2.9 . . . an entitlement exists under the Alliance Agreement to a review of the Total Amount due under the Agreement and that the Parties are in dispute regarding that Amount. Accordingly I do not need to consider the alternative case of damages.”

47. It is clear from those passages that the adjudicator saw it as his task to resolve the dispute arising from the failure of CCL and DML to reach agreement – in accordance with what he described as “the basic philosophy of the original Alliance Agreement” - as to what the revised adjustment to Actual Costs and Target Costs should be. Or, to put the point another way, he saw it as his task to supply the figures for Actual Costs and Target Costs which – if the dialogue between the parties had not failed to produce agreement - the parties would have supplied by agreement. That was the task upon which he embarked in answering Issue 2 – “What is the correct evaluation of any amount due to CCL?”.

48. It was on the basis of that approach that the adjudicator addressed the determination of Target Cost at paragraphs 3.3. and 3.4 of his Reasons:

“3.3. My consideration of the Target Cost concerns the dispute raised by CCL in relation to its revised valuation of the Target Cost as noted in its letter to DML dated 30 October 2001. I have been provided with an alternative calculation of Target Cost by DML after allowances for Provisional Sums and Scope Swaps. However as the dispute in this case concerns CCL’s estimation of the cost I shall not consider the alternative calculation. I have read and taken into consideration the various witness statements and the detailed quantum observations of Mr Ennis with respect to the Target Costs and conclude that I prefer the position of CCL. It appears to me that the considerations of the Parties relating to the Target Cost were discussed at great length during 2001 and the calculations of CCL were ultimately submitted in October 2001

as a result of those discussions. The valuation takes into account revisions and changes to the Risk Register and Challenge Register and make revised calculations due to cost.

"3.4. I therefore decide that the revised target cost is £113,953,000."

49. The adjudicator adopted the same approach to the determination of Final Actual Cost – paragraphs 3.5 to 3.10. After describing the evidence and the contentions that the parties had put before him, he concluded that :

"3.10 By considering the foregoing and the voluminous data with which I am provided in this case and the various statements made to the persons who were present at the time that the costs were originally compiled and audited, then I conclude that I prefer the quantum report of the Referring Party as adjusted to account for non conforming cost inclusions. Accordingly I decide that the final Actual Costs are £112,514,757.32."

These proceedings

50. DML did not accept the adjudicator's decision and did not make the payment which that decision required. As we have said, each of the parties commenced proceedings in the Construction and Technology Court on 4 April 2005. CCL sought summary judgment in the amount (£10,646,327) to which the adjudicator had decided it was entitled. DML sought declarations in the following terms:

"(1) The decision was made without and/or in excess of jurisdiction; and/or,

(2) The decision was made on an intrinsically unfair basis and/or in breach of the rules of natural justice; and/or,

(3) The decision is not compliant with the requirements of the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts Regulations 1998."

51. The proceedings were commenced and heard, and judgment delivered, within the space of three weeks. That degree of expedition led, as the judge observed at paragraph 52 of his judgment, to some evolution in the formulation of each party's case in the course of the hearing. The judge summarised the submissions advanced on behalf of DML, as they finally emerged, at paragraph 54:

"1. The adjudicator's decision on target cost (as explained by [counsel] in oral argument) was a decision which was outside his jurisdiction and therefore should not be enforced."

2. The adjudicator's decision on target cost was reached in breach of the rules of natural justice and therefore should not be enforced.

3. The adjudicator's decision on allowance for defects was reached in breach of the rules of natural justice and not supported by any or any adequate reasons; therefore it should not be enforced.
4. The adjudicator had no jurisdiction to award interest."

As the judge explained, if the attack on the adjudicator's decision were to succeed under any one of the first three of those grounds, the decision would be unenforceable. But if the attack were to succeed on the fourth ground alone, then the award of interest would be severable and the balance of the decision could be enforced.

The judge's reasoning

52. Before addressing those submissions the judge set out the legal principles which he was to apply. He examined a number of authorities, including five decisions of this Court – *Bouygues (UK) Limited v Dahl-Jensen (UK) Limited* [2001] All ER Comm 1041, [2000] BLR 522, *C&B Scene Concept Design Limited v Isobars Limited* [2002] BLR 93, *Levolux AT Limited v Ferson Contractors Limited* [2003] EWCA Civ 11, 86 Con LR 98, *Pegram Shopfitters Limited v Tally Weijl (UK) Limited* [2003] EWCA Civ 1750, [2004] 1 All ER 818 and *Amec Capital Projects Limited v Whitefriars City Estates Limited* [2004] EWCA Civ 1418, [2005] BLR 1. At paragraph 80 of his judgment he stated the general principles to be derived from those authorities and from two decisions in the Technology and Construction Court – *Discain Project Services Limited v Opecprime Development Limited* [2000] BLR 402 and *Balfour Beatty Construction Limited v Lambeth London Borough Council* [2002] BLR 288:

- "1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish).
2. The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law: see *Bouygues*, *C&B Scene* and *Levolux*;
3. Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision: see *Discain*, *Balfour Beatty* and *Pegram Shopfitters*.
4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice: see *Pegram Shopfitters* and *Amec*."

We do not understand there to be any challenge to those general principles. They are fully supported by the authorities, as the judge demonstrated in his judgment.

53. The judge then went on, at paragraph 81 of his judgment, to state five propositions which, as he said, bore upon the issues which he had to decide:

- "1. If an adjudicator declines to consider evidence which, on his analysis of the facts or the law, is irrelevant, that is neither (a) a breach of the rules of natural justice nor (b) a failure to consider relevant material which undermines his decision on *Wednesbury* grounds or for breach of paragraph 17 of the Scheme. If the adjudicator's analysis of the facts or the law was erroneous, it may follow that he ought to have considered the evidence in

question. The possibility of such error is inherent in the adjudication system. It is not a ground for refusing to enforce the adjudicator's decision. I reach this conclusion on the basis of the Court of Appeal decisions mentioned earlier. This conclusion is also supported by the reasoning of Mr Justice Steyn in the context of arbitration in *Bill Biakh v Hyundai Corporation* [1988] 1 Lloyd's Reports 187.

2. On a careful reading of His Honour Judge Thornton's judgment in *Buxton Building Contractors Limited v Governors of Durand Primary School* [2004] 1 BLR 474, I do not think that this judgment is inconsistent with proposition 1. If, however, Mr Furst is right and if *Buxton* is inconsistent with proposition 1, then I consider that *Buxton* was wrongly decided and I decline to follow it.
3. It is often not practicable for an adjudicator to put to the parties his provisional conclusions for comment. Very often those provisional conclusions will represent some intermediate position, for which neither party was contending. It will only be in an exceptional case such as *Balfour Beatty v London Borough of Lambeth* that an adjudicator's failure to put his provisional conclusions to the parties will constitute such a serious breach of the rules of natural justice that the Court will decline to enforce his decision.
4. During argument, my attention has been drawn to certain decisions on the duty to give reasons in a planning context. See in particular *Save Britain's Heritage v No 1 Poultry Limited*, [1991] 1 WLR 153 and *South Bucks DC and another v Porter (No 2)* [2004] 1 WLR 1953. In my view, the principles stated in these cases are only of limited relevance to adjudicators' decisions. I reach this conclusion for three reasons:
 - (a) Adjudicators' decisions do not finally determine the rights of the parties (unless all parties so wish).
 - (b) If reasons are given and they prove to be erroneous, that does not generally enable the adjudicator's decision to be challenged.
 - (c) Adjudicators often are not required to give reasons at all.
5. If an adjudicator is requested to give reasons pursuant to paragraph 22 of the Scheme, in my view a brief statement of those reasons will suffice. The reasons should be sufficient to show that the adjudicator has dealt with the issues remitted to him and what his conclusions are on those issues. It will only be in extreme circumstances, such as those described by Lord Justice Clerk in *Gillies Ramsay [Gillies Ramsay Diamond and others v PJW Enterprises Limited]* [2004] BLR 131, that the court will decline to enforce an otherwise valid adjudicator's decision because of the inadequacy of the reasons given. The complainant would need to show that the reasons were absent or unintelligible and that, as a result, he had suffered substantial prejudice."

54. With those propositions in mind, the judge turned to the first of the submissions advanced on behalf of DML - that the adjudicator's decision on target cost was a decision which was outside his jurisdiction and therefore should not be enforced. The judge rejected that submission for the six reasons which he set out at paragraph 87 of his judgment:

- "1. The adjudicator was required to determine the primary sum due to Carillion under the Alliance Agreement. This determination inevitably involved along the way making an assessment of the target cost. All this was spelt out in the notice of adjudication dated 4th January 2005.
2. In its notice of referral dated 6th January 2005, Carillion specifically asked the adjudicator to assess target costs in the sum of £113,953,000, as set out in Carillion's letter dated 30th October 2001. DML responded to this claim in its various written submissions to the adjudicator.
3. It is quite true that Carillion subsequently put forward an argument (based on recently disclosed documents concerning the settlement with MoD) that target costs should be £110 million. See paragraph 1.11 of Carillion's reply dated 28th January and section 11 of Carillion's summary dated 2nd March. Nevertheless, Carillion made it clear that it was not abandoning its original case on target cost. See Pinsent Masons' letter to the adjudicator dated 17th February 2005, which was copied to Herbert Smith. DML understood that this was the position, as can be seen from its rejoinder.
4. The method by which the adjudicator should determine target cost was a matter of controversy between the parties and ultimately for decision by the adjudicator. Both parties provided to the adjudicator voluminous factual and expert evidence to assist him in determining target cost by whichever route he chose to adopt. See, for example, the evidence of Mr Duckworth and Mr Ennis's comments on that evidence.
5. The adjudicator rejected Carillion's argument that a target cost of £110 million could somehow be derived from the documents disclosed concerning the settlement with MoD. In those circumstances, as Mr Dennys has argued, the adjudicator was quite entitled, if he saw fit, to assess target costs at £113.953 million in accordance with Carillion's letter dated 30th October 2001.
6. The adjudicator's assessment of target cost is highly likely to be revised either upwards or downwards, if and when an arbitrator or this court comes to determine the matters in issue between the parties. The adjudicator's approach to or assessment of target cost may well embody errors of both fact and law. This would be unsurprising in view of the statutory constraints under which he was operating and the sheer volume of evidence and intricate submissions which were thrust upon him. Nevertheless, any such errors of law and fact cannot be characterised as excess of jurisdiction."

The expression 'primary sum' in paragraph 1 of that citation means "the sum which is due to Carillion under clause 10 of the Alliance Agreement if one excludes the fee element" – as the

judge explained at paragraph 16 of his judgment. It is the aggregate of final actual cost and the gainshare/painshare element. It is because it is impossible to compute the gainshare/painshare element without first determining a figure for target cost that the judge observed (correctly) that determination of the primary sum "inevitably involved along the way making an assessment of the target cost".

55. The second of DML's submissions before the judge was that the adjudicator's decision on target cost was reached in breach of the rules of natural justice. It was submitted that the adjudicator had disregarded arguments which he should have taken into account. The judge identified these at paragraphs 90 ("the first disregard"), 92 ("the second disregard") and 93 ("the third disregard"). As the judge put it, at paragraph 96 of his judgment, counsel for DML "characterises these three disregards in two ways. First, he says that they amount to an exclusion of relevant considerations. Thus the adjudicator was in breach of paragraph 17 of the Scheme. Secondly [he] says that these three disregards are a breach of the rules of natural justice".
56. The first of the supposed "disregards" was the adjudicator's decision (explained at paragraph 2.8 of the Reasons) not to enter into the merits or otherwise of the discussion between DML and MoD under the main contract. The judge rejected that criticism, at paragraphs 97 to 99:

"97 . . . The first disregard was no more than the implementation of a decision of law. The adjudicator concluded that negotiations between DML and MoD could not impact upon the calculation of target cost under the Alliance Agreement and its amendments. In this respect, the adjudicator was rejecting an argument advanced by Carillion and accepting an argument which had been advanced more than once by DML. . . .

98. It was clearly an issue for the adjudicator to decide whether the negotiations between DML and MoD were relevant to the assessment of target cost and, if so, how. The adjudicator concluded that those negotiations were not relevant.

99. Whether the adjudicator was right or wrong in this conclusion cannot affect the validity of his decision. Having reached such a conclusion, the adjudicator, when assessing target cost, did not take into account the negotiations between DML and MoD. The adjudicator cannot be criticised for taking that course."

57. The second "disregard" was the adjudicator's decision (explained at paragraph 3.3 of the Reasons) not to consider the alternative calculation of target cost provided by DML. The judge rejected that criticism at paragraph 101 of his judgment:

"101. . . . Mr Ennis [one of DML's expert witnesses] undertook an alternative calculation. He took the target cost contained in amendment 2 and adjusted that figure in accordance with clause 13 of the Alliance Agreement. For the purposes of this exercise, he disregarded amendments 3 to 6. . . . This alternative calculation produced a target cost of £81 million to £84 million. The adjudicator rejected the contractual basis of Mr Ennis's alternative calculation. Therefore the adjudicator did not make use of Mr Ennis's [calculation] in assessing target cost. There was nothing objectionable in the adjudicator adopting that course."

58. The third “disregard” was that the adjudicator made no reference in his Reasons to five specific defence arguments. Those arguments are set out by the judge at paragraph 93 of his judgment:

“(a) CCL's failure to identify the factual and legal basis of its claim meant that its claim should fail ...

(b) DML was not obliged to put forward the letter of 30th October 2001 to MoD, nor was it in a position to do so ...

(c) DML did not secure payment in the sum set out in the letter from MoD ...

(d) Even if DML were obliged to put forward the letter of 30th October, CCL's remedy would be the loss of the chance to fix a target cost based on those figures ...

(e) There was no obligation on DML to make disclosure of the DML -- MoD negotiation documents.”

The judge rejected that criticism also (at paragraph 102 of his judgment):

“102. I turn now to the third disregard. The adjudicator was the recipient of literally hundreds of pages of legal argument. The parties' positions shifted as the adjudication progressed. By way of example, DML took numerous points of jurisdiction which were subsequently not pursued. The adjudicator did a remarkable job in keeping abreast of the battle and in keeping under control the torrent of incoming material. He made it plain in his written decision which arguments he accepted and how his figures were calculated. It is clear that the adjudicator was not persuaded by the five specific arguments mentioned in paragraph 28 of DML's skeleton argument. There was no need for the adjudicator specifically to recite and address those five arguments in his decision.”

59. The judge rejected, also, a further argument, advanced under the head of ‘breach of natural justice’ but which he described as “a variant of [DML's] first challenge to the adjudicator's decision”. It was said that, in breach of natural justice, the adjudicator decided the issue concerning target cost on a different basis from that advanced by the parties and without giving DML an opportunity to make representations. The judge took the view (at paragraph 105 of his judgment) that:

“105 . . . DML had proper opportunity to make representations concerning the assessment of target cost on the basis adopted by the adjudicator. Indeed DML did make such representations in the form of Mr Ennis's reports. ”

60. The third challenge to the adjudicator's decision was founded on the contention that his allowance for defects was reached in breach of the rules of natural justice and not supported by any or any adequate reasons. So, it was said, the decision could not be enforced.

61. As we have already mentioned, the dispute notice submitted by DML to the Alliance Board for consideration in November 2004 had evaluated defective items at £2,942,614. Subsequently DML revised its claim upwards to an amount of £20 million or thereabouts. CCL's stance was that there could be no allowance for defects because there had been no withholding notice, no crystallised dispute and no opportunity to remedy the defects. The adjudicator had rejected those threshold defences. He took the November 2004 dispute notice as a starting figure and applied a discount. The judge summarised the challenge to the adjudicator's approach at paragraph 111 of his judgment:

"111. DML considers that the allowance made for defects should have been higher. Mr Furst mounts three separate attacks on the adjudicator's assessment of £2,354,091. These attacks are:

1. The Adjudicator focussed on DML's original defects claim of November 2004. He did not address the expanded defects claims of January and February 2005, despite the fact that these had been prepared after further and fuller investigation.

2. The adjudicator applied a reduction factor of 20 per cent to DML's original defects claim: '... in an attempt to more accurately reflect the regular and routine nature of the intended works and their actual cost.' . . . The adjudicator took this course without giving either party the opportunity to comment on his proposed reduction.

3. The adjudicator gave no, or no adequate, reasons for his decision in respect of defects."

62. The judge rejected that challenge. In dismissing the first line of attack he said this, at paragraphs 112 and 113:

"112. As to the first line of attack, it is clear from paragraph 3.12 of his reasons that the adjudicator specifically considered DML's expanded defects claims of January and February 2005. As can be seen from paragraph 3.17 of his reasons, the adjudicator considered that the defects alleged by DML in November 2004 had been properly notified to Carillion under clause 17(3) of the subcontract. However the adjudicator did not find that the second batch of defects (which came to light in or around January and February 2005) had been properly notified to Carillion. Furthermore, the adjudicator took the view that the only satisfactory evidence relating to defects was the evidence supporting the first batch of defects. See the last sentence of paragraph 3.17 and the second sentence of paragraph 3.18.

113. Although it is irrelevant to anything which I have to decide, I have read the evidence of Mr Evans and Mr Ennis supporting the second batch of defects. It can be seen that of the £21 million claimed for defects, only £56,614.10 had so far been expended. Also, the assessment of future remedial work involved a significant degree of speculation. See, for example, Mr Evans's report at bundle C, page 158. The adjudicator was perfectly entitled to find that the expanded defects claim had not been satisfactorily proved at that stage. The adjudicator may have been right or he may have been wrong in (a) his analysis of the effect

of clause 17 of the subcontract and (b) his assessment of the expert evidence. These are two separate and independent justifications of the decision which the adjudicator reached. Whether the adjudicator was right or wrong in these matters, it cannot be said that he failed to consider and address DML's expanded claims for defects in the sum of about £20 million."

63. At paragraph 115 the judge addressed the complaint that the adjudicator had applied a 20 per cent discount without giving either party an opportunity to comment on that course:

"115 The 20 per cent reduction in quantum which the adjudicator made was the result of casting a critical eye over the expert evidence. This is precisely the kind of exercise which one would expect the adjudicator (who is himself an experienced engineer) to undertake. It is unrealistic to expect an adjudicator, who is struggling under tight time limits with a growing mass of evidence and legal submissions, as well as a barrage of intricate correspondence, to contact the parties and to invite their comments on a matter of this nature."

And, at paragraph 116, of his judgment, the judge dismissed the third line of attack in these words:

"116 In my view, the reasons which the adjudicator gave for his decision on defects were perfectly adequate. The adjudicator explained why he rejected the expanded defects claim. He also explained the reduction factor which he applied to the original defects claim."

64. The fourth challenge was to the adjudicator's decision to award interest. It is convenient to consider that issue separately and at a later stage in this judgment.

Permission to appeal

65. DML's application for permission to appeal was considered on the papers by Lord Justice Lloyd. He adjourned that application to an oral hearing before the full Court and directed that the appeal should follow forthwith if permission were granted. In those circumstances we have had the benefit of submissions from both parties. The grounds of appeal, although expressed at much greater length in the appellant's notice and expanded over 105 paragraphs (and 47 pages) of outline submissions, reflect closely the four 'final submissions' identified by the judge. After hearing full argument we have decided to refuse permission to appeal on all grounds save that relating to interest (ground 12 in the schedule attached to the appellant's notice).

66. The applicant's outline submissions are prefaced with a general criticism of the adjudicator's decision (an 'overview') in terms which are robust, if not extravagant:

"3. This appeal relates to an adjudication which went seriously awry. In short:

- a. The Adjudicator awarded the respondent ('CCL') more than CCL ended up claiming;
- b. The Adjudicator expressly ignored all the arguments advanced by both parties as to the basis upon which Target Cost should be calculated;

- c. Instead he decided that issue on a basis which had not been advanced by either party and which neither party had notice of;
- d. The Adjudicator provided no reasons at all for rejecting the arguments put forward by the parties as to the basis upon which Target Cost should be calculated and/or his reasons are wholly inadequate;
- e. Although the Adjudicator found there were defects, as contended for by DML, he evaluated the cost of remedying those defects at a figure well below the figures put forward, on a basis that neither party contended for and without providing any reasons at all for so doing;.
- f. He also discounted that figure for a reason which neither party had advanced and without notice to the parties or giving them an opportunity to make representations;
- g. . . .

4. This is not a case where the unsuccessful party is simply scabbling around to find some argument, however tenuous to resist payment. It is submitted that it is clear that the Adjudicator's decision was arrived at in breach of the rules of natural justice and fails to comply with the very basic and fundamental requirements prescribed by the 1996 Act and Scheme, as interpreted by the Courts. A very serious injustice has resulted."

- 67. We find it difficult to understand – and impossible to accept – the criticism that the adjudicator awarded CCL “more than CCL ended up claiming”. The claim made in the notice of adjudication (at paragraph 8.1) and in the referral notice (at paragraph 8.1.1) was for payment of £10,451,237.61 in respect of further amounts due (excluding bonus) pursuant to the Alliance Agreement (as amended). The comparable figure within the award (after excluding bonus) is £7,946,422, - that is to say, the aggregate of the sums which the adjudicator awarded under paragraphs 2 and 4 of his decision. As we have shown the difference between the two figures is attributable (i) to the adjudicator accepting a revised (and lower) figure for final actual cost than that originally advanced on behalf of CCL and (ii) to the set-off in respect of defects (£2,354,091). But, even if that set-off were left out of account, the amount that would have been awarded in respect of the aggregate of unpaid primary cost and subcontractor's fee (£3,521,527 + £6,778,986 = £10,300,513) is less than the amount (£10,451,237.61) claimed in respect of those two elements.
- 68. The criticism that the adjudicator awarded CCL “more than CCL ended up claiming” is based, it seems, on the premise that CCL abandoned the claim to be paid “further amounts due . . . pursuant to the Alliance Agreement (as amended)”. But that premise cannot be established. It is true that, in the referral notice (at paragraph 5.27), CCL advanced an alternative claim based on Actual Cost plus Fee which, on the figure then put forward in respect of final actual cost (£112,983,839), would have left an unpaid balance of £9,988,837. That figure reduced to £9,490,672 when CCL accepted that there should be a reduction in the final actual cost. But CCL's primary case remained that identified in the notice of adjudication – as appears from paragraph 12.37 of CCL's reply document served on 28 January 2005:

"12.37 . . . The dispute between the parties is very clearly identified at section 7 [of the notice of adjudication] in the following terms:

'A dispute has arisen between Carillion and DML in respect of the sub-contract works either pursuant to and/or as damages for breach of the Alliance Agreement (as amended by Amendments 1 to 6) . . .'"

And, in that context, as CCL asserted at paragraph 12.34 of that reply:

" 12.34 Carillion has maintained its position that in the absence of DML providing documentation and facilitating a review the Target Cost should be the figure of £113,953,000. . . ."

69. The primary case – that CCL's claim was made under or for breach of the Alliance Agreement as amended – was reaffirmed on 17 February 2005 in a letter to the adjudicator:

"Carillion rejects DML's assertions that new or different claims are advanced in the Reply. Carillion's claim for the purposes of this adjudication has always been:-

1. made under or for breach of the Alliance Agreement as varied by Amendments Nos 3 to 6; and
2. for the difference between the amount due under or for breach of the Alliance Agreement (as varied by amendments Nos 3 to 6) and the £110 million paid by DML to date."

That that was CCL's primary case was, again, confirmed in its summary of submissions dated 2 March 2005 – paragraphs 1(i), 3 and 4.

70. It can be said that, after some disclosure of documentation relating to the settlement between DML and MoD, CCL took the opportunity, in the summary of submissions, to advance a claim based on the contention that (in the absence of a review under the contractual machinery) target cost was to be taken to be the settlement figure – paragraphs 11.2 and 11.3. But CCL's primary case remained that advanced in the notice of adjudication. That was how DML understood the position – as appears from DML's own summary of submissions, at paragraph 2.2:

"2.2 Prior to amendment of the Alliance Agreement Target Cost could only be adjusted under clause 13. Contract Amendments No's 3-6 introduced an additional circumstance in which target cost might be adjusted *i.e.* upon the 'review' provided for by Contract Amendment No's 3-6 and under Clause 13 of the Alliance Agreement. This much is common ground. The principal issues that arise between the parties concern (a) how the 'review' element introduced by Contract Amendment No's 3-6 is properly to be construed, and (b) what occurs absent the contemplated review or absent any agreed result following the contemplated review."

And, at paragraph 1.2 of that summary:

"1.2 . . . Thus CCL argue (a) that unless Target Cost is adjusted to one or other of the sums claimed by it¹ then it is entitled to be paid its Actual Cost plus Fee . . .

¹ /i.e. the sum of £113.95m set out in its letter of 30 October 2001 or the sum of £110m paid by the authority to DML post agreement of the Revised D154 Contract "

The footnote to paragraph 1.2 of DML's summary of submissions contains a clear recognition by DML that CCL had not abandoned its primary claim based on target cost of £113.95 million.

71. We have set out those passages at some length because they provide the answer not only to the criticism that the adjudicator awarded CCL more than it was claiming but also to the submission that the adjudicator's decision on target cost was a decision which was outside his jurisdiction. We think it beyond argument that the questions (i) could target cost be determined in the event which had happened - that is to say, the failure of the contractual machinery – and, if so, (ii) what figure should be taken as the target cost were central to the determination of the dispute which was referred to the adjudicator by the notice of adjudication. They are raised, squarely, in paragraph 2.3.2 of the referral notice. The judge was correct to take that view, for the reasons which he gave. We have not been persuaded that an appeal from his order on the ground that he should have held that the adjudicator went beyond his jurisdiction in deciding those questions has any prospect of success. Accordingly we refuse permission to appeal on grounds 1 and 2 in section 7 of the appellant's notice. And we refuse permission on grounds 7 and 9 – in so far as those grounds rely on absence of jurisdiction.
72. Nor have we been persuaded that an appeal on grounds 3 and 4 in section 7 of the appellant's notice has any prospect of success. CCL had made it clear in the referral notice (at paragraph 4.33) that it was inviting the adjudicator to evaluate target cost on the basis set out in the letter of 30 October 2001. That was the basis which the adjudicator adopted. It cannot be said that DML did not have the opportunity to make such representations on the methodology as it thought fit. It is said that the opportunity to make representations was confined to the calculation of the target cost; and that there was no opportunity to make representations as to the basis of liability. But that, as it seems to us, borders on sophistry. It was obvious that, if the adjudicator were to evaluate target cost on the basis set out in the letter of 30 October 2001, he would, in effect, provide his own figure to fill the lacuna which arose from the parties' failure to agree. The judge was plainly correct to reject the submission that there had been a breach of natural justice in that respect. We refuse permission to appeal on grounds 3 and 4.
73. Grounds 5, 6 and 8 in section 7 of the appellant's notice seek to raise, in a modified form, the contentions advanced before the judge in respect of the first, second and third "disregards". In the applicant's skeleton argument the criticism is put in these terms:
- "33. The Adjudicator expressly excluded from consideration two matters:
- a The negotiations and settlement between DML and MoD ('the first disregard');
 - b DML's case as to how Target Cost should be calculated ('the second disregard').
- And, in his decision, he did not refer to
- c. DML's defences to CCL's primary claim ('the third disregard')."

74. It is, of course, correct that the adjudicator excluded from consideration the negotiations and settlement between DML and MoD. The judge observed that that was a necessary consequence of the adjudicator's conclusion that "negotiations between DML and MoD could not impact upon the calculation of target cost under the Alliance Agreement and its amendments". In that respect, "the adjudicator was rejecting an argument advanced by Carillion and accepting an argument advanced more than once by DML".
75. It is said that the judge misunderstood the basis upon which the adjudicator had taken the view that he should leave out of account the negotiations and settlement between DML and the MoD. But there is no substance in that criticism. The adjudicator explained why he had taken the view which he did at paragraph 2.8 of his reasons. We have set out part of that paragraph earlier in this judgment. The adjudicator pointed out, correctly, that he could not enquire into the merits of the outcome of negotiations between DML and MoD. Those negotiations were not undertaken under the Alliance Agreement (with or without the amendments). The relevance of those negotiations, as the adjudicator recognised, was that the amendments to target cost made by amendments 3 to 6 to the Alliance Agreement were to be subject to "review arising out of the final agreement reached with the authority and DML". But, as the adjudicator pointed out at paragraph 2.8:

"2.8 . . . any review of the Agreement contemplated by any '*...final agreement reached with the Authority and DML...*' did either not take place as agreed or alternatively did not culminate in agreement but actually in a dispute."

Accordingly any further amendment of the Alliance Agreement as contemplated by amendments 1 to 6 did not take place. The adjudicator saw it as his task to fill that lacuna by providing a figure of his own.

76. Whether he was correct to take that view (as a matter of law) may be debated elsewhere; but not in these proceedings. As the judge observed, in restating "four basic principles" at paragraph 80 of his judgment, this Court "has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law". For the reasons that we have already explained, the adjudicator was properly seized of the issue which he addressed. Whether or not the adjudicator was correct (as a matter of law) to adopt the approach which he did is a question on which it would be inappropriate for us to express any view; and we do not do so. What is beyond argument is that, adopting that approach, he was bound to leave out of account the settlement reached between DML and MoD.
77. We are satisfied, also, that there is no substance in the criticism that the adjudicator failed to take account of DML's case as to how target cost should be calculated. The judge drew attention, at paragraph 101 of his judgment, to Mr Ennis' alternative calculation. He pointed out that, for the purposes of that calculation, Mr Ennis had disregarded amendments 3 to 6. He observed that it was because the adjudicator took the view that some effect had to be given to those amendments that he had rejected the approach on which the alternative calculations were based.
78. It is said that the judge "fell into serious error" in analysing the adjudicator's reason for disregarding the alternative calculation. The judge should have held that: "The Adjudicator did not reject the contractual basis of the alternative calculation he simply refused to consider it, believing it to be outside his jurisdiction". We reject that criticism. In our view, the judge's analysis reflects a fair reading of the reason which the adjudicator had given (at paragraph 3.3 in his reasons) for the approach which he had adopted. As we have said, whether or not the adjudicator was correct (as a matter of law) to adopt that approach is not an issue in these proceedings.

79. In the course of the application to this Court, it became clear that DML accepted that the criticism that the adjudicator failed to refer to its defences to CCL's primary claim ('the third disregard') fell away if, on a true analysis, "the Adjudicator decided the issue [as to Target Cost] on the basis of the judgment of Solomon". The reference, in that context, to "the judgment of Solomon" is amplified at paragraph 17 of the applicant's skeleton argument:

"17 . . . [The Adjudicator] appears to have proceeded on the basis that absent the review contemplated by the Amendments to the Alliance Agreement or any agreement between the parties following the contemplated review, it was open to him to and/or he was required to undertake such a review. In short what he appears to have done is to provide his own view of the adjustment that should be made to Target Cost on the basis of what he thought was "fair" without regard to the issues raised by the dispute referred to him and without regard to (and indeed in two respects expressly disregarding) the arguments of the parties. In this sense the Adjudicator performed a judgment of Solomon."

80. Leaving aside the question whether the process by which the adjudicator is said (in that passage) to have reached his decision bears any meaningful analogy to the judgment recorded at I Kings 3.16-27 – which had little, if anything, to do with "fairness" and much to do with wisdom - the second sentence of that passage is not a true representation of the adjudicator's approach to his task. It is correct to say that the adjudicator saw as his task the need to supply a figure for target cost in the circumstances that the agreed or contemplated machinery had failed. But it is not correct to say that he provided his own view on the basis of what he thought was "fair" without regard to the issues raised by the dispute which had been referred to him and the terms of the agreements between the parties. Rather, the adjudicator accepted the calculation set out in the letter of 30 October 2001 as the best guide to the figure which would have been agreed between the parties if effect had been given to the machinery. The adjudicator may or may not have been correct (as a matter of law) to adopt that approach; but that is not the issue. The issue, in the present context, is whether – given the approach which the adjudicator did in fact adopt – he was required to give reasons for rejecting submissions which (on the basis of that approach) were irrelevant. The judge was right to hold that the adjudicator had done all that he needed to do in that respect.
81. For those reasons we are not persuaded that permission to appeal should be granted in respect of grounds 5, 6 and 8.
82. Grounds 10 and 11 in section 7 of the appellant's notice criticise the adjudicator's decision as to the set-off to be allowed in respect of defects. It is important to have in mind that, in making any allowance in respect of defects, the adjudicator rejected what the judge described as CCL's threshold defences.
83. We have already set out the reasons which led the judge to reject each of the three lines of attack pursued on behalf of DML and to hold that the adjudicator's decision as to defects was not open to challenge on the basis that it was reached in breach of the rules of natural justice. We agree with the judge for the reasons which he gave. We are not persuaded that an appeal from his order on grounds 10 or 11 would have any real prospect of success; and we refuse permission to appeal on those grounds.
84. It will be apparent, from what we have said in giving our reasons for refusing permission to appeal, that we are in broad agreement with the propositions which the judge set out at paragraph 81 of his judgment and which we have ourselves set out at paragraph 53 in this judgment. Those propositions are indicative of the approach which courts should adopt when required to address a challenge to the decision of an adjudicator appointed under the 1996

Act. We are, perhaps, less confident than the judge that the decision in *Buxton Building Contractors Limited v Governors of Durand Primary School* [2004] 1 BLR 474 can be reconciled with the first of those propositions. We endorse that first proposition and, to the extent that *Buxton* is inconsistent with that proposition, the judge was right not to follow that decision.

85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case; which (contrary to DML's outline submissions, to which we have referred in paragraph 66 of this judgment) may, indeed, aptly be described as "simply scrabbling around to find some argument, however tenuous, to resist payment".
86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice". It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their subcontractors. The need to have the "right" answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt 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. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present.
87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense – as, we suspect, the costs incurred in the present case will demonstrate only too clearly.

Interest

88. The remaining question is whether it was within the jurisdiction of the adjudicator to award interest on the sum which he had found to be due under the Alliance Agreement (as amended). It is common ground that that question turns on the extent of the powers conferred by paragraph 20(c) of the Scheme, which (for convenience) we set out again:

"20. The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute. In particular, he may –

(a) . . .

(b) . . .

(c) having regard to any term of the contract relating to the payment of interest, decide the circumstances in which, and the rates at which, and the periods for which simple or compound rates of interest shall be paid.”

89. The judge took the view that paragraph 20(c) conferred a freestanding power to award interest – ‘freestanding’ in the sense that the jurisdiction existed whether or not (i) the contract itself provided for interest on monies outstanding or (ii) the parties had agreed that an award of interest should be within the scope of the adjudication. The reasons which led him to that view are set out at paragraph 123 of his judgment:

“1. As a matter of impression, this seems to me to be the more natural meaning of subparagraph (c), when read in the context of the whole of paragraph 20 of the Scheme.

2. In my view it is reading too much into the second and third sentences of paragraph 20 to hold that everything in subparagraphs (a), (b) and (c) must arise from some other express term of the contract.

3. It makes obvious commercial sense for an adjudicator to have the power to award interest. The Scheme takes effect as a set of implied terms in many construction contracts pursuant to section 114(4) of the 1996 Act. I would certainly expect the Scheme to include a power to award interest.

4. In my view, the phrase in paragraph 20(c) “having regard to any term of the contract relating to the payment of interest ...” means that if there is any such term, the adjudicator must have regard to it. In other words, the freestanding right conferred by paragraph 20(c) does not override any express term of the contract dealing with interest.

5. If paragraph 20(c) had the meaning for which [DML] contends, it would be unnecessary. The clause would be saying that which was self-evident.”

90. We agree that subparagraph (c) must be read in the context of paragraph 20 as a whole. We agree, also, that there are sensible commercial reasons why the scheme might well be expected to include a power to award interest. But that, as it seems to us, takes the matter no further. There are sensible commercial reasons why the underlying construction agreement might be expected to provide for interest on monies outstanding. The scheme does include a power to award interest in such a case. The question, in the present context, is whether the power exists where the parties (for whatever reason) have chosen not to include such a provision in the underlying contract. We do not accept that, if paragraph 20(c) had the meaning for which DML contends, it would be unnecessary. It would, for example, enable the adjudicator to decide whether circumstances in which the contract provided for the payment of interest had arisen, the date from which interest was payable under the contractual provisions and (if not specified in the contract) the rate at which and the basis on which (whether simple or compound) interest should be paid.

91. The real question, as it seems to us, is what effect is to be given to the words “In particular” which precede the three subparagraphs (a) to (c). It is necessary to have regard to the structure of paragraph 20 as a whole. There are three sentences: (1) The adjudicator shall

decide the matters in dispute; (2) [In deciding those matters] he may take into account other matters (which are specified); (3) In particular [in deciding those matters] he may (a) open up, revise and review decisions already taken or certificates already given (unless the contract otherwise provides), (b) decide that any of the parties is liable to make payment and if so when and in what currency and (c) decide the circumstances in which (and the rates at which and the periods for which) interest is to be paid. Within that structure effect has to be given to the words "In particular" at the beginning of the third sentence. We can see no reason why those words should not bear their usual and natural meaning. What comes after them is intended to be a particularisation of what has gone before. What comes after elaborates and explains what has gone before; it does not add to what has gone before. So the adjudicator may decide questions as to interest if, but only if, (i) those questions are "matters in dispute" which have been properly referred to him or (ii) those are questions which the parties to the dispute have agreed should be within the scope of the adjudication or (iii) those are questions which the adjudicator considers to be "necessarily connected with the dispute". Questions which do not fall within one or other of those categories are not within the scope of paragraph 20(c) of the Scheme. There is no freestanding power to award interest.

92. It follows that we think it right to give permission to appeal from the judge's decision that the adjudicator had power to award interest. But it does not follow that the appeal should be allowed. The issue remains: do the questions of interest which the adjudicator decided fall within one or other of the categories which we have just identified? In particular, in the present context, is the question whether interest should be paid on monies outstanding a question which the parties to the dispute have agreed should be within the scope of the adjudication?

93. The judge explained, at paragraphs 119 to 121 of his judgment, the circumstances in which the adjudicator came to award interest:

"119. The background to this challenge is as follows: Carillion advanced a claim for interest in paragraph 8.4 of its notice of adjudication dated 4th January 2005. The basis of this claim was spelt out in paragraph 7.1 to 7.9 of Carillion's referral dated 6th January 2005, together with the appendices referred to in those paragraphs. Carillion relied upon paragraph 20(c) of the Scheme. On page 74 of DML's response, one finds the sentence:

'No sum is due and owing to CCL. Therefore the question of interest does not arise'

120. Despite ferreting through the bundles, I have been unable to find any other reference to interest in DML's various submissions to the adjudicator.

121. In paragraph 6.2 of his reasons, the adjudicator concluded in the absence of any submissions to the contrary from DML, that he had power to award interest under paragraph 20(c) of the Scheme. . . ."

It is of significance that DML did not dispute that the adjudicator would have power to award interest if he found monies to be outstanding under the agreement. Its position was that the question of interest did not arise because there were no monies outstanding.

94. In those circumstances, as it appears to us, the conclusion that the parties to the dispute agreed that the question whether interest should be paid on monies outstanding was to be within the scope of the adjudication is irresistible. CCL had referred that question to adjudication and DML acquiesced in that referral. If DML had intended to take the point that

interest should not be within the scope of the adjudication it is inconceivable (given the extensive representations which were made) that it would not have said so. By agreeing that the adjudicator should decide whether interest should be paid the parties conferred on him a jurisdiction to award interest which he would not otherwise have had.

95. It follows that we reach the same conclusion as the judge on the question of interest, albeit for different reasons. We dismiss the appeal.

Conclusion

96. Permission to appeal is refused in respect of all issues save the power to award interest. On that issue permission to appeal is granted, but the appeal is dismissed.