

**Neutral Citation Number: [2006] EWHC 848 (TCC)**  
**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**TECHNOLOGY AND CONSTRUCTION COURT**

St Dunstan's House  
133-137 Fetter Lane  
London EC4A 1HD

Monday, 6 March 2006

BEFORE:

**THE HONOURABLE MR JUSTICE JACKSON**

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BETWEEN:

	KIER REGIONAL LIMITED (t/a WALLIS)	<b>Claimant</b>
	- and -	
	CITY & GENERAL (HOLBORN) LIMITED	<b>Defendant</b>

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MR ADRIAN WILLIAMSON QC (instructed by Messrs Taylor Wessing) appeared on behalf of the Claimant

MR JOHN BLACKBURN QC (Instructed by Messrs Pinsent Masons) appeared on behalf of the Defendant

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**Judgment**

MR JUSTICE JACKSON:

1. This judgment is in six parts, namely: Part 1, Introduction; Part 2, The Facts; Part 3, The Present Proceedings; Part 4, The Law; Part 5, Application to the Present Case; Part 6, Conclusion.

#### Part 1: Introduction

2. This is an application by a building contractor for summary judgment to enforce an adjudicator's award. The building contractor, who is claimant in these proceedings, is Kier Regional Limited, trading as Wallis ("Kier"). It is referred to in some of the documents from which I shall quote as "Wallis".
3. The employer, who is defendant in these proceedings, is City & General (Holborn) Limited ("CG"). The role of contract administrator in relation to the building project in question is being performed by a company called AYH Plc ("AYH").
4. The statutory background to this litigation is the Housing Grants Construction and Regeneration Act 1996 ("the 1996 Act"). It is not necessary for me to read out any provisions of the 1996 Act, since no issue arises concerning the meaning or effect or those provisions. The adjudication in the present case was carried out pursuant to contractual provisions which accord with the requirements of the 1996 Act.
5. There has been earlier litigation concerning the same building project between CG and AYH. The outcome of that litigation is recorded in City & General (Holborn) Limited v AYH Plc [2005] EWHC 2494 (TCC).
6. After these brief remarks by way of introduction, I must now turn to the facts of the present case.

#### Part 2: The Facts

7. By a contract dated 6 November 2001, made between CG and Kier, Kier agreed to carry out works of refurbishment and rebuilding at the site of the former Patent Office Library in London ("the Construction Contract"). The Construction Contract was made using the JCT Standard Form of Building Contract, 1998 edition with amendments. The contract sum was £11,650,000. The Contract Administrator named in the Construction Contract was and is AYH. Clause 25 of the Construction Contract provides that the Contractor Administrator may grant extensions of time on certain specified grounds. Clause 26 provides that Kier shall be entitled to recover loss and expense on certain specified grounds. Some of the grounds which entitle Kier to an extension of time under clause 25, also entitle Kier to recover loss and expense under clause 26.
8. Clause 41A of the Construction Contract provides for adjudication. It is accepted by both parties that the provisions of clause 41A comply with the requirements of the 1996 Act. Clause 41A includes the following sub-clauses:

"41A.5.2            The party not making the referral may, by the same means stated in clause 41A.4.2 send to the Adjudicator within 7 days of the date of the referral with a copy to the other party a written statement of the contentions on which he relies and any material he wishes the Adjudicator to consider.

41A.5.3 The Adjudicator shall, within 28 days of the referral under clause 41A.4.1 (and acting as an Adjudicator for the purposes of section 108 of the Housing Grants Construction and Regeneration Act 1996 and not as an expert or an arbitrator) reach his decision and forthwith send that decision in writing to the parties provided that the party who has made the referral may consent to allowing the adjudicator to extend the period of 28 days by up to 14 days and that by agreement between the parties after the referral has been made, a longer period than 28 days may be notified jointly by the parties to the Adjudicator within which the reach his decision.

41A.5.4 The Adjudicator shall not be obliged to give reasons for his decision.

41A.5.5 In reaching his decision, the Adjudicator shall act impartially and set his own procedure and, at his absolute discretion, may take the initiative in ascertaining the facts and the law as he considers necessary in respect of the referral which may include the following:

- .5.1 Using his own knowledge and/or experience;
- .5.2 Subject to clause 30.9 opening up, reviewing and revising any certificate, opinion, decision, requirement or notice issue given or made under this contract as if no such certificate, opinion, decision, requirement or notice had been issued, given or made;
- .5.3 Requiring from the parties further information than that contained in the notice of referral and its accompanying documentation, or in any written statement provided by the parties, including the results of any tests that have been made or of any opening up.
- .5.4 Requiring the parties to carry out tests or additional tests or to open up work or further open up work.
- .5.5 Visiting the site of the works or any workshop where work is being or has been prepared for this Contract.
- .5.6 Obtaining such information as he considers necessary from any employee or representative of the parties provided that, before obtaining information from an employee of a party, he has given prior notice to that party.
- .5.7 Obtaining from others such information and advice as he considers necessary on technical and on legal matters, subject to giving prior notice to the parties together with a statement or estimate of the cost involved.

.5.8 Having regard to any term of this Contract relating to payment of interest, deciding the circumstances in which or the period for which a simple rate of interest shall be paid."

9. A number of delays and problems have arisen during the course of the works for reasons which are in dispute between the parties. Kier contends that the sum which is due to it on the final account is approximately £30 million.
10. Disputes between the parties have already generated five different Adjudications. In Adjudication No.2, the Adjudicator was Mr Ellis. Mr Ellis awarded to Kier an extension of time of 28 weeks. This was in addition to an extension of time of 31 weeks previously granted by the Contract Administrator.
11. Following Adjudication No.2, Kier made an application for loss and expense in respect of the period for which it had received an extension of time. After some correspondence on this matter, Kier's claim was finally formulated in Interim Application No.32. The loss and expense claimed on that occasion was £1,330,012. The sum was made up of the following components: site administration, multi-service gang, welfare, site accommodation, scaffolding, plant, tower crane, temporary electrics, water, telephone, fax, copier, email, protection, site clean and bond.
12. On 13 August 2004, AYH issued Interim Certificate of Valuation no.32. This certificate included loss and expense in the sum of £527,192. It can be seen from the contemporaneous documents that this is a sum which had been awarded to Kier some months previously. Interim Certificate 32 does not include any additional loss and expense in respect of the extension of time awarded in Adjudication No.2.
13. Kier was dissatisfied with the sums certified in Interim Certificate 32. Accordingly, on 14 September 2004, Kier commenced a further adjudication. This was Adjudication No.3. Mr Ellis was again appointed as Adjudicator. Kier's Notice of Adjudication and Referral first set out Kier's contentions in some detail. It then set out the remedies sought in section 6. Section 6 includes the following passage:

"6.1 The Referring Party requests that the Adjudicator considers and makes a decision as to whether it is entitled to an ascertainment and Interim Certificate for loss and/or expense for £1,330,012 based on contract preliminary rates as set out in Application No.32. The Referring Party requests that such decision be made in favour of the Referring Party in accordance with clauses 26.1, 30.1.1.1 and 30.2.2.2 based on the information set out in the Referral.

6.2 Alternatively, the Referring Party requests that the Adjudicator considers and makes a decision to award the Referring Party loss and/or expense based on contract preliminary rates which the Adjudicator considers appropriate and states under which clauses such extension is to be granted based on the information set out in the Referral."

(In reading out this extract, I have corrected what is clearly one clerical error).

14. CG served its Notice of Response on 23 September 2004. CG advanced four lines of defence. These were as follows: (1) the Adjudicator had no jurisdiction, because no dispute had crystallised; (2) Kier was claiming loss and expense on a basis that did

not accord with the terms of the Construction Contract; (3) there were concurrent causes of delay for which Kier was not entitled to reimbursement; a significant part of the loss and expense claimed by Kier ought to be attributed to these concurrent causes; (4) if Kier was entitled to loss and expense on the basis claimed, then the actual figure should be substantially reduced on two principal grounds, which were set out in paragraph 6.2 of the Notice of Response as follows:

“6.2.1 There are a number of preliminary items that do not relate to the works that were carried out during the period in respect of which the Referring Party is claiming an entitlement to loss and/or expense; and

6.2.2 Where the preliminaries do relate to works that were delayed by reason of an event that gives rise to an entitlement to loss and/or expense, then there must be an apportionment of the preliminaries claimed for that period due to the other activities that were carried out concurrently with the delay.”

15. The Notice of Response was accompanied by a number of appendices. These included Appendix C, an expert report by a firm called Precept, and Appendix D, an expert report by a firm called Driver Consult.
16. On 30 September 2004, Kier served its Reply. In this document Kier responded to each of CG's arguments in some detail. On page 14 of its Reply, Kier commented on CG's expert reports as follows:

“5. The Responding Party has, after the event, introduced new expert evidence from Driver and Precept. No submission or analysis has been provided by the Contract Administrator. The Referring Party has not seen this information before and in the limited time available can only make general comments.

5.1 As to section 6 of the Response entitled “Alternative valuation on the basis of contract preliminaries”, the Referring Party respectfully invites the Adjudicator to ignore the evidence of Driver Consult and Precept as their submissions constitute new evidence.

5.2 Without prejudice to the above contention, the Driver report simply appears to be an attempt to identify the number of activities that were carried out during a period for which the Referring Party has been given an award by way of extension of time.

5.3 It appears that Mr Steven's numerous bar charts endeavour to demonstrate work activities during the course of the Contract period. As this is all new information and the Referring Party has not had time to examine the detail of these charts and therefore cannot comment on their accuracy or otherwise, albeit if they are a direct analysis of the site progress reports, then they may well be accurate.

5.4 If the Adjudicator feels it appropriate to consider the reports, it is our view that in any event they are of no assistance in this Referral as they do not address the fact that there have been no contemporaneous allegations of concurrency or culpability and thus the Referring Party must be entitled to recover direct loss and/or expense throughout the 60 week period in relation to a contract where to date circa £18,863,954 has been certified as against an original Contract value of £11,650,000 where beyond the original Contract

period drawings CVAs and CIAs were being issued in abundance.

5.5 In order to deal with the Driver and Precept reports, subject to their admissibility, these reports are addressed by the enclosed report of David Gibson Associates to be found at tab 6, which is limited to comment on reports and other already submitted information. Because of the limited time available, this is brief but challenges the validity of the contents of the reports in any event."

17. The Adjudicator duly considered the parties' arguments. On 28 October 2004, he delivered his written decision. In this decision, the Adjudicator in large part accepted the arguments of Kier and rejected the arguments of CG. The Adjudicator reduced the quantum of the loss and expense to which Kier was entitled from £1,330,012 (as claimed) to £1,246,487.40. The Adjudicator then deducted £527,192 which had previously been certified and paid. Thus, the balance due to Kier was £719,295.40. The Adjudicator ordered CG to pay that sum to Kier within seven days. The Adjudicator ordered that Kier should pay his own fees and expenses, namely £3,564 plus VAT. Finally, the Adjudicator ordered CG to pay £3,564 to Kier by way of reimbursement for his own fees and expenses.
18. There is one part of the Adjudicator's decision which I should read out in full. This is paragraph 3.2(d) in which the Adjudicator considers Kier's two expert reports. The Adjudicator there said:

"The Driver Consult and Precept Reports

C&G has submitted two reports on issues relating to the valuation of loss and expense by Driver Consult and Precept. Wallis maintains that these reports are new evidence and should be disregarded. I agree with Wallis that these reports were not before the CA when he produced his Valuation No.32 and they are not therefore relevant to the way in which he prepared his valuation. I am required to decide whether the CA was right in all of the circumstances known to him at the time to reject, in whole or in part, Wallis' claim for £1,330,012, based on a pro rata calculation using the contract preliminary rates.

I find that the Driver Consult and Precept reports are new evidence not known to the parties at the time this dispute crystallised and I find that I should not take it into account in this Adjudication."

19. CG took the view that the Adjudicator's decision was unlawful. Accordingly, CG refused to make the payments which had been ordered. Kier took a different view of the matter. Accordingly, in order to enforce the Adjudicator's decision, Kier commenced the present proceedings.

### Part 3: The present proceedings

20. By a Claim Form issued under CPR Part 8 on 17 January 2006, Kier claimed against CG the various sums which had been awarded by the Adjudicator. On the same day, Kier applied for summary judgment in respect of its claim. A claim of this nature is more appropriately brought under Part 7 of the CPR: see paragraph 9.2.1 of the second edition of the TCC Guide. Accordingly, on 17 January 2006, I ordered that this action should proceed as if commenced under Part 7 of the CPR. At the same time I gave directions for the service of evidence by both parties.

21. The evidence served on behalf of Kier comprises a witness statement made by Mr Lawrence Cobb, a partner in Taylor Wessing, the claimant's solicitors. Mr Cobb exhibits the Adjudicator's decision and other relevant documents. The evidence served on behalf of CG comprises a witness statement made by Mr Mark Rowe, a partner in Pinsent Masons, CG's solicitors. Those two witness statements helpfully set out the relevant facts. Shortly before the hearing, CG's solicitors furnished the court with some additional documents, in particular the Construction Contract and the two expert reports by Precept and Driver Consult.
22. The hearing of these proceedings, together with related proceedings (to enforce a later Adjudicator's decision) commenced on Friday, 3 March. Mr Adrian Williamson QC represents Kier and Mr John Blackburn QC represents CG.
23. At the start of the hearing, Mr Williamson argued as a preliminary point that the court should not consider the supplementary documents recently lodged by CG's solicitors. I am afraid that this point received somewhat short shrift. The new documents can have taken nobody by surprise. They are obviously relevant. Indeed, Mr Williamson relied upon part of them in support of his own submissions. Whilst I accept, of course, that relevant documents must be served within specified time limits, this court will not allow technical breaches (causing nobody prejudice) to stand in the way of doing justice. The additional documents have duly been received in evidence.
24. It appears from the pleadings and witness statements that CG has three separate defences to Kier's claim. These are summarised as follows in Mr Blackburn's skeleton argument:
  - "1. That the Adjudicator had no jurisdiction because what he decided had not been subject to any prior dispute;
  2. That the Adjudicator was wrong to rely on statements which he (wrongly) attributed to Mr Brock of C&G without giving C&G an opportunity to comment;
  3. That the Adjudicator at paragraph 3.2(d) of the decision (page 6) wrongly refused to pay any regard to two expert reports submitted by C&G in its response to the reference. As a result the process leading to the decision was manifestly unfair and the decision is a nullity."
25. Mr Blackburn made it clear at the outset that, for present purposes, CG no longer relies upon the first two defences. This concession was both realistic and helpful. It has enabled both the court and the advocates to concentrate on the real issue between the parties. That issue, on the basis of Mr Blackburn's skeleton argument, may be summarised as follows: did the Adjudicator's refusal to pay regard to the two expert reports, cause his decision to be invalid?
26. This issue was argued fully on Friday. Mr Blackburn placed reliance upon the Court of Appeal's decision in Carillion Construction Ltd v Devonport Royal Dockyard Limited [2005] EWCA (Civ) 1358. He submitted that the present case is "the plainest case" of breach of natural justice falling within paragraph 87 of that judgment. Mr Blackburn also submitted that the decisions of this court in William Verry (Glazing Systems) Limited v Furlong Homes Limited [2005] EWHC 138 (TCC) and Quietfield

Limited v Vascroft Contractors Limited [2006] EWHC 174 (TCC) lend some support to his submissions.

27. Mr Williamson, on the other hand, submitted that Carillion supported Kier's case that the award must be enforced. Mr Williamson also placed some reliance upon the fact that the Court of Appeal in Carillion doubted Judge Thornton's decision in Buxton Building Contractors Limited v The Governors of Durand Primary School [2004] 1 BLR 374.
28. Mr Williamson submitted that this court's recent decisions in William Verry and Quietfield provide no assistance to CG. Mr Williamson also made brief reference to the decision of Judge Humphrey Lloyd QC in Balfour Beatty Construction Limited v the Mayor and Burgesses of the London Borough of Lambeth [2002] 1 BLR 288.
29. The issue raised in these proceedings is an important one. I was concerned to ensure that all relevant authorities are before the court. Accordingly, the lunchtime adjournment on Friday was extended to enable counsel to review their research and to ensure that no relevant authority on either side had been overlooked. I am grateful to both counsel for their industry and considerable assistance in this regard.
30. Having heard full argument on Friday, I said that I would consider counsel's submissions over the weekend and give my decision on Monday morning, before hearing argument about the second action. This I now do.

#### Part 4: The Law

31. In Buxton Building Contractors Limited v The Governors of Durand Primary School [2004] 1 BLR 374, the defendant engaged the claimant contractor to construct a school building. Following practical completion, the school failed to release part of the retention monies because the school had a counterclaim for damages for defects. The contractor referred its claim for the balance of the retention monies to adjudication. The school's sole defence was one of set-off and counterclaim. The contractor in its reply invited the adjudicator to disregard the school's counterclaim and supporting evidence because the school had not served a valid and timeous withholding notice. The adjudicator found in favour of the contractor. In subsequent proceedings in this court, His Honour Judge Thornton QC refused to enforce the adjudicator's decision.
32. The core of Judge Thornton's reasoning is contained in paragraphs 16 to 21 of his judgment. In these paragraphs he said:
  - "16. The Adjudicator's decision showed that the Adjudicator did not consider at all the nature, content, validity or quantification of the school's cross-claim. He did not investigate the material provided to him by the school, did not decide whether the school's cross-claim had in fact been taken into account by the Supervising Officer when certifying, but instead made an erroneous assumption that it had been. He did not consider whether the certificate was issued with contractual validity, and instead wrongly assumed that the certificate was one that was duly authorised by the contract conditions and that its payment was provided for by those conditions and did not take into account or consider the validity of the correspondence from the school which amounted or arguably amounted to a valid withholding

notice that had been served timeously.

17. The Adjudicator also erroneously concluded that the sum being certified represented part of the value of the work which had not previously been certified and did not consider at all the possibility that this was a partial release of retention that had been previously certified and then validly retained. The significance of that error was that the Adjudicator did not consider one of the school's principal arguments to the effect that one of the purposes of the retention fund was to provide a fund to reimburse the school for the kind of loss that made up its cross-claim. The withholding notice had been served on the advice of the supervising officer and he had envisaged that the sum he had certified as being due, would then be subject to a withholding equal to the school's cross-claim. In consequence, the cross-claim could and should be set against the retention release in question.
18. Miss Gillies in her cogent and succinct submissions on behalf of Buxton, contended that, whether or not the Adjudicator's decision was erroneous in the respects that I have summarised, it was still a valid decision whose errors, which were not conceded, were ones within jurisdiction and were therefore not ones which could or should impugn that decision or render it unenforceable.
19. I accept these submissions so far as they go. However, they do not and cannot address the fundamental flaw that attaches to the Adjudicator's decision and which Mr Martin, the school's head who represented the school at the hearing with admirable courtesy and clarity, pointed to. That flaw is that the decision had been reached or must be taken to have been reached, without the Adjudicator having considered or decided upon the contents of the submissions, documents and issues referred to him by the school. This is not surprising because the Adjudicator had been invited to ignore the documents submitted by the school by Buxton's reply submissions. Given the content of his decision, set against the issues referred to him, the Adjudicator had clearly acceded to that invitation and had set aside unconsidered the material that had been referred to him by the school.
20. The consequence of that failure to consider the school's referred issues and materials is twofold. Firstly, the Adjudicator did not fulfil his statutory duty to decide the dispute referred to him. He only decided that part of the dispute referred to him by Buxton, whilst failing to decide that part referred by the school. This duty to decide the entirety of the dispute referred is a duty imposed by section 108(2)(c) of the Housing Grants Construction and Regeneration Act 1996. Secondly, the Adjudicator failed to decide all matters in dispute or to consider the representations of the school. These failures constituted serious irregularities in the adjudication procedure since they amounted to serious failures to conform to paragraphs 17 and 20 of Part 1 of the Scheme for Construction Contracts applicable to the Adjudication. These paragraphs required the Adjudicator to consider all relevant information submitted to him by any of the parties to the dispute and to decide all matters in dispute.
21. It follows that the decision is one that is now unenforceable,

certainly on a summary judgment application. It is a decision which is intrinsically unfair in that it was arrived at following a failure to consider or decide core referred issues that were and remained in dispute and was also arrived at following a decision to take into account relevant material and information that had previously been placed before the Adjudicator. In consequence, the decision is one which potentially exceeds the Adjudicator's jurisdiction, has potentially been reached in breach of his statutory obligations and is in a public law sense sufficiently unfair as to lack enforceable validity."

33. In Carillion Construction Limited v Devonport Royal Dockyard Limited [2005] EWCA (Civ) 1358, the defendant main contractor was resisting on several grounds a subcontractor's claim to enforce an adjudicator's decision. One line of defence was that the adjudicator had failed to consider relevant evidence submitted to him. After reviewing the relevant authorities, this court at first instance formulated five propositions of law which would guide the court in deciding that case. The first two propositions (as recorded in paragraph 53 of the Court of Appeal's decision) read as follows:

- "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."

34. The Court of Appeal (comprising the Master of the Rolls, Chadwick LJ and Moore-Bick LJ) refused permission to appeal against the Technology and Construction Court's decision to enforce the Adjudicator's award (subject to one point concerning interest). Chadwick LJ, delivering the judgment of the Court of Appeal said this at pages 84-87:

"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."

35. One issue which has been debated in the present litigation concerns the status of Judge Thornton's decision in Buxton in the aftermath of Carillion. Having considered the rival submissions of counsel, I have come to the conclusion that the status of Buxton may be summarised as follows:

(1) It is now unclear whether or not Buxton was rightly decided.

(2) In the light of Carillion certain passages in Judge Thornton's judgment in Buxton must now be regarded as incorrect. These are the passages in which the judge asserted that the Adjudicator's failure to consider the school's evidence rendered the Adjudicator's decision unenforceable.

36. Let me now move on to Quietfield Limited v Vascroft Contractors Limited [2006] EWHC 174 (TCC). The adjudicator in this case ordered a contractor to pay liquidated and ascertained damages for delay in the sum of £588,000. The adjudicator declined to consider the contractor's defence, namely that it was entitled to an extension of time, because the adjudicator believed that the contractor was precluded from advancing that defence. The claimant conceded that if (as this court subsequently held) the adjudicator was wrong on the threshold point, then the adjudicator's decision could not stand by reason of breach of natural justice. This court acted on that concession and declined to enforce the judgment.
37. Since the natural justice point was a matter of concession rather than argument in Quietfield, neither counsel in their submissions nor this court in its judgment discussed the impact of Carillion. Presumably, the basis of the claimant's concession in Quietfield was that an express refusal to consider the substantive defence at all was one of "the plainest cases" of breach of natural justice referred to in paragraph 87 of Carillion.
38. That completes my survey of the relevant authorities. I must now consider how the law enunciated in those authorities applies to the present case.

#### Part 5: Application to the present case

39. Mr Blackburn contends that the Adjudicator's reasoning in paragraph 3.2(d) of his decision was flawed. It was the Adjudicator's duty to consider the claim for loss and expense on the basis of all the evidence submitted to him by both parties. Accordingly, the Adjudicator erred in deciding to disregard the Driver Consult and Precept reports. This failure amounted to "the plainest case" of breach of the rules of natural justice.
40. In support of his submission, Mr Blackburn relies upon the terms of clause 41A.5 of the Construction Contract, in particular sub clauses .2 and .5. Further, Mr Blackburn submits that the general duty of fairness required the Adjudicator to take into account CG's expert reports. Mr Blackburn also places reliance upon the decision of Judge Coulson in William Verry (Glazing Systems) Limited v Furlong Homes [2005] EWHC 138 (TCC), in particular at paragraph 47.
41. Mr Williamson sought to resist Mr Blackburn's argument on a number of grounds. He pointed out that under clause 41A.5 the Adjudicator has a discretion as to what evidence to take into account. He reminded me of the time constraints of adjudication, he submitted that it was unfair for CG to produce new evidence at a late stage, which he characterised as "defence by ambush". Mr Williamson also submitted that William Verry should be distinguished. In the alternative to this submission, Mr Williamson argued that, even if the Adjudicator erred in failing to consider the two expert reports, nevertheless, that error does not invalidate his decision. Mr Williamson relied upon the reasoning of the Court of Appeal in Carillion

and upon the Court of Appeal's disapproval of Buxton. Mr Williamson pointed out that many of the features of Buxton are similar to the present case.

42. I must say that, despite Mr Williamson's persuasive submissions, I see considerable force in Mr Blackburn's contention that the Adjudicator ought to have taken the two expert reports into account. However, it is not necessary finally to decide this point for one simple reason: this is that the error allegedly made by the Adjudicator is not one which could invalidate his decision. It can be seen from the decision as a whole that the Adjudicator considered each of the arguments advanced by CG in its written response. At worst, the Adjudicator made an error of law which caused him to disregard two pieces of relevant evidence, namely the expert reports of Driver Consult and Precept. In the light of the Court of Appeal's decision in Carillion, that error would not render the Adjudicator's decision invalid: see in particular paragraph 84 of Carillion. If I refuse to enforce the Adjudicator's decision on this ground, I should be following that part of the reasoning in Buxton which has been disapproved by the Court of Appeal.
43. The general statements of principle made by the Court of Appeal in paragraphs 85 to 87 of Carillion are also relevant. The present case is certainly not one of "the plainest cases" of breach of natural justice referred to in paragraph 87.
44. I have come to the conclusion that on the ultimate question which arises in this case, the submissions of Mr Williamson are correct. As the law stands, the matters about which CG complain (whether with justification or not) are not such as can invalidate an adjudicator's decision. Accordingly that decision must be enforced.

#### Part 6: Conclusion

45. I am grateful to the solicitors on both sides for the efficient preparation of this case. I am grateful to counsel on both sides for their clear presentation of the competing arguments. For the reasons set out in part 5 above, this court will give summary judgment under CPR Part 24 enforcing the Adjudicator's decision. I invite counsel to agree the precise wording of the court's order. After that, I shall hear argument in relation to the second action.