Case No: HT-02-47

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
TECHNOLOGY & CONSTRUCTION COURT

Date: 12 April 2002

Before
HIS HONOUR JUDGE HUMPHREY LLOYD Q.C.

B E T W E E N

BALFOUR BEATTY CONSTRUCTION LIMITED
Claimant

- and -

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF LAMBETH
Defendant

JUDGMENT

[2002] EWHC 597 (TCC)

Andrew Goddard appeared for the claimant, instructed by Berwin Leighton Paisner.

Jonathan Acton Davis QC appeared for the defendant, instructed by Knowles Lawyers Limited.

Pursuant to the Practice Statement of 22 April 1998 this is the official judgment of the court and no note or further record is to be made.

His Honour Judge Humphrey LLoyd QC

JUDGMENT

1. The claimant (BB) makes an application under part 24 of the CPR to enforce the decision of an adjudicator, Mr. David Richards FRICS, made on 23 January 2002. The contract between BB and the defendant (Lambeth) was for the refurbishment and remodelling of Falmouth House, Penwith Manor Estate, Kennington Park Road, London SE11. The contract was apparently made as a result of Lambeth placing an order (H9855) for work to the value of £3,847,231 on 1 October 1999. Some time in March 2000 agreement was reached on all the terms. At the time of the adjudication Lambeth had not apparently executed the agreement but it incorporated the JCT standard form of building contract 1998 Edition, local authorities without quantities, incorporating amendments and TC/94 and contractor's designed portion supplement 1998. The principal relevant conditions are annexed to this judgment.

2. The dispute referred to adjudication concerned the amount of damages for delay withheld or deducted by Lambeth. BB maintains that during the course of the works a number of Relevant Events (as defined in clause 25 of the JCT conditions) occurred. The works began about 1 November 1999. Notice of the delays was given in a series of letters from 5 May 2000. On three occasions the architect decided that BB was entitled to extensions of time, the last of which was granted on 15 January 2001 which fixed a new completion date for 23 October 2000. However the architect also issued certificates of non-completion on 26 September 2000 and 17 January 2001, as a result of which Lambeth became entitled to, and did, deduct damages for delay totalling £355,831.71. Practical completion took place on 24 May 2001.

3. In correspondence and at meetings, both before but mainly after that date, BB maintained that it was entitled to further extensions of time and to repayment of the damages deducted. BB relied on some 31 specified Relevant Events but a number of these were sub-divided so there were a considerable number of such events. In July 2001 BB sent the architect its "Overall Review Analysis of its "As Built" programme". However BB accepted that in August 2001 it told the architect that the critical path constantly fluctuated as a result of the many changes which increased the scope of the works and that it had said that it was not a practical proposition to determine the constantly changing critical path "almost on a weekly basis which, in any event, is unnecessary". That quotation comes from BB's Referral Notice.

Lambeth's subsequent submissions to the adjudicator contained the following on the subject of BB's As Built programme which, although lengthy and out of chronological sequence, it is convenient at this stage to set out:

"45. Balfour Beatty had a contractual obligation pursuant to clause 250 of the specification as follows:

> Monitoring: Record progress on a copy of the programme kept on site. If any circumstances arise which may affect the progress of the works put forward proposals or take other action as appropriate to minimise any delay and to recover any lost time.

46. In breach of contract BB failed to record progress on any programme, on site, or otherwise, and/or in breach of contract BB failed to put forward proposals to minimise delay and/or to recover lost time. Lambeth submits that in consequence of the failure of BB to comply with its contractual obligations it is now not possible with any degree of certainty to determine the date or duration that the various activities were undertaken by BB, nor the impact or effect on other linked or non-linked activities. Lambeth submits that this being the case it is impossible to properly assess the true causes of the delay to the completion of the works and the dates and durations of the delays claimed by BB are nothing less than speculation.

47. BB has submitted the following "final as-build programmes".

F0315/FAB1 – Critical Trade Activities
FAB2 – Stripping Out and Demolition Works
FAB3 – Brick and Block Works
FAB4 – Asphalt and Pitched Roofing Works
FAB5 – Carpentry Works
FAB6 – Window Installation Works
FAB7 – Drylining Works
FAB8 – Decoration Works
FAB9 – Insulated Render Works
FAB10 – Concierge Area Works.

48. As stated above, Lambeth submits that it is only when you review the "final as-built programmes" does the reason for the "filter programmes" become evident. Lambeth say that the inadequate record keeping by BB means that it can only report "progress" on a floor by floor basis. Lambeth submits that such general records are hopelessly vague and inadequate. By way of an example, a variation in one flat on one floor may have a delaying effect on that flat but it is submitted would have no impact or effect on the other non-affected flats on the same floor. The manner in which BB has recorded progress is that it is simply not possible to isolate any individual event. Thus an event in one trade in one flat on the one floor is depicted as a delay to all of the entire floor. This is simply not credible and calls into question the entire reliability of all of the programmes.

49. BB programmed the works on a flat type basis (albeit without identifying the critical path for same) and at the very least BB should have measured progress against these same flat types. That way it would have been possible to compare the planned progress with the actual progress in a meaningful way. Instead all that BB have provided is an aggregate of all the planned time and compared with all the actual time on a trade by trade basis. No attempt has even been made by BB to demonstrate any link between the trades.

50. Lambeth would also observe that as with the "as-planned" programmes, the "Final as-built programmes" also fail to identify any critical path.

51. Before looking at the "final as-built programmes" exhibited by BB, Lambeth would make passing reference to the delay analysis methods most widely recognised and used:

> (I) Time Impact Analysis (or "time slice" of "snapshot" analysis). This method is used to map out the impacts of particular delays at the point in time at which they occur permitting the discrete effects of individual events to be determined.
>
> (II) Window analysis. For this method the programme is divided into consecutive time "windows" where the delay occurring in each window is analysed and attributed to the events occurring in that window.
>
> (III) Collapsed as-built. This method is used so as to permit the effect of events to be "subtracted" from the as-built programme to determine what would have occurred but for those events.
>
> (IV) Impacted plan where the original programme is taken as the basis of the delay calculation, and delay defaults are added into the programme to determine when the work

should have finished as a result of those delays.

(V) Global assessment. This is not a proper or acceptable method to analyse delay.

52. It is Lambeth's case that the programme of BB do not conform or comply with any of the recognised and accepted delays analysis methods. Further all that it has provided by BB is a claim in the most global of natures. It is observed that BB has provided no explanation whatsoever as to why it has not used any of the above mentioned delay analysis techniques, nor even why it has pleaded its case on a global basis. Lambeth suggest that this is because none of the above methods would not substantiate the delays claimed by BB.

53. Lambeth submits that it would be of assistance to the adjudicator to provide its comments on the "as-built" programmes submitted by BB."

4. The discussions with the architect came to an end effectively in early September 2001. BB gained no further extension of time. It does not appear that BB had in the summer of 2001 produced anything new to the architect. Had BB commenced an arbitration at that time then, in the right hands, that arbitration would by now have been reaching a conclusion.

5. BB decided, however, to seek adjudication. It gave notice of adjudication on 5 December 2001. As it is and has always been Lambeth's case that the decision of the adjudicator was "without jurisdiction" it was somewhat surprising that neither party had put in the notice of adjudication or even had it available in court. Since the jurisdiction of an adjudicator is normally defined by the notice of adjudication (and not by the referral notice) it is almost always essential that it should be produced if the enforcement of the decision is challenged for want of jurisdiction.

6. In this instance, however, it was clear and it is common ground that the dispute related to the damages deducted or withheld by Lambeth and accordingly the adjudicator was being asked to review the certificates of non-completion given by the architect. Clause 41A.5.2 of the JCT conditions expressly gives to the adjudicator what would otherwise be inferred, namely the power to open up, review and revise such a certificate. Before issuing a certificate that the contractor has failed to complete the works by the completion date, as provided by clause 24.1, an architect has to consider whether it should be issued. In doing so the architect has thus to consider any grounds which might excuse the contractor for failing to complete the works by the completion date. Thus the architect will carry out the same exercise as that required under clause 25.3.3. Clause 25.3.3.1 requires the architect to fix a completion date which is "fair and reasonable having regard to any of the Relevant Events, whether upon reviewing a previous decision or otherwise and whether or not the Relevant Event has been specifically notified by the contractor under clause 25.2.1.1". The JCT conditions do not make the issue of a certificate under clause 24.1 dependent upon the grant of any extension of time (or refusal to do so) under clause 25 so in law there is no connection even though in practice the same ground will be covered. Clause 25.3.3.1 tells the architect to decide what is fair and reasonable even though a Relevant Event has not been notified providing, of course, the architect is aware of the Relevant Event. In issuing a certificate of non-completion under clause 24.1 the architect is equally not limited by the absence of a formal notification. (However, unless the cause of delay considered to excuse the contractor is a Relevant Event it cannot be taken into account either under clause 25 or under clause 24.)

7. On 11 December 2001 the RICS appointed Mr. David Richards of Mouchel Consulting Limited. In a letter to the parties of the same date Mr. Richards said that he looked forward to receiving the referral notice by 12 December. He also set out proposed terms for agreement between himself and the parties. He said:-

"It appears to me from the Notice of Adjudication that the dispute concerns substantial issues that may not be capable of being determined in 28 days. I do not currently, but may request the Referring Party to extend the time for the making of my decision by 14 days. I will issue directions once I have seen the Referral and I look forward to both parties' co-operation in this matter.

Dependent on the content of the Referring parties' referral document, it seems to me that I may require assistance in my investigations. Such assistance will be limited to determination of fact and will be called upon only if likely to result in a saving of my fees".

8. The agreement proposed by Mr. Richards read as follows:-

"MOUCHEL ADJUDICATION AGREEMENT

AGREEMENT

THIS Agreement is made on the ..... day of ..... 20.....

Between

1. Balfour Beatty Construction Ltd of 23 Ravelston Terrace, Edinburgh, EH4 3TN ("the Referring Party")"

2. The Mayor and Alderman of The London Borough of Lambeth of Harnbrook House, Porden Road, London SW2 1RW ("the Other Party") (together called "the Parties") And

3. David M Richards of Mouchel Consulting Limited, West Hall, Parvis Road, West Byfleet, Surrey KT14 6EZ ("the Adjudicator")

A dispute has arisen between the Parties under a Contract between them. This dispute has been referred to adjudication in accordance with a clause of the contract between the Parties and the Adjudicator has been requested to act.

IT IS AGREED that

1. The rights and obligations of the Adjudicator and the Parties shall be set out in this Agreement.

2. The Adjudicator agrees to adjudicate the dispute in accordance with the Procedure.

3. The Parties agree jointly and severally to pay the Adjudicator's fees and expenses as set out in the attached schedule and in accordance with the Procedure.

4. The Parties acknowledge that the Adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator (whether in negligence or otherwise) unless the act or omission is in bad faith. Any employee or agent of the Adjudicator shall be similarly protected from liability.

5. This Agreement shall be interpreted in accordance with the law of England and Wales.

6. The adjudication and all matters connected with it are and will be kept confidential by the Parties and the Adjudicator except in so far as it is necessary to enable a party to implement or enforce the decision of the Adjudicator or for the purpose of any proceedings subsequent to the adjudication.

7. The Adjudicator shall inform the Parties if he intends to destroy the documents which have been sent to him in relation to the adjudication and he shall retain documents for a further period at the request of either Party.

8. The Parties allow the Adjudicator to employ assistants at rates that will be advised.

9. The Adjudicator's fees shall be paid prior to release of his decision.

SCHEDULE

1. Appointment Fee (if requested) UK £2,700.00 (To include preliminary reading, etc, by which time charges will be abated). The appointment fee is payable in the first instance by the Claimant, if requested. Up to fifty per cent of this fee of refundable in the event of settlement and if less time has been spent on the matter.

2. Hours worked outside hearing: UK £135.00 per hour (including preliminary reading, meetings, views and preparation of decision).

3. Clerk UK £51.00 per hour I have a legally qualified clerk as well as a secretary. My clerk undertakes administrative work that I would otherwise do.

4. Fees for hearing (if applicable): UK £1,050 per day. Part days charged at UK £135.00 per hour with a minimum of UK £675.00

5. Rendering of Fee Notes: Fees will be invoiced in Sterling, plus VAT as applicable, and will be payable in that currency to Mouchel Consulting Limited. The due date for payment is on presentation of the invoice and interest will be charged at 15% p/a on the full invoice should any sum remain outstanding fourteen days after the due date.

6. Travelling Expenses and Disbursements: These will be charged on the basis of my being resident in West Byfleet, England and are payable as and when incurred. Air travel will be business class and rail travel will be first class. Travelling time will be charged as reading time.

7. Notification of Decision I will make my Decision on or by the date that I am required to do so and will notify the Parties and their Representatives that my Decision will be dispatched to them on full payment of my fees."

In an e-mail of 13 December 2001 Mr. Richards made it clear that the Procedure referred to in the proposed agreement was that set out in clause 41A of the JCT conditions. The agreement as proposed was accepted by the

parties.

9. BB submitted its referral notice on 11 December 2001. It comprised two ring binders and three lever arch files. In his e-mail of 13 December Mr. Richards also said that he required the claims consultants (who represented both parties) to attend him all day on 20 December commencing at 9.30 "so that Mr. Hossack, [BB's claim consultant who was a director of BRM Project Management Limited] can take me through his time analysis in detail". He continued "at that point I will be in receipt of the respondent's reply to the referral and I should by the end of the day be in a position to advise what further information I require from both parties". Lambeth also retained a claims consultant to represent them: Mr. Barry Wicks, an Executive Director of James R Knowles Ltd.

10. Some four days later, on 17 December 2001, Mr. Richards wrote to both Mr. Hossack and Mr. Wicks as follows:-

> "Having now read the referral notice together with appendices (but I have not yet read the other four files) I should be grateful if the Referring Party would produce a schedule setting out, for each relevant event: the date of the event, the activity (or activities) directly affected by the event, the nature of that effect (i.e. delay to start, extension to duration, delay to finish), the timing or date of that effect and any comment necessary.
>
> Further, I note the Referring Party's contention that all material has been previously supplied to the Respondent, and this seems to me to be the case for the material delivered to me. I would also be grateful, therefore, if the Referring Party can reference each piece of information in the suggested schedule to the documents delivered to me – this will prevent any possibility of 'ambush'. If this was restricted to the events described in Appendix 13, the Extension of Time Summary Document, that may help to limit the work necessary but I do not wish to restrict the Referring Party's case if it is made on a wider basis (I have not considered the aspect of similarity between the documents submitted).
>
> I expect that the information is all included within the documents provided to me, but such a schedule will assist me to assimilate the material and come to a decision as speedily as possible. Please advise by return if you will not be able to provide the schedule by Christmas as I will then need to consider requesting an extension of time and/or employing an assistant to help me.
>
> With regard to information from the Respondent, in case such information is not intended to be submitted with its response to the Referral Notice (tomorrow), I should be grateful if the Respondent would provide me with details of the Architect's extension of time analysis and reasons for not allowing extensions of time claimed. I would like this by Christmas, as well."

11. This letter shows that the adjudicator was unable to make use (and, possibly, sense) of the material submitted on behalf of BB which included BB's "as-built" programme and analysis. The documents could not assist him without the answers that he sought. (BB sent its as-built programme in electronic form on 21 December.) Lambeth submitted the first instalment of its statement in answer to the referral notice on 18 December 2001. In the circumstances it is understandable that it was not able to do more.

12. On 20 December the meeting was held at Mr. Richards' offices. In his witness statement Mr. Wicks said that, despite its purpose being for BB to take Mr. Richards through its "time analysis in detail", this did not happen. According to Mr. Wicks (whose evidence is to be accepted) Mr. Richards asked BB to identify the critical path on the programmes included with its referral notice but Mr. Hossack was unable to do so as its programmes were not a critical path analysis but were "merely drawn bars without any links". Mr. Wicks pointed out that BB had provided no evidence whatsoever to support its "as-built" programme. Accordingly Mr. Richards directed BB to provide records to support two separate weeks of its "as-built details" namely for the first week of March 2000 and the first week of August 2000. BB told Mr. Richards that it did not have any information on the "as-built" details for either the mechanical works or the electrical works.

13. BB was not able to reply to Mr. Richards' request of 17 December by Christmas, as Mr. Richards had envisaged, but did so on 28 December. The schedule was some 10 pages long. On 3 January 2002 Mr. Hossack sent Mr. Richards the additional information which he had asked for at the meeting on 20 December. This included a valuation of the works, as established by Lambeth's quantity surveyor.

14. On 15 January Mr. Richards sent a letter to both Mr. Hossack and Mr. Wicks in which he said:-

> "I have read the responding party's defence and I do not consider there to be any points arising out of that document upon which a reply is needed other than the issue of law surrounding relevant event 25, the flood in December 2000.
>
> The responding party does not appear to have accepted the as-built programme on the basis of the substantiation provided by the referring party. I will therefore require the assistance of a colleague to provide a check in order that I may be satisfied.

> I propose to use Mr. Richard Leakey at the rate of £50 per hour."

Mr. Wicks replied immediately stating that it was intended to reply to the details sent on 28 December. Mr. Wicks asked Mr. Richards "in the interest of costs may we you request that your colleague waits for our document before undertaking his checks". On the same day Mr. Wicks sent the answers to BB's letter of 3 January including some criticisms of the material relied upon by BB to support its as-built programme.

15. On the next day, 16 January, Mr. Wicks wrote to Mr. Richards stating:-

> "We note that Balfour Beatty will be making a response to Lambeth's reply in the above matter. We understand that despite your facsimile of yesterday you are minded to allow Balfour Beatty to present such further details as will be in its response. Lambeth believes that this response will contain new argument and/or change the basis upon which Balfour Beatty has presented its case.
>
> This being the situation Lambeth will wish to make a further submission, the timing of which is likely to put even more strain on the already tight timescale. In view of this may we propose that the parties agree to allow you more time in which to make your Decision. Can we further suggest that in the event that Balfour Beatty refuses this proposal that you decline to look at any information they subsequently provide."

(At that time it had been agreed that Mr. Richards should have until 25 January instead of 8 January 2002, to make his decision.) Mr. Wicks' proposal was refused by BB. On 16 January BB replied to Lambeth's letter of 15 January. As forecast in its letter to Mr. Richards of 15 January Lambeth delivered, on 21 January, a 21-page submission (which included the passage that I have already quoted.) On 22 January Lambeth sent the first part of his reply in response to BB's submission of 17 January (at 6.20 pm) which was followed by the second part at 11.04 am on the next day (23 January).

16. In his witness statement Mr. Wicks recounts that immediately before Lambeth sent the second instalment of its submissions he had a telephone call from Maria Smith, Mr. Richards' administrative assistant, who had asked if there was any more information to be provided "as Mr. Richards was finalising his decision". Mr. Wicks asked Ms Smith how Mr. Richards could finalise anything if he had not received all the information. The final submission was sent by Lambeth to Mr. Richards by fax at 2.32 pm on 23 January. Shortly thereafter (at 2.45 pm) Ms Smith telephoned Mr. Wicks again and informed him that Mr. Richards had now made his decision and would accept no more submissions. Mr. Wicks asked Ms Smith to identify which submissions Mr. Richards had considered in coming to his decision but Ms Smith was unable to answer that question. Five minutes later Mr. Richards telephoned Mr. Wicks to tell him that he did not have to make any further response to "relevant event 25", [i.e. the flood] as he was with Lambeth on that point. Within an hour (at 3.47 pm) Mr. Richards e-mailed the parties to say that he had made his decision which was available on payment of his fees. Not surprisingly Mr. Wicks in his witness statement posed the question as to how Mr. Richards could have been aware of the entirety of Lambeth's answer to BB's case in the time available. Mr. Richards furthermore had another two days in which to make his decision as time had been extended to 25 January.

17. The decision itself contained the following (in amended form sent by the adjudicator on 24 January):

> "5. Law.
>
> 5.1 The Referring Party relies on the existence of relevant events for its entitlement to extension of time and has no regard for any delay for which it may be culpable and which may impact at the same time as the relevant event. This approach follows that adopted in the case of **Balfour Beatty Building Ltd v Chestermount Properties Ltd** (1993) 62 BLR 12 where the only limitation placed on the approach was that the net delay of the event should be added to the time for completion, rather than the gross delay including prior culpable delay. However, insofar as the Referring Party relies on the timing of an instruction for additional work as preventing completion by a certain date then, while the contention may be correct in itself, that does not give rise to an entitlement to extension of time other than on the basis decided in **Chestermount**.
>
> 5.2 The Respondent relies, to a degree, on a limited quotation from the judgment of HHJ Dyson, [sic] in **Henry Boot Construction v Malmaison Hotel (Manchester) Ltd** (1999) 70 Con LR 32 to content that the **Chestermount** approach is wrong. However, the **Malmaison** judgment is founded on the Parties' agreement that **Chestermount**, as summarised above, is correct.
>
> 5.3 The Respondent also relies on the dictum of HHJ Seymour in **Royal Brompton Hospital National Health Service Trust v Frederick Alexander Hammond & Others** (2000) Lloyd's Rep 643. This case contradicts the principle that a contractor should have the benefit of a relevant event if it is in culpable delay, as approved in **Chestermount**.

5.4 On the basis that the first instance authorities, as contended by the Respondent, conflict and these points were not considered in the appellate decisions, I decline to follow the Respondent's view of **Brompton Hospital**. Those cases have been said by some legal commentators to support each other to the opposite effect of that contended for by the Respondent. Further, the Society of Construction Law's draft Protocol for Determining Extensions of Time and Compensation for Delay and Disruption recommends a contrary position to **Brompton Hospital**.

5.5 In addition to the above, the Respondent's case is predominantly that the Referring Party has failed to properly make its case. However, it does not advance any positive case such as may be made with the assistance of its Architect and I am aware that this may be due to some difficulties between the Respondent and the Architect. The Respondent contends that the Referring Party has failed to give proper notices. I do not need to investigate this allegation in detail as, in the absence of any assistance from the Respondent's Architect, I must make my own determination on the basis of the papers before me and on the balance of probability.

6. Relevant Events.

6.1 I have had some difficulty in reviewing the relevant events contended for by the Referring Party against its programmes and progress. While it is clear that the Referring party intended to progress its tradesmen sequentially down through the building, the Referring Party advised, in my meeting with it and the Respondent, that its programmes were drawn rather than linked. Those programmes must therefore be regarded as a statement of intent for general utilisation of resource rather than a detailed forecast of location of resource utilisation. In this regard I accept the Respondent's point that a delay in one location will not necessarily prevent work in another location, and would not necessarily cause a delay. Rather, the project must be reviewed in the round.

6.2 While a degree of float may exist in the activities of a particular trade, a contractor will always seek to minimise the float by reducing its resources appropriately – a contractor will always seek optimum utilisation of its resources. In the circumstances of this project, that would mean use of reduced workforce rather than intermittent use of the workforce. Consequently, bearing in mind that a contractor has no obligation to accelerate its work, it appears to me that the most likely causes of delay will be such events that prevent a trade from working entirely or from working efficiently, or such events that increase the work of a trade.

6.3 The Parties are aware of the Society of Construction Law Protocol, [the adjudicator added in a footnote: Society of Construction Law Protocol For Determining Extension Of Time And Compensation For Delay And Disruption, Consultation Version, November 2001, paragraph 3.9.4, pp 18 & 19] which sets out a reasonable hierarchy for the methodologies available for the delay analysis. In order of preference, these are:

1. Time Impact Analysis
2. Windows Analysis
3. Collapsed As-built Analysis
4. Impacted Plan Analysis

The use of a particular method is determined by the information available, with least information allowing the least preferred method and giving rise to the least accurate answer. That does not mean that if all information is available, the answer determined by a less accurate method is not valid or that, if little information is available, an assessment is not valid. Rather the answer is less likely to be accurate.

6.4 Given the nature of the project and the construction programme, any evaluation of extension of time in this case must necessarily be relatively coarse. That does not disentitle the Referring Party to an evaluation of its extension of time. Rather, it means that any inaccuracy in determination will cut both ways.

6.5 It is not possible to make an assessment on the basis of time impact analysis and therefore I have reviewed the As-Built programme. I find it a reasonable representation of work being carried out at various locations on the project. I have also reviewed it for impact of events, similar to a 'collapsed as-built' method. Where issues between the Parties fall away as a result of the work that is the subject of that issue not being on the critical path, I have not necessarily set out my decision on the particular issue.

6.6 The project had two basic components, the Flats and the Concierge. Each element had its own critical path and must initially be considered separately in reviewing entitlement to extension of time.

6.7 From the As-built programme for the Flats, my summary of which is attached, the sequence of work was as follows.....[the adjudicator then considered the sequence].

6.8 The critical path for the work to the Flats seems tome to have run through the stripping out and demolition activity, then through brickwork and blockwork. Following that, the critical path went either through fourth and fifth window installation or dry liming works generally, before continuing predominantly through dry lining work. The Minaret boarding was the predominant subsequent activity, followed by remedial and decoration works, consequent upon the flood in December 2000.

6.9 It appears to me that the Referring Party was unable to fully realise its aim of working in an orderly fashion in the Flats, progressing from floor to floor with continuous working on each floor.

6.10 On the basis of the information presented, I determine that the Concierge works initially had five weeks float. By the time the basement slab commenced, three weeks' float had been used and, at completion of the basement slab, the original five weeks' float was extinguished.

6.11 The critical path through the Concierge work appears to me to have run through the structural concrete work and into the brickwork and blockwork until commencement of plastering to the Concierge. At this point both the plastering and windows were critical until brickwork and blockwork became critical again, prior to commencement of carpentry. Carpentry was concurrently critical with plastering up to the Christmas (2000) break. Thereafter the M&E and CCTV works were critical through to completion.

6.12 With regard to the combined position of the Flats and the Concierge works, the Flats work was critical up to four weeks before actual completion of the drylining, at which point the critical path moved to the plastering in the Concierge. This results from the Flats having only four weeks of work scheduled following dry lining completion and from the Concierge having six weeks of work due from commencement of plastering, with the Concierge plastering, alone, continuing for eight weeks until the flood in early December 2000. At that point, it appears to me, from the lack of recorded as-built work for the whole project, that the flood and its effects were critical for a period of four weeks. Thereafter, the M&E and CCTV work to the Concierge was critical.

6.13 Considering in chronological order of potential effect, the relevant events (RE's) contended for by the Referring Party against the background set out above, I find as follows, [the adjudicator then dealt with the Relevant Events]

... .

6.41 I consider that the above analysis is such as could have been carried out by the Architect in the absence of the detailed particulars that should always be preferred.

6.42 No evidence has been produced to support the Respondent's allegation that the Referring Party failed to use its best endeavours to prevent delay to the works. Neither has any evidence been produced to establish that, to any material degree, the Referring Party failed to properly proceed with the works – note of failure to work in a particular area is not sufficient without demonstration that the project was under-resourced by comparison with the contracted requirements. Nor should an as-built programme show any more than shown on those of the Referring Party. All contractors experience a degree of set-back in constructing work that is their responsibility but I see nothing that is out of the ordinary in this case, in that regard. Consequently these defences fail, except insofar as I have determined a date for completion that is earlier than the date actually achieved.

6.43 I determine that the Referring Party is entitled to an extension of time of thirty five weeks and one day, creating a Date For Completion, in the terms of the contract, of 10 April 2001, some six weeks and two days prior to the Date of Practical Completion.

6.44 Of the thirty five weeks and one day, all are due to variation or late instruction or information, none is due to 'weather' (if such is what the Referring Party refers to as a neutral event) and none is due to water damage. Further, on that basis, the Referring Party is entitled to reimbursement of such loss and expense as may be due to relevant events, which may be more than those impacting on the critical path, pursuant to clause 26 of the conditions of contract.

7. Liquidated and Ascertained Damages.

7.1 The Referring Party seeks repayment of damages deducted. The amount deducted by the Respondent is £355,831.71 in respect of thirty weeks and three days delay. That amount should be £71,834.57 in respect of six weeks and two days delay. The Referring Party is entitled to reimbursement of the difference in the sum of £283,997.14.

8 Interest and/or Financing.

8.1 I have discretion as to interest and do not accept the Respondent's contention that interest should be reviewed in the context of the entire account. I determine that the Referring Party is entitled to £18,355.51 by way of interest.

9 Costs.

9.1 I have discretion as to the apportionment of my fees. I determine that, taking into account all of the above and on the basis that costs should follow the event, the Respondent shall bear my fees.

10. Adjudicator's Decision.

10.1 The Date for Completion is 10 April 2001.

10.2 The Respondent shall pay £283,997.14, plus VAT, if applicable and at the appropriate rate, to the Referring Party within fourteen days of the date hereof as reimbursement of damages incorrectly deducted.

10.3 The Respondent shall pay £18,355.51, plus VAT, if applicable and at the appropriate rate, to the Referring Party within fourteen days of the date hereof as damages for the incorrect deduction.

10.4 The Respondent shall bear and pay my fees in the total of £11,267.96 inclusive of VAT. Provided always that, if the Referring Party shall have paid some or all of my fees, the Respondent shall reimburse the Referring Party within fourteen days of the date hereof".

18. Prior to issuing his decision Mr. Richards had on 14 January informed the parties of the time that had been spent up to 11 January. This was as follows:-

"David M Richards: 47.4 hours
Geoff Bewsey: 5.2 hours
Bob Neill: 1 hour
Maria M Smith: 3.8 hours"

Mr. Bewsey and Mr. Neill were said to have assisted Mr. Richards in the "consolidation of the as-built programme". (Ms Smith was Mr. Richards' administrative assistant.) After the decision had been given Mr. Richards informed the parties of the breakdown of the time spent in the matter. Apart from Mr. Richards' time the only significant amount of time was that of Mr. Richard Leakey who had spent 7.5 hours in the week ending 18 January 2002. In a further letter of 29 January Mr. Richards said that Mr. Leakey, a senior quantity surveyor, had been engaged in "checking compilation of referring party's as-built programme"; Mr. Neill as a "senior dispute manager/programmer" had been engaged on "translation of Power Project file to Excel"; Mr. Geoff Bewsey, who occupied a similar position had been engaged in the "translation of Excel files to access database in loading CSP plan and software".

Case for Defendant

19. Lambeth challenge the adjudicator's decision and resist enforcement on two principal grounds. First, Mr. Jonathan Acton Davis QC, for Lambeth, submitted that in reaching his decision the adjudicator did not act impartially, in that a fair-minded and informed observer would conclude that there was a real possibility or a real danger that he was biased and that he did not comply with the principles of natural justice as he did not give Lambeth an opportunity to deal with arguments which had not been advanced by either party, although he relied on them to reach his decision. Mr. Acton Davis also submitted that the adjudicator did not consider properly the full arguments of both parties before making his decision. Secondly, it was submitted that the decision was reached "in breach of contract and without jurisdiction" in that the adjudicator employed assistants to do work beyond those that which the parties had agreed he would employ assistants to do.

20. The legal basis for the first submission lay in clause 41A.5.5 of the JCT conditions which, of course, follows section 108 of the Housing Grants Construction and Regeneration Act 1996 (HGCRA) in providing that the adjudicator should act impartially. That requirement has been considered by this court in a number of cases such as (amongst those cited by Mr. Acton Davis): Discain Project Services Limited v Opecprime Development Limited (No 2), [2001] BLR 205 and 291-292 in which His Honour Judge Bowsher QC applied the statement of principle to be found in **Director General of Fair Trading v Proprietary Association of Great Britain**, [2000] All ER (D) 2425 at paragraph 85. The legal basis for the other main plank of Lambeth's case is to be found in the acceptance by Judge Bowsher QC in Discain Project Services Limited v Opecprime Limited (No 1), [2000] BLR 402 that "the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit". That phrase originated in a case which I decided: Glencot Developments v Ben Barrett, [2001] BLR 207 at page 218 (paragraph 20). Mr. Acton Davis, likening adjudication to arbitration, also referred to some well known decisions in which it is established that an arbitrator must, in accordance with the principles of natural justice, inform a party of a view or point which is likely to be material to the decision but which the parties have not covered to

anticipated in their respective cases. Thus in **Fox v Wellfair Limited**, [1981] 2 Lloyd's Reports 514 at page 529, Dunn LJ said:

> "If the expert arbitrator, as he may be entitled to do, forms a view of the facts different from that given in the evidence which might produce a contrary result to that which emerges from the evidence, then he should bring that view to the attention of the parties. This is especially so where there is only one party and the arbitrator is in effect putting the alternative case for the party not present at the arbitration.
>
> Similarly if an arbitrator as a result of a view of the premises reaches a conclusion contrary to or inconsistent with the evidence given at the hearing, then before incorporating that conclusion in his award he should bring it to the attention of the parties so that they may have an opportunity of dealing with it."

In **Interbulk Limited v Aiden Shipping Co Limited (The "Vimeira")**, [1984] 2 Lloyd's Reports 66 at page 75 Robert Goff LJ said:

> "In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal."

Ackner LJ also said at page 76:-

> "Where there is a breach of natural justice as a general proposition it is not for the courts to speculate what would have been the result if the principles of fairness had been applied. I adopt, with respect, the words of Mr. Justice Megarry in **John v Rees**, [1969] 2 All ER 275 at p 309 where he said: As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change." But, in this case, speculation does not arise. If the arbitrators had informed the parties of what they had in mind, the consequences would have been obvious. Firstly, the charterers would have sought to persuade the arbitrators that it was common ground on the evidence that there was adequate room to turn the vessel and that, therefore, the arbitrators should decide the dispute according to the evidence. If they failed so to persuade the arbitrators, they would have sought, and would have been entitled to, an adjournment. Having obtained an adjournment, the charterers would have called the evidence which in fact was called at the sub-arbitration and would have satisfied the arbitrators that the turning area was adequate."

Mr. Acton Davis also referred to a passage in **Gbangbola v Smith & Sherriff**, [1988] 3 All ER 730 at page 740B where I said:-

> "A tribunal does not act fairly and impartially if it does not give a party an opportunity of dealing with arguments which have not been advanced by either party".

Mr. Acton Davis drew attention to paragraph 40 of the judgment of His Honour Judge Bowsher QC in Discain (No 2) in which he had said:-

> "While the Arbitration Act does not apply to arbitrations, some help may be obtained from that Act by way of analogy. As a result of that Act, serious irregularity on the part of the arbitrator (including failure to act fairly and impartially as between the parties) is not a sufficient ground for the court to interfere in an arbitrator's decision unless the court is satisfied that the irregularity "has caused or will cause substantial injustice to the applicant": See **Egmatra AG v Marco Trading Corporation**, [1999] 1 Lloyd's Rep 862 at page 865."

21. On the facts Mr. Acton Davis submitted that the adjudicator had not acted impartially or had been in breach of the rules of natural justice since

> (1) Neither party had presented a critical path analysis to the adjudicator.
>
> (2) Lambeth had submitted to the adjudicator that the material provided by BB did not establish its claim.
>
> (3) The adjudicator himself constructed or had constructed for him a chart (an "as-built programme") which combined the as-built record on one sheet and had drawn on that chart a representation of a critical path through the work as actually carried out.
>
> (4) That conclusion from the as-built chart had not been presented to the parties for their comment.
>
> (5) The decision and the extension of time had been based on that critical path since the decision contained numerous reference to "critical" and "non-critical" matters.

> (6) In addition the adjudicator apparently adopted a "collapsed as-built" analysis from which he arrived at his conclusion as to what was "critical" and "non-critical" for the purposes of his decision.
>
> (7) Lambeth was not given any opportunity to comment on the propriety of such an analysis which the adjudicator elected to adopt or on its use even though it had in its submissions drawn attention to the fact that there were four possible ways of analysing the delay.
>
> (8) Finally, Lambeth were not given the opportunity to deal with the conclusions which the adjudicator intended to draw or in fact drew from the application of that analysis.

Lambeth relied on **John Barker Construction Ltd v London Portman Hotel Ltd** (1996) 83 BLR 31 in which Mr. Recorder Toulson QC held that an architect who had to decide whether to grant an extension of time under clause 25 of the JCT conditions would not have acted fairly and lawfully and his decision would be fundamentally flawed if he had not carried out a logical analysis in a methodical way of the impact of the relevant events on the contractor's programme and made only "an impressionistic, rather than a calculated, assessment" (see page 62). The judge said also (see the same page):

> "I accept that the assessment of a fair and reasonable extension involves an exercise of judgment, but that judgment must be fairly and rationally based."

As the assessment was not fair or based on a proper application of the terms of the contract it was submitted that it was invalid. (In the context of a dispute about the time for completion a logical analysis includes the logic required in the establishment of a CPN.) Lambeth tendered evidence from a planner, Mr. D. C. Bentley, which criticised Mr. Richard's work, for example, that it was impossible to establish a critical path on the basis on observations of an " as built" record programme. Mr. Bentley's evidence is in my judgment irrelevant and thus inadmissible in so far as it is intended to show that Mr. Richards made errors or on the main grounds relied on by Lambeth. I have therefore disregarded them.

22. In addition Lambeth's case was that the adjudicator could not have taken Lambeth's latest submissions into account before making his decision. Those submissions were delivered on 22 and 23 January with the final one being sent at around 2.30 pm on 23 January. The adjudicator could not have taken them into account before making his decision at around 2.45 pm which was sent to the parties at 3.45 pm. It was not necessary for the adjudicator to reach his decision at that time since the parties had agreed that he could have until 25 January to make his decision.

23. On the second ground upon which the decision was challenged, Mr. Acton Davis submitted that the adjudicator had only got permission to use assistance if it would save costs to help him determine fact. The adjudicator appeared to have used the assistants to construct the as-built chart from BB's material and, possibly, to derive the critical path. The adjudicator was not authorised to use his assistants for that purpose and accordingly the decision fell outside his authority and was made without jurisdiction and in breach of the agreement that he had made with the parties.

Case for the Claimant

24. Mr. Andrew Goddard for BB accepted that the adjudicator was under a duty to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by the contract and the HGCRA permitted and also to act impartially. He submitted that the adjudicator had complied with each of those requirements. He drew attention to the Act and to clause 41 of the JCT conditions which empowered the adjudicator to "set his own procedure" and provided that "at his absolute discretion", [he] could take the initiative in ascertaining the facts and the law as he considers necessary". Clause 41A.5.5 expressly permitted him to use "his own knowledge and experience" (.1) and to obtain "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" (.7). Mr. Goddard submitted that the adjudicator had followed the procedure referred to in his agreement, namely that set out in clause 41A by allowing Lambeth not only to make initial submissions but also to comment on the material submitted by BB. He gave Lambeth considerable latitude even though it did not make its submissions by the time required. It was an important part of Lambeth's case that the adjudicator should conduct a proper analysis but it had in paragraph 51 of his submissions of 21 January 2001 directed the adjudicator to the Society of Construction Law's draft Protocol on Delay and Disruption to which the adjudicator had referred in his decision and had therefore effectively allowed the adjudicator to select one of the methods suggested, namely the "collapsed as-built" analysis. Lambeth could also have put forward a positive case based upon any of the analyses suggested by it but it had declined to do so. It did not even meet the adjudicator's request in his e-mail of 17 December 2001 to produce the justification for the extension of time which had been granted or the reasons for rejecting BB's claims for further extensions of time. Lambeth had also provided its comments on each of the 30 or so Relevant Events relied upon by BB.

25. Mr. Goddard produced two documents which set out graphically the extensions of time granted by the adjudicator. The adjudicator had decided that there should be three weeks for asbestos removal; one week for "soil stacks"; 21 weeks (including 2 weeks being included for Christmas) for difficulties in relation to "drylining"; 9 weeks for "CCTV"; 1 day for "vinyl floor" and 1 week for "building controlling". Of these only the latter two were the subject of

Lambeth's final submission. The primary delaying event found by the adjudicator was relevant against number 3 (drylining). Accordingly Mr. Goddard maintained that any complaint by Lambeth that the adjudicator had made his decision prematurely could only have affected a small part of the overall extension of time granted (one week and one day). The adjudicator had indeed rejected BB's case in respect of the overwhelming number of relevant events. Even in relation to the relevant events where he had decided in BB's favour Lambeth had nothing to complain about. On relevant event 1 (asbestos removal) his decision was exactly the same as that of Lambeth's architect; on relevant event 2 (soil stacks) he had found against Lambeth's argument on design responsibility; on relevant event 3 he had based his conclusion on Lambeth's quantity surveyor's own valuation as to the increase in the scope of the drylining work and had evaluated the effect of the other increase in scope together with late instructions finding that there had been critical delay; on relevant event 17 (CCTV) he had not accepted the whole of BB's case. On relevant event 22 only a nominal period of one day had been allowed. On relevant event 31 Lambeth's latest submission added nothing to what it had said.

26. Mr. Goddard submitted that the adjudicator had not acted in breach of contract or had reached a decision which he was not authorised to do and acted without jurisdiction in employing assistants. Clause 41A.5.5.7, in addition to the provisions of the adjudication agreement authorised him to do so. He had given prior notice to the parties of his intention or actions. The steps taken by the adjudicator insofar as the material all fell within "determination of facts". Lambeth had not objected at the time to the use of technical assistants as set out in the adjudicator's letter of 15 January.

Decision

27. It is now well established that the purpose of adjudication is not to be thwarted by an overly sensitive concern for procedural niceties. In Macob Civil Engineering Limited v Morrison Construction Limited, [1999] BLR 93 Dyson J made it clear that a mere procedural error should not invalidate an adjudicator's decision. Adjudication under the HGCRA is necessarily crude in its resolution of disputes. Errors of fact and law do not vitiate the decision which has to be complied with, unless of course it was not authorised and thus made without jurisdiction. On the other hand adjudication under the JCT conditions (which are typical of other forms) envisage that some basic procedural principles have to be applied in order that each party is treated fairly. The party who has not sought adjudication must be given the opportunity of putting in a statement under clause 41A.5.2. Thereafter the adjudicator acts to investigate the dispute in the light of the Referral Notice and that statement. He has power to set his own procedure but he cannot of course do so without first informing the parties of the procedure which he is going to adopt. The adjudicator's agreement, although it referred to some "Procedure", went no further than clause 41A.5 of the JCT conditions, by which the parties were of course contractually bound. The adjudicator set up a meeting on 20 December 2001 and told the parties of its purpose. Thereafter the adjudicator properly allowed both parties equality in making further submissions (I deal later with the effect of them). An adjudicator is not of course limited to the material presented by the parties. He may obtain further information and may apply his own knowledge and experience. Above all "he has to take the initiative in ascertaining the facts and the law". He has an "absolute discretion" to do what "he considers necessary".

28. Is the adjudicator obliged to inform the parties of the information that he obtains from his own knowledge and experience or from other sources and of the conclusions which he might reach, taking those sources into account? In my judgment it is now clear that, in principle, the answer may be: Yes. Whether the answer is in the affirmative will depend on the circumstances. The reason lies, at least in part, in the requirement that the adjudicator should act impartially. That must mean that he must act in a way that will not lead an outsider to conclude that there might be any element of bias, i.e. that a party has not been treated fairly. In addition impartiality implies fairness although its application may be trammelled by the overall constraints of adjudication. Lack of impartiality carries with it overtones of actual or apparent bias when it in reality the complaint may be better characterised as a lack of fairness. Judge Bowsher QC put it very well in Discain Project Services Limited (No 1) when he said at page 405:-

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

The last sentence shows that the question that I posed cannot be given an unqualified answer as the facts have to be taken into account.

29. Nevertheless, in my judgment, that which is applicable in arbitration is basically applicable to adjudication but, in determining whether a party has been treated fairly or in determining whether an adjudicator has acted impartially, it is very necessary to bear in mind that the point or issue which is to be brought to the attention of the parties must be one of which is either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant. It is now clear that the construction industry regards adjudication not simply as a staging post towards the final resolution of the dispute in arbitration or litigation but as having in itself considerable weight and impact that in practice goes beyond the legal requirement that the decision has for the time being to be observed. Lack of impartiality or of fairness in adjudication must be considered in that light. It has become all the more necessary that, within the rough nature of the process, decisions are still made in a basically fair manner so that the system itself continues to enjoy the confidence it now has apparently earned. The provisional nature of the decision also justifies ignoring non-material breaches. Such errors, if apparent (as they usually are), will be rectified in any negotiation and settlement based upon the decision. The consequence of material issues and points is that the dispute referred to adjudication will not have been resolved satisfactorily by any fundamental standard and the chances of it providing the basis for a settlement are much less and the chances of it proceeding to arbitration or litigation are much greater. However the time limits, the nature of the process and the ultimately non-binding nature of the decision, all mean that the standard required in practice is not that which is expected of an arbitrator. Adjudication is closer to arbitration than an expert determination but it is not the same.

30. I now turn to the facts. This is yet another case in which adjudication has been launched after completion of the works and in which the dispute attracts a simple description but comprises a highly complex set of facts and issues relating to the performance of a contract carried out over many months. It may well be doubted whether adjudication was intended for such a situation. If it is to be utilised effectively it is essential that the referring party gives the adjudicator all that is needed in a highly manageable form. From the material available to me it is clear that BB did little or nothing to present its case in a logical or methodical way. Despite the fact that the dispute concerned a multi-million pound refurbishment contract no attempt was made to provide any critical path. The work itself was no more complex than many other projects where a CPN is routinely established and maintained. It seems that BB had not prepared or maintained a proper programme during the execution of the works. By now one would have thought that it was well understood that, on a contract of this kind, in order to attack, on the facts, a clause 24 certificate for non-completion (or an extension of time determined under clause 25), the foundation must be the original programme (if capable of justification and substantiation to show its validity and reliability as a contractual starting point) and its success will similarly depend on the soundness of its revisions on the occurrence of every event, so as to be able to provide a satisfactory and convincing demonstration of cause and effect. A valid critical path (or paths) has to be established both initially and at every later material point since it (or they) will almost certainly change. Some means has also to be established for demonstrating the effect of concurrent or parallel delays or other matters for which the employer will not be responsible under the contract. BB and its claims consultants, whilst recognising that the critical path would constantly fluctuate (see the referral notice), nevertheless decided that not only was it not practicable but that it was unnecessary to determine a constantly changing critical path.

31. In the circumstances it is not at all surprising that the adjudicator had to ask BB to provide him with further basic information which would enable him, first, to have the raw material to do what BB had conspicuously failed to do. It had to be asked to produce a schedule which would set out each Relevant Event, the date of the Event, the activity directly affected by the Event, the nature of the effect (i.e. delay to start, extension of duration, delay to finish) the timing or date of that effect and any necessary comment. The adjudicator naturally expected that elementary information to be readily available and that it would be produced before Christmas. BB could not do so. The adjudicator was aware that his request might lead to BB producing material which had previously not formed part of the referral notice. That shows again why he thought that BB’s case was inadequately prepared. He therefore took steps to require BB to reference its supporting material to the documents already presented to him so as to minimise the possibility of Lambeth complaining of a “ambush”. That was plainly fair. At the meeting held on 20 December the adjudicator asked for the critical path or paths to be identified but was told that BB’s as-built programmes did not show them.

32. As a result of BB's reply the adjudicator reasonably and understandably decided that he had first to verify BB’s as-built programmes or chart as a reliable record of the actual sequence of the works executed and, secondly, to try to divine a critical path. (This second decision may not have been spelled out but it is obvious as it was essential if the dispute as to the time sought was to be decided methodically and fairly.) These steps would however only lay the foundations for the central exercise which was to determine the effect of each of the Relevant Events upon which BB relied. If anything approaching a logical or methodical analysis were to be made then a decision would have to be taken as to whether to base that analysis on BB’s original planned programme or programmes (which appeared to be non-existent) or upon the so called “as built programme”. The adjudicator appears to have taken up Lambeth's reference to the Society of Construction Law’s Protocol (see paragraph 6.3 of his decision), or to have thought on the same lines. I was not referred to this consultative document and I am not concerned with it. No doubt because it is still in consultative or draft form, the adjudicator at one point appears only to have used it for a convenient description of some of the main methods available for delay analysis. However it is clear that from paragraph 6.5 of his decision that

the adjudicator then used one of them, namely the "collapsed as-built" analysis (or a variant of it), i.e. the third on the list, to decide the criticality of each Event.

33. Thus, in my judgment, the adjudicator not only took the initiative in ascertaining the facts but also applied his own knowledge and experience to an appreciation of them and thus, in effect, did BB's work for it. Lambeth knew of course that Mr. Richards intended first to verify the "as built programme" and it made submissions on it and on each of the Relevant Events. Mr. Richards did not however inform Lambeth of what he then intended to do with the facts. He did not invite their comments on whether the "as built programme" or chart that he had drawn to depict the actual progress of the work was a suitable basis from which to derive a retrospective "critical path". Nor did Mr. Richards inform either party of the methodology that he intended to adopt, or to seek observations from them as to the manner in which it or any other methodology might reasonably and properly be used in the circumstances to establish or to test BB's case. In my judgment he ought to have done so. BB had not presented its case on that basis. Lambeth had criticised BB both at the outset and in its final, if belated, submissions that it had failed to establish its case in any proper way. One would ordinarily expect the appropriate method of analysis to be agreed before it was used by an architect or other contract administrator. The adjudicator steps into the shoes of such a person. If an adjudicator intends to use a method which was not agreed and has not been put forward as appropriate by either party he ought to inform the parties and to obtain their views as it is his choice of how the dispute might be decided. An adjudicator is of course entitled to use the powers available to him but he may not of his own volition use them to make good fundamental deficiencies in the material presented by one party without first giving the other party an proper opportunity of dealing both with that intention and with the results. The principles of natural justice applied to an adjudication may not require a party to be aware of "the case that it has to meet" in the fullest sense since adjudication may be "inquisitorial" or investigative rather than "adversarial". That does not however mean that each party need not be confronted with the main points relevant to the dispute and to the decision.

34. Mr. Goddard submitted that it was open to Lambeth either to have anticipated the course that was adopted by the adjudicator by selecting one or more of the methods of analysis listed in its submissions or by proffering the reasoning behind the architect's opinions which gave rose to the dispute. It was suggested that by not taking either route Lambeth could not complain of the course taken by the adjudicator. I disagree. Lambeth was in my view entitled to criticise BB's case without putting forward an alternative. Since BB had not justified its case Lambeth was not obliged to justify the architect's extensions of time or certificates of non-completion. It was entitled to rely on them as they were apparently valid decisions by the architect and the parties by adopting the JCT conditions have agreed to be bound by them (subject to their review by an adjudicator or arbitrator). BB had to persuade the adjudicator that the architect's decisions were wrong. Lambeth was not obliged to prove that they right (although it is usually prudent to do so). It was entitled to have the dispute decided on BB's own terms, i.e. on the material provided by it either originally or in answer to the adjudicator's requests and not on a basis devised by the adjudicator and which had not been made known to it. For example, if a dispute about the ascertainment of loss or expense arose because the quantity surveyor considered that the contractor had not provided the necessary material, the adjudicator would have to decide that dispute on that basis, i.e. whether the loss and expense was capable of being ascertained on what was known to the quantity surveyor. If the adjudicator were to use his powers to find out more about the facts or to form the opinion that a different principle should be applied for their evaluation he would have to tell both parties of what he had found, and of their potential implications (if that needed to be pointed out). In my judgment Mr. Richards exceeded his jurisdiction by himself making good fundamental deficiencies in BB's material, namely the lack of a critical path and the method of analysis adopted for demonstrating the criticality or otherwise of the Relevant Events.

35. Moreover there was sufficient time for the adjudicator to present Lambeth with the "as built" chart and the critical path. Mr. Acton Davis pointed out that, on the information provided by Mr. Richards about his assistants' time, they had effectively completed their work by mid January. The importance of the "as built" programme and the critical path may be seen from paragraph 6.5 of Mr. Richards' decision where he said that "the critical path went either through the fourth and fifth window installation or dry lining works generally, before continuing predominantly through dry lining work". Dry lining was the largest element in the adjudicator's assessment so its place on the critical path needed to be established with certainty.

36. Furthermore the adjudicator ought to have given Lambeth the opportunity of commenting on the use of the analysis chosen by the adjudicator. There was again time for this to be done. For example, even if Lambeth had agreed or is to be taken as having agreed that some form of a "collapsed-as-built" method was acceptable, the manner in which the "subtraction exercise" should be carried out from the as-built programme might be important (especially since the adjudicator appears only to have used a modification of that type of analysis. It might mean that all or some part of the sequences designated either as "critical" or "non-critical" might have to be viewed differently. I do not, of course, suggest that the adjudicator would be obliged to inform a party such as Lambeth of all his thinking (as revealed in Mr. Richards' decision) as to which events were or were not critical. That is not something which could necessarily and practicably be done within the time allowed. On the other hand, if, as Mr. Richards himself recognised right from the outset, the nature of BB's case was likely to make it extremely difficult for himself (or for Lambeth) to complete a reasonably fair investigation of it within the original 28 days, or even the further period agreed by the parties, then an adjudicator would have to say that it would not be possible to carry out such an investigation and to arrive at a decision, even if it was "coarse" (to quote paragraph 6.4 of his decision) within the time available. An adjudicator does not act impartially or fairly if he arrives at a decision without having given a party a reasonable

opportunity of commenting upon the case that it has to meet (whether presented by the other party or thought to be important by the adjudicator) simply because there is not enough time available. An adjudicator, acting impartially and in accordance with the principles of natural justice, ought in such circumstances to inform the parties that a decision could not properly reasonably and fairly be arrived at within the time and invite the parties to agree further time. If the parties were not able to agree more time then an adjudicator ought not to make a decision at all and should resign.

37. Can these departures from basic principle be ignored? Does the defendant have to show prejudice or how different the decision might have been? The authorities relating to arbitration and to adjudication establish that some deviations from the standards required of impartiality and fairness may be disregarded (see Discain (No 1) at page 405 and Discain (No 2) at para 40). However in **The" Vimeira"** both members of the Court of Appeal evidently saw this as exceptional. Robert Goff LJ said at page 75: "Generally speaking, the breach of the rules of natural justice itself creates the prejudice." Ackner LJ began the passage that I have quoted: "Where there is a breach of natural justice as a general proposition it is not for the courts to speculate what would have been the result if the principles of fairness had been applied." On a Part 24 application all that a defendant has to do is to persuade the court that it has realistic, not fanciful, prospects of success (**Swain v Hillman**). If jurisdiction or impartiality is in issue the question is whether a defendant has such prospects of showing that the decision is invalid. It is not the function of the court to reinvestigate the dispute to determine the extent of the invalidity (unless the unauthorised part of the decision is clearly severable). In my judgment constructing (or reconstructing) a party's case for it without confronting the other party with it is such a potentially serious breach of the requirement of either impartiality or fairness that the decision is invalid for it is a not a decision which the adjudicator was authorised to make. Strictly, it is therefore not necessary to go further.

38. In addition, for the purposes of a Part 24 application, the defendant has satisfied me that it has realistic prospects of demonstrating that, since the adjudicator's method of analysis which had not been agreed or commented on by either party, the decision was itself invalid as it was not one which an architect or an adjudicator standing in the architect's shoes could have made lawfully and fairly made (see **John Barker**). Mr. Goddard rightly pointed out that a number of the events identified by Mr. Richards as critical were either not contentious or were not apparently significant. However this application is to enforce the whole decision and not part of it. It is not accompanied by an application under Part 25 for an interim payment, as it might have been. I cannot therefore give effect to those parts, even if the decision had been authorised. I do not accept Mr. Goddard's additional submission that Lambeth has to show, on an application of this nature, either an alternative critical path or a different method of analysis and to demonstrate some other effect of the Relevant Events which Mr. Richards decided were critical. It is clear from paragraphs 6.4 and 6.5 of the decision that Mr. Richards' conclusions on drylining in particular that the critical path was not certain so the values attributed to the critical events might well vary. The decision was "coarse" as he put it, beyond the parameters permitted of the exercise required under clauses 24 or 25 of the JCT conditions which will ultimately become one of judgment or impression in order that the determination is also fair and reasonable. In my judgment Lambeth does not have to do more than establish that there is real and serious issue that the decision may be flawed by reason of the manner in which it was arrived at, which it has done.

39. I have therefore come to the conclusion that Lambeth has established that, for the purposes of a Part 24 application, it has realistic prospects of success that Mr. Richards did not act impartially and that he failed to comply with the rules of natural justice in significant respects which cannot be disregarded and that the consequences may be sufficiently serious that they too cannot be disregarded. In my judgment an observer would conclude that by making good the deficiencies in BB's case and by overcoming the absence of a sustainable as-built programme with a critical path and the complete lack of any analysis as to which of the relevant events were critical and non-critical, the adjudicator moved into the danger zone of being impartial or liable to "apparent bias", as it is now recognised. That lack of impartiality or supposed bias can easily be cured by disclosure to the other party of what is being done or thought about. In truth this case may be more a question of whether Mr. Richards failed to comply with the principles of natural justice rather than whether he lacked impartiality. Certainly I have no reason to conclude that Mr. Richards personally was lacking in impartiality. There is no question of actual bias. However the authorities make it clear that a person in the position of an adjudicator is obliged in certain circumstances – and these are some of them – to tell both parties of what he has in mind and give them the opportunity of either endorsing or deflecting him from that course. That Mr. Richards did not do and accordingly for that reason alone the application must be dismissed since Lambeth have established reasonable prospects of success, as I have indicated.

40. Had Mr. Richards made his intentions clear or if he was not obliged to do so, then Lambeth's other complaint under its first head, namely the apparent haste with which he made his decision, has to be considered. Lambeth had BB's catalogue of Relevant Events on 28 December. It ought to have been able to have presented a comprehensive answer within a week or 10 days. Instead some of the central parts of its case only emerged at the very later stage. It has only itself to blame for not getting its tackle in order in time. On the other hand Mr. Richards knew that Lambeth were intending to make further submissions and knew that they could contain matters which he would have to take into account. He did not have to reach his decision by 23 January. He had until 25 January to do so. On the facts at present before me Mr. Richards could not have taken the last set of submissions into account properly or at all. In my judgment, Lambeth has also established that it has some realistic prospects of success in establishing that Mr. Richards failed to be fair in so acting. However Mr. Goddard's analysis of the decision shows that, if this had been the only complaint (ie that the methodology and its use were not in issue), there would have been no substantial injustice since the contents of the last set of submissions, if they had been read and accepted by the adjudicator, could only have

affected a week or so of the extension of time. Lambeth necessarily did not satisfy me that the decision would probably have been that different had Mr. Richards taken an extra day or so to arrive at it. There is nothing in Lambeth's latest submissions which seems to me to contain material which would have caused the adjudicator to pause and think again and to change any of the reasoning expressed in the decision.

41. Lambeth also submit that Mr. Richards was not authorised to use the assistants that he did. I consider that Mr. Richards did seek and obtain assistance from others in a manner which was not authorised by the original agreement or the JCT rules. I do not accept Mr. Goddard's submission that the technical assistants provided to Mr. Richards fell within clause 41A.5.7 since that relates to obtaining information and advice on technical matters "from others". That provision is directed to obtaining information from people outside the parties or the adjudicator and his offices. In any event it only comes into operation if prior notice has been given to the parties together with a statement or estimate of the cost involved. Notice was only given in respect of Mr. Leakey (on 15 January) and Ms Smith (in the agreement) but notice was not given before use was made of the other two technical assistants, as required by clause 8 of the adjudicator's agreement. The adjudicator's letter of 11 December also only limited him to use assistants for "the determination of fact". The presentation of the as-built progress of the work in the form of a programme or chart is clearly within the words "determination of fact". The delineation of this retrospective critical path is not, strictly speaking, a determination of fact but rather a judgment, after the event, as to where the critical path might have been. There is however no evidence that that delineation came from any source other than Mr. Richards. The technical assistance provided appears to have been of a kind that one would ordinarily expect to have been borne on the overheads of Mouchel Consulting Limited, namely conversion of BB's as-built programme from PowerProject to Excel (and other matters). Lambeth may have established a breach of contract but they have not established to my satisfaction what the consequences are. It is true that what the adjudicator did was not authorised technically but I cannot draw the conclusions that the breaches had any material consequences on the decision or that there was any material prejudice to Lambeth or substantial injustice. Only a few hours are involved. The adjudicator had made it clear that assistants would be employed to save money (see his letter of 11 December). Lambeth did not object to the use of Mr. Leakey. It was not suggested that they would have objected to Mr. Bewsey or to Mr. Neill. This is not a question that goes to the fairness of the procedure or to impartiality as would be the case if there was evidence of unauthorised delegation to some one of a finding of fact or opinion. Had this been the only ground upon which enforcement was resisted I would have considered that it had no realistic prospect of success and BB's application would have succeeded.

42. The options open on a Part 24 application include making a conditional order. In the course of argument I raised the possibility of a payment into court since it is hard to believe that, even if Mr. Richards had complied with his obligations, his decision would have endorsed the architect's opinions. Mr. Richards plainly proceeded in a methodical manner. However the amount would necessarily be speculative and since there is no reason to suppose that Lambeth would not have the means to pay, to make a conditional order would be wrong and would not benefit BB. BB could have made an alternative application for interim payment which, if arbitration were not sought, would have required Lambeth to deal with the merits. BB did not do so. Its application is therefore dismissed.

ANNEXE TO JUDGMENT

Extracts from JCT Conditions

24 Damages for non-completion

24.1 If the Contractor fails to complete the Works by the Completion Date then the Architect/the Contract Administrator shall issue a certificate to that effect. In the event of a new Completion Date being fixed after the issue of such a certificate such fixing shall cancel that certificate and the Architect/the Contract Administrator shall issue such further certificate under clause 24.1 may be necessary.

24.2 .1 Provided:
the Architect/the Contract Administrator has issued a certificate under clause 24.1; and

the Employer has informed the Contractor in writing before the date of the Final Certificate that he may require payment of, or may withhold or deduct, liquidated and ascertained damages,

then the Employer may, not later than 5 days before the final date for payment of the debt due under the Final Certificate:

either

.1 .1 require in writing the Contractor to pay to the Employer liquidated and ascertained damages at the rate stated in the Appendix (or at such lesser rate as may be specified in writing by the Employer) for the period between the Completion Date and the date of Practical Completion and the Employer may recover the same as a debt;

or

.1 .2 give a notice pursuant to clause 30.1.1.4 or clause 30.8.3 to the Contractor that he will deduct from monies due to the Contractor liquidated and ascertained damages at the rate stated in the Appendix (or at such lesser rate as may be specified in the notice) for the period between the Completion Date and the date of Practical Completion.

24.2 .2 If, under clause 25.3.3, the Architect/the Contract Administrator fixed a later Completion Date or a later Completion Date is stated in a confirmed acceptance of a 13A Quotation, the Employer shall pay or repay to the Contractor any amounts recovered, allowed or paid under clause 24.2.1 for the period up to such later Completion Date.

24.2 .3 Notwithstanding the issue of any further certificate of the Architect/the Contract Administrator under clause 24.1 any requirement of the Employer which has been previously stated in writing in accordance with clause 24.2.1 shall remain effective unless withdrawn by the Employer.

25 Extension of time

25.1 In clause 25 any reference to delay, notice or extension of time includes further delay, further notice or further extension of time.

25.2 .1 .1 If and whenever it becomes reasonably apparent that the progress of the Work is being or is likely to be delayed the Contractor shall forthwith give written notice to the Architect/the Contract Administrator of the material circumstances including the cause or causes of the delay and identify in such notice any event which in his opinion is a Relevant Event.

.1 .2 Where the material circumstances of which written notice has been given under clause 25.2.1.1 include reference to a Nominated Sub-Contractor, the Contractor shall forthwith send a copy of such written notice to the Nominated Sub-Contractor concerned.

25.2 .2 In respect of each and every Relevant Event identified in the notice given in accordance with clause 25.2.1.1 the Contractor shall, if practicable in such notice, or otherwise in writing as soon as possible after such notice:

.2 .1 give particulars of the expected effects thereof; and

.2 .2 estimate the extent, if any, of the expected delay in the completion of the Works beyond the Completion Date resulting therefrom whether or not concurrently with delay resulting from any other Relevant Event

and shall give such particulars and estimate to any Nominated Sub-Contractor to whom a copy of any written notice has been given under clause 25.2.1.2.

25.2 .3 The Contractor shall give such further written notices to the Architect/the Contract Administrator, and send a copy to any Nominated Sub-Contractor to whom a copy of any written notice has been given under clause 25.2.1.2, as may be reasonably necessary or as the Architect/the Contract Administrator may reasonably require for keeping up-to-date the particulars and estimate referred to in clauses 25.2.2.1 and 25.2.2.2 including any material change in such particulars or estimate.

25.3 .1 If, in the opinion of the Architect/the Contract Administrator, upon receipt of any notice, particulars and estimate under clauses 25.2.1.1, 25.2.2.2 and 25.2.3,

.1 .1 any of the events which are stated by the Contractor to be the cause of the delay is a Relevant Event and

.1 .2 the completion of the Works is likely to be delayed thereby beyond the Completion Date

the Architect/the Contract Administrator shall in writing to the Contractor give an extension of time by fixing such later date as the Completion Date as he then estimates to be fair and reasonable. The Architect/the Contract Administrator shall, in fixing such new Completion Date, state:

.1 .3 which of the Relevant Events he has taken into account and

.1 .4 the extent, if any, to which he has had regard to any instructions issued under clause 13.2 which require as a Variation the omission of any work or obligation and/or under clause 13.3 in regard to the expenditure of a provisional sum for defined work or for Performance Specified Work which results in the omission of any such work,

and shall, if reasonably practicable having regard to the sufficiency of the aforesaid notice, particulars and estimate, fix such new Completion Date not later than 12 weeks from receipt of the notice and of reasonably sufficient particulars

and estimate, or, where the period between receipt thereof and the Completion Date is less than 12 weeks, not later than the Completion Date.

If, in the opinion of the Architect/the Contract Administrator, upon receipt of any such notice, particulars and estimate, it is not fair and reasonable to fix a later date as a new Completion Date, the Architect/the Contract Administrator shall if reasonably practicable having regard to the sufficiency of the aforesaid notice, particulars and estimate so notify the Contractor in writing not later than 12 weeks from receipt of the notice, particulars and estimate, or, where the period between receipt thereof and the Completion Date is less than 12 weeks, not later than the Completion Date.

25.3 .3 After the Completion Date, if this occurs before the date of Practical Completion, the Architect/the Contract Administrator may, and not later than the expiry of 12 weeks after the date of Practical Completion shall, in writing to the Contractor either

.3 .1 fix a Completion Date later than that previously fixed if in his opinion the fixing of such later Completion Date is fair and reasonable having regard to any of the Relevant Events, whether upon reviewing a previous decision or otherwise and whether or not the Relevant Event has been specifically notified by the Contractor under clause 25.2.1.1; or

.3 .2 fix a Completion Date earlier than that previously fixed under clause 25 or stated in a confirmed acceptance of a 13A Quotation if in his opinion the fixing of such earlier Completion Date is fair and reasonable having regard to any instructions issued after the last occasion on which the Architect/the Contract Administrator fixed a new Completion Date

- under clause 13.2 which require or sanction as a Variation the omission of any work or obligation; and/or

- under clause 13.3 in regard to the expenditure of a provisional sum for defined work or for Performance Specified Work which result in the omission of any such work; or

.3 .3 confirm to the Contractor the Completion Date previously fixed or stated in a confirmed acceptance of a 13A Quotation.

Provided that no decision under clause 25.3.3.1 or clause 25.3.3.2 shall alter the length of any adjustment to the time required by the Contractor for the completion of the Works in respect of a Variation for which a 13A Quotation has been given and which has been stated in a confirmed acceptance of a 13A Quotation.

25.3 .4 Provided always that:

.4 .1 the Contractor shall use constantly his best endeavours to prevent delay in the progress of the Works, howsoever caused, and to prevent the completion of the Works being delayed or further delayed beyond the Completion Date;

.4 .2 the Contractor shall do all that may reasonably be required to the satisfaction of the Architect/the Contract Administrator to proceed with the Works.

41A Adjudication

41A.1 Clause 41A applies where, pursuant to article 5, either Party refers any dispute or difference arising under this Contract to adjudication.

41A.2 The Adjudicator to decide the dispute or difference shall be either an individual agreed by the Parties or, on the application of either Party, an individual to be nominated as the Adjudicator by the person named in the Appendix (‘the nominator’). Provided that

41A .2 .1 no Adjudicator shall be agreed or nominated under clause 41A.2 or clause 41A.3 who will not execute the Standard Agreement for the appointment of an Adjudicator issued by the JCT (the ‘JCT Adjudication Agreement’) with the Parties, and

41A .2 .2 where either Party has given notice of his intention to refer a dispute or difference to adjudication then

- any agreement by the Parties on the appointment of an adjudicator must be reached with the object of securing the appointment of, and the referral of the dispute or difference to, the Adjudicator within 7 days of the date of the notice of intention to refer (see clause 41A.4.1);

- any application to the nominator must be made with the object of securing the appointment of, and the referral of the dispute or difference to, the Adjudicator within 7 days of the date of the notice of intention to refer.

Upon agreement by the Parties on the appointment of the Adjudicator or upon receipt by the Parties from the nominator of the name of the nominated Adjudicator the Parties shall thereupon execute with the Adjudicator the JCT Adjudication Agreement.

41A.3 If the Adjudicator dies or becomes ill or is unavailable for some other cause and is thus unable to adjudicate on a dispute or difference referred to him, then either Parties may agree upon an individual to replace the Adjudicator or either Party may apply to the nominator for the nomination of an adjudicator to adjudicator that dispute or difference; and the Parties shall execute the JCT Adjudication Agreement with the agreed or nominated Adjudicator.

41A.4 .1 When pursuant to article 5 a Party requires a dispute or difference to be referred to adjudication then that Party shall give notice to the other Party of his intention to refer the dispute or difference, briefly identified in the notice, to adjudication. If an Adjudicator is agreed or appointed within 7 days of the notice then the Party giving the notice shall refer the dispute or difference to the Adjudicator ('the referral') within 7 days of the notice. If an Adjudicator is not agreed or appointed within 7 days of the notice the referral shall be made immediately on such agreement or appointment. The said Party shall include with that referral particulars of the dispute or difference together with a summary of the contentions on which he relies, a statement of the relief or remedy summary of the contentions on which he relies, a statement on the relief or remedy which is sought and any material he wishes the Adjudicator to consider. The referral and its accompanying documentation shall be copied simultaneously to the other Party.

41A.4 .2 The referral by a Party with its accompanying documentation to the Adjudicator and the copies thereof to be provided to the other Party shall be given by actual delivery or by fax or by special delivery or recorded delivery. If given by fax then, for record purposes, the referral and its accompanying documentation must forthwith be sent by first class post or given by actual delivery. If sent by special delivery or recorded delivery the referral and its accompanying documentation shall, subject to proof to the contrary, be deemed to have been received 48 hours after the date of posting subject to the exclusion of Sundays and any Public Holiday.

41A.5 .1 The Adjudicator shall immediately upon receipt of the referral and its accompanying documentation confirm the date of that receipt to the Parties.

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 S.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 to 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 opening up, reviewing and revising any certificate, opinion, decision, requirement or notice issued, given or made under this Contract as if no such certificate, opinion, decision, requirement or notice had been issued, given or made;

.5 .3 requiring from the Parties 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 the payment of interest, deciding the circumstances in which or the period for which a simple rate of interest shall be paid.

41A.5 .6 Any failure by either Party to enter into the JCT Adjudication Agreement or to comply with any requirement of the Adjudicator under clause 41A.5.5 or with any provision in or requirement under clause 41A shall not invalidate the decision of the Adjudicator.

41A.5 .7 The Parties shall meet their own costs of the adjudication except that the Adjudicator may direct as to who should pay the cost of any test or opening up if required pursuant to clause 41A.5.5.4.

41A.6 .1 The Adjudicator in his decision shall state how payment of his fee and reasonable expenses is to be apportioned as between the Parties. In default of such statement the Parties shall bear the cost of the Adjudicator's fees and reasonable expenses in equal proportions.

41A.6 .2 The Parties shall be jointly and severally liable to the Adjudicator for his fee and for all expenses reasonably incurred by the Adjudicator pursuant to the adjudication.

41A.7 .1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given.

41A.7 .2 The Parties shall, without prejudice to their other rights under this Contract, comply with the decision of the Adjudicator; and the Employer and the Contractor shall ensure that the decision of the Adjudicator is given effect.

41A.7 .3 If either Party does not comply with the decision of the Adjudicator the other Party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 41A.7.1.

41A.8 The Adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith and this protection from liability shall similarly extend to any employee or agent of the Adjudicator.