Judgment 24/2010 **Discain Project Services Ltd v Charles Le Quesne (Guernsey) Ltd – Royal Court (Civil Action File 1206) – 16 June 2010**

Building dispute – parties had agreed to resolve by a non-standard form of adjudication – adjudicator's decision to be final and binding – Discain issued proceedings to challenge the adjudicator's awards as to costs and as to his fees and expenses – allegation that the adjudicator acted contrary to the principles of fairness and natural justice – adjudicator did not inform the parties of his decision on quantum and liability before considering the issue of costs – adjudicator's decision on costs and his fees and expenses set aside on grounds that the parties should have been given the opportunity to make further submissions on those issues after being informed by the adjudicator of his decision on the substantive issues - 'Calderbank offer' had been made – normal for the offeror to offer to pay the costs of the offeree up to the date of acceptance of the offer – adjudicator would have had to accept the figure for costs claimed by Discain and should have concluded that Le Quesne were unable to demonstrate that their offer was better than the award – Deputy Bailiff ordered that Le Quesne shall pay Discain's reasonable costs in the adjudication and the adjudicator's fees

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1206

The 16th day of June 2010, before Richard John Collas Esquire, Deputy Bailiff sitting alone

Between

DISCAIN PROJECT SERVICES LIMITED

Plaintiff

-and-

CHARLES LE QUESNE (GUERNSEY) LIMITED

Defendant

The Deputy Bailiff having considered submissions from Advocates C J Hay and A J Ayres, counsel for the Plaintiff and Defendant respectively, on an application by the Defendant, that the Adjudicator's awards as to costs and the Adjudicator's fees and expenses in these proceedings, be set aside, this day handed down judgment in the terms attached hereto and ORDERED;

1. That the Adjudicator's decision as to the payment of the parties' costs and his fees and expenses be set aside.

2. That the Defendant shall pay the Plaintiff's reasonable costs in the Adjudication and the Adjudicator's fees.

S M D ROSS
H M Deputy Greffier

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Approved Judgment
16 June 2010

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between

DISCAIN PROJECT SERVICES LIMITED

Plaintiff

-and-

CHARLES LE QUESNE (GUERNSEY) LIMITED

Defendant

Judgment handed down: 16th June 2010

Before: Richard John Collas Esq., Deputy-Bailiff

Advocates for Plaintiff: **C J Hay**
Advocate for Defendant: **A J Ayres**

Cases, texts & legislation referred to:
Hudson's Building and Engineering Contracts, at page 867
Balfour Beatty Construction Ltd v Lambeth London Borough Council [2002] EWHC 597 (TCC)

Background

1. Discain Project Services Limited ("Discain") was employed to provide specialist metalwork on a building project at the College of Further Education pursuant to a sub-contract dated 1 November 2005, ("the sub-contract") between Discain and Charles Le Quesne (Guernsey) Limited ("CLQ") , the main contractor on the project.

2. The sub-contract was based upon a JCT Standard Form of Domestic Sub-Contract 2002 Edition (2003). Section 9 contained provisions for the "Settlement of disputes – Adjudication – Arbitration – Legal Proceedings".

3. Approximately 18 months later a dispute arose between the parties which they agreed to resolve by a process they called "Adjudication" although Advocate Hay, on behalf of Discain, correctly referred to it as a bespoke form of dispute resolution of the parties' own design.

The Adjudication Agreement

4. I must explain the nature of the Adjudication procedure that they agreed to adopt. Section 9A of the sub-contract envisaged disputes being resolved by adjudication. Footnote 1 at the start of the Section drew attention to the availability of standard adjudication agreements at any retailer of JCT Forms. However, the parties chose not to adopt standard terms. Instead they drew up their own Adjudication Agreement dated 17 May 2007 signed by both parties and by the Adjudicator.

5. The Adjudication Agreement recited that the parties had agreed that the Adjudication was to be conducted in accordance with the provisions of section 9A of the sub-contract subject

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to a number of amendments set out in a letter from Shadbolt & Co (English Solicitors for CLQ) dated 6 March 2007. In the absence of any other disputes to be resolved, one of the most significant amendments was intended to ensure that the Adjudicator's decisions would be final and binding on the parties. Paragraph 7 of Shadbolt's letter stated that

> *"The adjudicator's decision shall be final and binding as to the issues which it determines and shall not be subject to any further process of dispute resolution unless both parties agree that it should be so. However, this is without prejudice to a party's right to challenge the enforceability of the adjudicator's decision on the basis that: (a) he has acted outside his jurisdiction; or (b) he has conducted the adjudication contrary to the principles of fairness and natural justice. Any challenge to the adjudicator's decision on this basis would be determined by the Royal Court of Guernsey. Clause 9A.7.1 is amended accordingly."*

That replaced the standard clause 9A.7.1 which provides:

> *"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."*

6. The result was that the Adjudicator would determine all the disputed issues, there would be no other dispute resolution proceedings and the Adjudicator's decisions could only be reviewed by the Royal Court if he acted outside his jurisdiction or contrary to the principles of fairness and natural justice.

The Present Proceedings

7. Discain is dissatisfied with the Adjudication and the outcome. It has issued these proceedings in the Royal Court to challenge the Adjudicator's awards as to costs and as to the Adjudicator's fees and expenses. I understand that Discain is also dissatisfied with the Adjudicator's decisions on the substantive issues but is not challenging those decisions, possibly because the amended wording of clause 9A.7.1 does not leave any scope for a challenge.

8. The Orders made by the Adjudicator that are being challenged are:

> *"145. Accordingly, I direct that Discain shall pay the 'reasonable legal and other costs incurred' by CLQ as from receipt of the Shadbolt & Co. offer letter dated 31 May 2007.*
>
> *146. My fees in this reference which are in accordance with Clause 3 of the Adjudication Agreement Schedule of Charges amount to £17,184.37 including VAT (£14,625.00 plus 17.5% VAT) and I direct that the Discain shall be responsible for paying them."*

9. Discain is seeking a declaration that those orders be set aside and/or declared void and an order that CLQ pay Discain's reasonable costs in the Adjudication and the whole of the Adjudicator's fees. Discain alleges that the Adjudicator acted contrary to the principles of fairness and natural justice. It also pleaded that he acted outside of his jurisdiction but that was not pursued at the hearing before me.

10. In addition, Discain is seeking to recover damages of £32,412.87 as awarded by the Adjudicator but which CLQ has not paid because it alleges the costs payable by Discain exceed that amount. I am not concerned with that aspect of the claim in this decision as I have ordered that if liability is upheld, in whole or in part, any arguments as to quantum will be determined in separate taxation proceedings.

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The Disputed Issues

11. Advocate Hay identified the issues that are in dispute in a document filed with the Court on 17 April 2009. Eleven of the twelve issues identified therein are relevant; the twelfth concerns quantum. The eleven issues are:

> *"1)Did the Adjudicator fail to act in accordance with his declared intent to notify the parties of the substantive award in relation to liability and quantum prior to making the award as to costs, and was this a failure that prejudiced the Plaintiff?*
>
> *2) Did the Adjudicator fail to consider the sealed submissions in relation to costs and/or fail to give the parties adequate opportunity following the determination of the substantive award to make submissions as to the costs and the apportionment of the fees of the adjudication and, if so, did this constitute a failure or failures to act in accordance with the principles of fairness and natural justice?*
>
> *3) Did the Adjudicator fail to act in accordance with the principles of fairness and natural justice by failing to provide in his Decision reasons for rejecting the Plaintiff's arguments on costs and the apportionment of his fee?*
>
> *4) Did the Adjudicator fail to deal with, or deal with fairly the costs of the adjudication and the apportionment of the Adjudicator's fees for the period prior to the Defendant's calderbank offer, and if so did the Adjudicator act outside of his jurisdiction and/or fail to act in accordance with the principles of fairness and natural justice?*
>
> *5) Did the Adjudicator wrongly and/or unfairly award that the costs of the adjudication and the Adjudicator's fees be paid by the Plaintiff, as a result of errors in the adjudicator's reconciliation of the calderbank offer with the substantive award?*
>
> *6) Did the Adjudicator wrongly award costs to be paid by the Plaintiff from 31 May 2007 being the date of the Plaintiff's receipt of the offer rather than the date of the expiry of the offer acceptance period?*
>
> *7) Did the Adjudicator fail to account for the fact that the Plaintiff was not given a reasonable period of time or sufficient information to consider or make an accurate assessment of the Defendant's calderbank offer?*
>
> *8) If it is decided that the Adjudicator did not accurately reconcile the Defendant's calderbank offer with the substantive award, should the Adjudicator have corrected the 'slips' in his decision when clearly identified to him?*
>
> *9) Did the Adjudicator fail to take into account all relevant matters when making his decision as to the costs and fees of the Adjudication?*
>
> *10) If the answer is 'yes' to any of the questions posed in paragraphs 5-9 above, did the Adjudicator fail to act in accordance with the principles of fairness and natural justice?*
>
> *11) Did the Adjudicator, in making his award as to the costs of the adjudication and the Adjudicator's fees, act outside of his jurisdiction and/or fail to act in accordance with the principles of fairness and natural justice?"*

12. In support thereof Advocate Hay submitted a written skeleton argument and, on behalf of CLQ, Advocate Ayres lodged a brief skeleton argument by email on 7 September and I heard Counsels' oral submissions on 8 September.

The Provisions of the Adjudication agreement as to Costs and Expenses

13. In my view, the starting point is to look at what the parties agreed in the Adjudication Agreement. The parties chose not to resolve their dispute by arbitration or through court process. Instead they adopted their own form of dispute resolution and chose not to follow conventional procedures. What is fair and just needs to be decided in the context of their agreement. Parties may agree to adopt a procedure that would not normally be considered to be fair and just. For example, two people might agree to resolve a dispute by the toss of a coin and, if so, the Court would have to respect their agreement (assuming it was a valid and binding agreement).

14. The relevant provisions in respect of the parties' costs are contained in the amended provisions in Shadbolt's letter of 6 March 2007, at paragraph 6:

> *"In addition to determining how his fees and reasonable expenses shall be apportioned between the parties, the adjudicator shall be given jurisdiction to direct that a party shall pay the reasonable and other costs incurred by the other party incurred in connection with the reference. In the event that no such direction is made, the parties shall be responsible for meeting their own costs of the adjudication – clause 9A5.7 is amended accordingly."*

15. In relation to the Adjudicator's fees and expenses, paragraph 9A.6 of the JCT contract was adopted without amendment:

> *"9A.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 fee and reasonable expenses in equal proportions.*
>
> *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."*

16. In terms of the procedure to be followed, the Adjudicator had a wide discretion. Paragraph 9A.5.5 of the standard terms of the JCT sub-contract applied: *"[the Adjudicator] shall act impartially, set his own procedure and at his absolute discretion may take the initiative in ascertaining the facts as he considers necessary in respect of the referral…"* Para 9A.4 provided that he was *"not obliged to give reasons for his decision"*.

17. In addition, the parties agreed (in points 3 and 4 of Shadbolt's letter of 6 March 2007) a timetable for the Adjudication that included a period of 42 days for the Adjudicator to reach his decision, with power for the parties to extend that period up to 56 days.

18. There was no express requirement that the Adjudicator act in accordance with the requirements of natural justice, but such a term is to be implied in the light of the express term (to which I have referred) that there could be a reference to the Royal Court if he conducted the Adjudication contrary to the principles of fairness and natural justice.

The Calderbank Offer

19. On 31 May 2007, Shadbolt sent to Mr Smalley, acting on behalf of Discain, a letter entitled "Without Prejudice Save As To Costs 'Calderbank Offer' to Settle". The offer was open for a short period only, that is until 4 pm the following day Friday 1 June although the letter said that it was merely repeating an offer previously made in March that year. If the offer was rejected, or if no reply was received by the appointed time, the letter stated that:

> *"Our client will proceed forthwith with forwarding a copy of this letter in a sealed envelope to [the Adjudicator] and will ask him to keep the envelope unopened until such time as he has reached a decision in the reference on all liability and quantum*

> *issues, whereupon we will ask that he opens and considers the contents of the letter before exercising his discretion as to whether and if so what percentage of one party's costs should be borne by the other party and how payment of his own fees and expenses should be apportioned between the parties."*

20. Mr Smalley replied in writing to the offer, not on 1 June but on the following Monday, 4 June. The letter confirmed a telephone call in which Shadbolt had been advised the offer was rejected but said it would be reviewed when Discain *"has had the opportunity to review and consider your Response to the case set out in the Referral"*. Mr Smalley also wrote that Discain *"accept that it is desirable that the spirit/intent of a Calderbank letter should be applied to adjudication"*. However he went on to say that the recipient of a 'Calderbank' letter must be given a reasonable period in which to consider the offer and that Discain should be allowed three days after receipt of CLQ's Response to consider its case and then make a further response to the offer. He asserted that CLQ's proposal that the parties bear their own costs and share the Adjudicator's fees and expenses was inadmissible in a 'Calderbank' letter because the offeror must accept liability for costs to the date the offer lapses and that, accordingly, the quantum of the offer had to be reduced to take account of the costs and fees (which he did not then quantify).

21. Mr Smalley concluded the letter by saying *"We will provide [the Adjudicator] with a second copy of this letter and ask him to keep it unopened until he addresses the issue of the parties' costs."* He then sent a copy of the letter to the Adjudicator under cover of a letter that read *"We enclose a sealed envelope and request that you do not open it until you have reached your decision on the substantive issues in the adjudication and are considering the parties submissions on costs."*

22. Shadbolt & Co replied to Mr Smalley on 5 June, advising him that its 'Calderbank letter' of 31 May and the letter of 5 June had been sent to the Adjudicator in a sealed envelope. They addressed the issues that Mr Smalley had raised and rejected all his criticisms, saying that the offer had been made before any substantial legal costs had been incurred in the hope of exploring whether the matter could be settled amicably. The letter concluded *"We have asked [the Adjudicator] to bear this in mind when exercising the discretion which the parties have given to him and we are sure that he will do so."*

23. By email of 6 June to both parties, the Adjudicator acknowledged receipt of the sealed envelopes and confirmed that he would comply with the requests not to open them until he had reached his Decision in the matter.

24. Further correspondence was exchanged between Mr Smalley and Shadbolt on a "Without Prejudice Save as to Costs" basis and copied to the Adjudicator in sealed envelopes. The number of communications was, in my view, significant. Mr Smalley wrote to Shadbolt on 18 June in reply to their letter of 5 June, Shadbolt replied on 19 June, Mr Smalley wrote on 27 June, Shadbolt responded on 28 June and Mr Smalley replied on 29 June.

25. Other correspondence was exchanged on an "open" basis, including (at Tab 16 of the Bundle) an email sent on 28 June from Mr Smalley to the Adjudicator and copied to Shadbolt and Discain which referred to a letter of the previous day and dealt with matters raised in the reference. There was an "open" letter from Shadbolt to the Adjudicator dated 29 June (at Tab 20). It asserted that it was time to draw the correspondence to a close as the costs were becoming disproportionate and stated that the Adjudicator had sufficient material to reach a decision.

26. On 28 June 2007, Shadbolt sent Mr Smalley a letter on a "Without Prejudice Save as to Costs" basis and forwarded the same to the Adjudicator in a sealed envelope, saying:

> *"We would be grateful if you could leave this sealed envelope unopened until such time as you have reached your decision on all issues of liability and quantum referred to you but prior to deciding whether and if so how to exercise the discretion which*

> *you have to make directions in respect of payment of your costs and expenses and the legal and other costs incurred by the parties."*

27. Mr Smalley wrote to the Adjudicator on 29 June 2009 (at Tab 22) saying:

> *"The hard copy of this letter encloses a further sealed envelope (the fourth from Discain). We request that you give consideration to the envelope's contents after you have reached your decision on the substantive issues."*

28. At 1126 on 29 June, Chris Hoar of Shadbolt sent an email addressed to the Adjudicator and copied it to Mr Smalley. After referring to Mr Smalley's letter of the same day, he repeated his client's concerns about the time and costs incurred in the reference and said, in the final paragraph:

> *"In the interests of saving costs, we do not propose responding to Mr Smalley's letter or any subsequent correspondence of this type at this time. If however when in due course you do come to see this correspondence and there is a particular issue upon which you require elucidation or alternatively upon which you intend to place particular emphasis, we would be grateful if you could inform us in advance of exercising your discretion in order that we can be afforded the opportunity, if appropriate, of addressing you in this connection."*

29. The Adjudicator replied by email of 29 June at 1229 (at Tab 21):

> *"I trust that is now it; everybody has had their say, and I can now reach a conclusion on the substantive issues of liability and quantum, save for any questions I may have of the parties in the process. Having done so I will advise the parties before proceeding to open the sealed letters received."*

30. Advocate Hay argued before me that this email created an expectation that the Adjudicator would inform the parties of his decision before considering the question of costs. However, he did not do so. The Adjudicator issued his decision on liability and quantum to the parties on 20 July by email (at Tab 24). He included in the decision his orders as to the parties' costs and his fees and expenses in connection with the reference.

The Decision

31. The Adjudicator's decision as to the Parties' costs is at paragraphs 141 to 145 of his Decision and at paragraph 146 in respect of his own fees and expenses. In summary, he said that he had jurisdiction under paragraph 6 of Shadbolt's letter of 6 March to make an order as the parties' costs, he had opened the sealed envelopes after he reached his findings on the substantive reference. He concluded that the offer made by CLQ in Shadbolt's 'Calderbank' letter of 31 May was higher than the value of his award. So, he directed Discain to pay *"the reasonable legal and other costs incurred by CLQ as from receipt of the Shadbolt & Co. offer letter dated 31 May 2007"*. He also directed Discain to pay his fees and expenses in the amount of £17,184.37. His orders are quoted in full in paragraph 8 of this judgment.

Natural Justice and Fairness

32. On behalf of Discain, Advocate Hay submitted that the Adjudicator failed (i) to notify the parties of his substantive decision (ii) to allow the parties the opportunity to comment after issuing his decision and before deciding on costs and (iii) to give reasons for rejecting Discain's arguments on costs and on his fee. He submitted that those failures offended against the principles of acting fairly and in accordance with the principles of natural justice.

33. In support of his submissions, Advocate Hay referred to the procedures that an arbitrator is required to follow, describing them as analogous to what was expected of the Adjudicator.

34. The approach I have followed looks first at what the parties agreed and then at how the parties conducted themselves during the adjudication process before deciding what the principles of fairness and natural justice require in the context of this dispute.

35. I begin by looking at the Adjudication Agreement including the letter from Shadbolt dated 6 March 2007 which is incorporated into the Agreement. There is no express statement as to the procedure that the Adjudicator was expected to follow although paragraph 9A.6.1 provides that **in his decision** he is to state how payment of his fees and reasonable expenses are to be apportioned. I understand that to require him to issue a single decision documenting his award as to liability, quantum and costs including his own fees and expenses. It does not envisage that he would issue the decision on liability and quantum before inviting further submissions on costs.

36. That is contrary to what is normally required of an arbitrator. In Hudson's Building and Engineering Contracts, at page 867 it is said that an arbitrator is normally recommended to follow the practice of the courts in allowing submissions on costs with the added advantage of allowing the arbitrator to take account of any sealed offers not forwarded to him. It also points out that the arbitrator has full power to control the proceedings before him.

37. Adjudication is becoming, or has become, well established in England where it has some statutory basis unlike in Guernsey where it lacks any statutory recognition and, as far as I am aware, has not previously been considered by the Guernsey courts. In considering how the Adjudicator should have proceeded in this matter, I have been greatly assisted by the judgment of Judge Humphrey Lloyd QC (sitting as a Deputy-Judge of the Queen's Bench Division, Technology and Construction Court) in *Balfour Beatty Construction Ltd v Lambeth London Borough Council* [2002] EWHC 597 (TCC). Judge Lloyd said:

> *"**[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] 37 EG 173, [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 cl 41A5.2. 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 cl 41A5 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 me 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, ie that a party has not been treated fairly. In addition impartiality implies fairness although its application may be trammelled by the overall constraints of adjudication. Lack of impartiality carries with it overtones of actual or apparent bias when in reality the complaint may be better characterised as a lack of fairness. Judge Bowsher QC put it very well in Discain Project Services Limited (No 1) when he said at p 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 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."*

38. The penultimate sentence of that quotation merits some comment in relation to the matter with which I am concerned. First, there were no time limits other than those which the parties had chosen to impose themselves. Those limits were agreed in paragraph 3 and 4 of Shadbolt's letter of 6 March 2007, including provision for the parties to allow the Adjudicator an extra 14 days if required. Importantly, there was no other process or procedure that was dependent upon the outcome of the Adjudication and would be delayed by it other than the payment of any monies ordered to be paid from one party to another.

39. Secondly and more importantly, unlike most adjudications which are non-binding in the sense that they are subject to final determination in arbitration or legal proceedings, this adjudication was agreed to be final and binding subject only to review by the Royal Court in the limited circumstances specified in paragraph 7 of Shadbolt's letter.

40. The absence of time constraints and the agreement that the decision was to be final point towards a conclusion that it was important that the manner in which the Adjudication was conducted should be beyond reproach.

41. I have looked at the correspondence to seek to infer what the parties intended at the time the relevant letters were written. In my view, it shows that at the beginning, the parties intended that the Adjudicator would open the 'Calderbank' letter and related letters after finalising his decision on the substantive issues and then reach a decision on the costs and fees without further reference to the parties. He would then issue a single judgment or written decision dealing with all matters. That would have been in accordance with paragraph 9A.6.1 of the JCT sub-contract and is, I believe, what the Adjudicator intended to do. See, for example, the email from him sent on 6 June 2007 at 1413 hours:

> *"Gentlemen,*
> *I would confirm having received yesterday pm a faxed letter from Shadbolt & Co dated 5/6/07 regarding a sealed letter, a hard copy of which was being sent in the post; I acknowledge receipt today, by post, the hard copy letter and an enclosed sealed envelope apparently containing two letters which I am requested not to open until I have reached my Decision in this matter on both liability and quantum and before I make any decision as to costs generally. I will of course comply with this request.*
>
> *I also acknowledge receipt, by post this morning, of a letter dated 4 June 2007 from Mr Smalley for Discain, also enclosing a sealed envelope with similar instructions as to when it should be opened by me, with which I will equally comply."*

42. He did not say that he would not be inviting any further submissions in relation to costs but the inference I draw from the correspondence is that it was understood that when he opened the sealed envelopes he would have sufficient information available to him to reach a decision without seeking further submissions.

43. However, that changed with Shadbolt's email sent at 1126 hours on 29 June (quoted above) in which they asked the Adjudicator to afford the parties the opportunity of addressing him if there was *"a particular issue upon which you require elucidation or alternatively upon which you intend to place particular emphasis".* The Adjudicator's reply, in an email sent at 1229 hours on the same day, 29 June was:

> *"I trust that is now it; everyone has had their say, and I can now reach a conclusion on the substantive issues of liability and quantum, save for any questions I may have of the parties in the process.* ***Having done so I will advise the parties before proceeding to open the sealed letters received.****"*

44. I have emphasised the last sentence of that quotation because, in my view, it represented a change of procedure. There can be no objection to the Adjudicator changing the procedure he was to follow as long as he informed both parties of the change he was making. He was authorised to set his own procedure by clause 9A.5.5.1 of the JCT sub-contract.

45. From that time onwards the parties were entitled to expect that the Adjudicator would issue his decision on liability and quantum before opening the sealed envelopes. He did not expressly state that they would have the opportunity to make further submissions on costs but, in my view, that is to be inferred.

46. Having said that was what he was going to do, the Adjudicator should have acted accordingly. Advocate Hay submitted that his client relied upon what he had said and did so to its detriment. I have some doubt as to whether that can be true when it was CLQ, not Discain who asked to be given the opportunity to address the Adjudicator on costs. However, in my opinion, it does not matter whether Discain did, or did not, act to its detriment. The Adjudicator should have followed the procedure he said he would adopt.

47. Even if the Adjudicator had not said that he would proceed in that way there were, in my view, compelling reasons to do so. There were no time pressures. Neither party had won 'hands down'. He had received a number of sealed envelopes which raised several issues for him to consider. He was aware, or should have realised, that the quantum of the parties' costs and his fees had reached a level that was very significant having regard to the quantum of the claim and his award. The Adjudication was in the nature of judicial proceedings and best practice both in the courts and in arbitration required that the parties be allowed to make submissions on costs.

48. In all the circumstances, the failure to allow further submissions amounted to a breach of the requirement that the Adjudication be conducted in accordance with the requirements of fairness and natural justice.

49. I accept that the Adjudicator was well placed to consider what orders to make on the issues of costs and fees. If he wanted to indicate to the parties what were his views on the issues, he could have issued a preliminary indication of the award he was considering and invited the parties to comment on it before finalising the award. He should not have issued a final decision on those issues without inviting further submissions.

50. In writing this judgment I was troubled as to whether it was fair for me to reach a conclusion criticising the Adjudicator when he is not party to these proceedings and has not had any opportunity to comment on the matters raised. I therefore invited Advocates Hay and Ayres to make further written submissions and I am grateful to them both. Advocate Ayres' Supplemental Skeleton Argument was issued on 4 December, delayed in part at least, by his involvement in a lengthy trial that required considerable preparation both before and during the hearing. I apologise to the parties that this judgment has been delayed for much longer than I would have liked. The reason is that I was involved in the same lengthy hearing.

51. The two Advocates agree that there is no need for the Adjudicator to be made a party.

52. The reason I raised the issue was because my views were critical of the Adjudicator and amount to a conclusion that he acted in breach of an implied term of the contract in failing to conduct the Adjudication in accordance with the requirements of fairness and natural justice. I was concerned at the possibility that either of the parties might wish to take further action against the Adjudicator. However, they accept that is not an option as the contract included a term indemnifying the Adjudicator from any further action in the discharge of his functions as Adjudicator.

53. In the English cases to which I was referred in which adjudication decisions have been reviewed, the adjudicator has not been a party but I did not know whether that was pursuant to statute. Advocate Ayres submitted that:

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> *"The Defendant's counsel has been unable to identify any authority in support of the following submissions but, nonetheless, understands that contractual adjudications were commonplace before the intervention of statute (the Housing Grants, Construction and Regeneration Act 1996). Contractual adjudications are becoming more popular again in England, notwithstanding the existence of a statutory framework for the resolution of disputes. The Defendant's counsel is not aware of any authority which deals with the question of whether an adjudicator appointed by contract should or may become a party to proceedings and understands that this is because the English courts have shied away from so doing, preferring instead to treat the matter objectively and as if the adjudicator were acting in a judicial capacity.*
>
> *The Defendant contends that the Royal Court should take a similar approach as a matter of policy; it would be contrary to the modern trend of encouraging parties to settle disputes without recourse to the courts for the court to determine that an adjudicator should become a party to subsequent legal proceedings or an appeal wherever there was a dispute between the parties to an adjudication."*

54. I accept his submissions and do not consider it necessary to join the Adjudicator as a party. However, as he has not had the opportunity to comment on my decision, I have extended to him the courtesy of not naming him in my judgment.

Further Correspondence

55. After the Adjudicator had issued his decision, the correspondence continued. Mr Smalley wrote to the Adjudicator by letter dated 21 July (at Tab 31) in which he detailed *"four slips and/or arithmetical errors in your decision on the parties' costs"*.

56. Mr Smalley followed that later the same day by drawing attention to *"Bloor Construction v Blowmer & Kirkland [TCC 5th April 2000]"* as authority for the proposition that the Adjudicator had the power and duty to correct accidental slips and errors. He also referred to CPR Part 36 on the question of the adequacy of CLQ's offer letter.

57. Shadbolt responded on 23 July by saying that the Adjudicator's decision was final and binding and demanding the payment of monies due pursuant to it.

58. The Adjudicator replied by email of 23 July stating that he was *functus officio* but acknowledging that he was able to correct slips and errors. He then addressed each of the four alleged slips and errors and dismissed all of the criticisms that Mr Smalley had made.

59. Mr Smalley replied to the Adjudicator with further comment and advising him that Discain was to take legal advice in the matter. The Adjudicator responded the following day, 24 July stating again that he was *functus officio* and he added that he did not *"intend to participate in any further debate over the contents of my Decision, save for recording my absolute rejection of the farrago of wild assertions and innuendo contained in your letter"*. There was further correspondence but there is no need for me to refer to it.

Conclusion

60. For the reasons I have explained, I am satisfied that the Adjudicator should have given the parties the opportunity to make further submissions on the issues of costs and fees after he delivered his decision on quantum and liability. His failure to do so amounts to a breach of the requirements that the conduct the Adjudication in accordance with the principles of fairness and natural justice. Consequently, his decision on as to the payment of the parties' costs and his fees and expenses has to be set aside.

61. At the conclusion of the hearing in Court, I raised the question of what should happen next if I was persuaded to set aside the decision. There was not sufficient time for Counsel to complete their submissions so I said I would advise them of my conclusion before deciding what should happen next. I will hear further from counsel but my present view is that there

is no power to remit the matter to the Adjudicator. The parties cannot be ordered to re-submit the matter to him, even if he was willing to consider it again. If he was willing, it could be said that he would not be acting impartially as he might be inclined to uphold his earlier decision.

62. Advocate Hay suggested one possible outcome would be for there to be no order, leaving the parties to pay their own costs and share the Adjudicator's fees and expenses equally.

63. My preliminary view is that cannot be fair or correct. Unless the parties can agree who pays what, the Court must have the power to step in and take a decision where no one else is empowered to do so.

64. When this judgment is formally handed down in Court, I will ask the parties whether they agree to me deciding what order to make in respect of the parties' costs and the Adjudicator's fees in the Adjudication. If they agree, I have already read and heard submissions from them but if either of them wishes to add to their submissions, they should be prepared to do so at the same hearing. I would then expect to be able to decide the issues at the same hearing or very shortly thereafter.

65. Once again, I apologise for the late delivery of this judgment. As I have said, it was regrettably delayed by an intervening lengthy hearing.

Addendum - My Assessment of Costs

66. After releasing the above decision in draft, I received Counsels' further submissions but not without some regrettable delays. Following a brief hearing on 14th May 2010 I said I would consider my decision in relation to costs. In view of the delays, I have had to refresh my memory as to the details of the correspondence passing between the parties' representatives and the Adjudicator regarding his costs award.

67. Both parties accept that as they are unable to agree the issue between themselves, it is for me to make a decision and I have the same discretion as the Adjudicator in deciding what order should be made.

68. The starting point, as the Adjudicator recognised, is that costs, in general, follow the event. It is appropriate to have regard to the 'Calderbank Offer' of 31 May and to compare the Adjudicator's award with the offer.

69. Advocate Hay submitted that the protocols of such offers require that the offeror bears the costs that the offeree has expended on proceedings prior to the offer being made and that the offeree is allowed reasonable opportunity to review the offer and respond.

70. Regarding the latter, I regard it as significant that on the next working day after receipt of the offer (namely Monday 4th June), Mr Smalley wrote to Shadblot saying *"Our client has now firmed up on the 'initial-response' rejection telephoned to you on Friday. Discain rejects CLQ's offer of £140,000 in the terms set out in your letter. Our client will however review your offer when it has had the opportunity to review and consider your Response to the case set out in the Referral."*

71. The letter went on to give reasons as to why the offer should not give any protection against costs, including that the recipient must be given reasonable time to consider the offer being made. However, I regard it as significant that Discain already had sufficient understanding of the issues involved to give an immediate *"initial-response rejection"* and to *"firm up"* on that rejection the following working day. Furthermore, although Mr Smalley reserved the right to review the offer after receipt of CLQ's Response, he never subsequently sought to withdraw his client's rejection. Such facts suggest that Discain was not prejudiced by the failure to allow it more time to consider the offer. The explanation probably lies in the suggestion that the 'Calderbank Offer' merely repeated an offer that had previously been

made; however, I have not taken that explanation into account as I do not have the details of any earlier offer.

72. I accept Advocate Hay's submission that it is normal for the offeror to offer to pay the offeree's costs to the date of the offer or, to be more precise, to the date of acceptance of the offer. In my opinion, there is a very good practical reason for doing so. The offeror may not be able to obtain the costs advantage sought if the value of the final award cannot be compared easily with the value of the offer, especially where the two are similar in value. The onus is on the offeror to ensure that the terms of the offer are clear.

73. The Adjudicator is the person who was best placed to decide where the costs of the Adjudication should fall and a court should not lightly interfere with his exercise of discretion.

74. The Adjudicator explained his costs award in paragraphs 141-146 of the Decision. My understanding is that he started from the general principle that costs normally follow the event and he then took into account the 'Calderbank offer'. In a later email dated 23 July 2007, he said the offer was a major influence but not the only consideration. He also said *"I have dealt with costs in the round including, without limitation, the merits of the substantive claims made by both parties, the CLQ offer, Discain's response to the CLQ offer and my award on the substantive issues."*

75. That would suggest that he followed the correct approach in deciding how to exercise his discretion. He would be entitled to deprive Discain of its costs if he thought Discain had, for example, conducted the proceedings in a way that caused unnecessary disputation and expense, or had otherwise acted unreasonably or oppressively, or it had failed to succeed on an element of the claim that involved substantial costs. In such circumstances he could have made an order that favoured CLQ but if that was his reason for doing so, I would have expected him to explain his reason in the Decision. He did not. The only explanation given relates to the 'Calderbank offer'.

76. My finding is that the Adjudicator must have misdirected himself when comparing the 'Calderbank' offer to his award in that he did not know the quantum of Discain's costs to the date of the offer which was, in effect, inclusive of Discain's costs. Furthermore, he did not say he had taken account of his own costs to that date, so I must assume he did not do so.

77. The difference in value between the offer and his award is small enough that he could not fairly compare the one to the other without enquiring about the costs to the date of the offer. Had he done so, he would not have concluded that the award was lower than the offer.

78. I am therefore persuaded that it is appropriate for me to set aside the cost order he made and to substitute my own order. When comparing the value of the 'Calderbank offer' to the value of the award, I have the benefit of knowing how much Discain is claiming in respect of its costs to that date and also the amount of the fee the Adjudicator would have charged to that date. The Adjudicator could have asked Discain for its costs if he had consulted with the parties before making his costs order but he failed to do so. I recognise that Discain's claimed costs to the date of the offer have not been agreed by CLQ nor assessed through taxation. However the Adjudicator could not have been expected to conduct a detailed assessment of them and would have had to accept the figure claimed by Discain with the result that he should have concluded that CLQ were unable to demonstrate that its offer was better than the award.

79. In the absence of any other reasons in the Adjudicator's Decision to explain why he displaced, or could have displaced the general principle that costs follow the event, my decision is that CLQ shall pay Discain's reasonable costs in the Adjudication and the Adjudicator's fees.

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