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Adjudication – Does One Size Fit All?

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THE QUESTION - Is the process of adjudication a suitable forum to effectively deal with both simple and complex disputes? In May 1998 the Housing Grants Construction and Regeneration Act 1996 (The Act) was introduced. The Act was developed based on the recommendations of Sir Michael Latham in the 1994 Latham Report Constructing the Team and it was to provide the construction industry with a process that would allow parties to obtain an interim decision on a matter that would be final and binding if the parties so wished or that could be finally determined in litigation or arbitration at a later date. The purpose of an interim decision was to maintain cash flow the construction industry, something Latham considered was the lifeblood of the industry.

Adjudication was introduced on the basis that "one size fits all", allowing simple and complex disputes alike to be referred to adjudication.

The judiciary backed adjudication 100%, no questions were raised over the suitability of adjudication in complex disputes, with adjudication fulfilling the following objectives:

- To be a provisional/interim decision making process which could then be finally decided in Arbitration or Litigation at a later date.
- To produce a cash flow remedy as described by Latham in the Latham Report 1994.
- To be implemented during the progress of the project and not after practical completion.
- It was not intended to replace litigation or arbitration as an ultimate method of resolving construction disputes.

The Judiciary clearly supported the process of adjudication and accepted that it was a quick dispute resolution process.

In contrast to the above John Uff in 2005 in his article titled 100 Day Arbitration: Is the Construction Industry Ready for It, raises concerns over the suitability of adjudication to all disputes, particularly complex matters.

Also in 2005 the Technology and Construction Court heard a case regarding William Verry and Furlong Homes which was a final account dispute involving variations, extensions of time, loss and expense and liquidated damages. HHJ Coulson QC described the adjudication as "*kitchen sink, final account adjudication*".

In summing up HHJ Coulson QC highlighted the following point "*Whilst such adjudications are not expressly prohibited by the Housing Grants, Construction and Regeneration Act 1996 as it presently stands, there is little doubt that composite and complex disputes such as this cannot be accommodated within the summary procedure of adjudication*".

The above statement made by HHJ Coulson QC can be analysed in two parts 'The Theory' and 'The Practice'.

Firstly he recognises The Theory demonstrating that the Judiciary were fully aware of the intentions of The Act and the process of adjudication, in that it was designed to accommodate all disputes arising under a construction contract of whatever complexity.

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In the second part of the statement by HHJ Coulson QC refers to adjudication in 'Practice' and raises concerns as to whether one size really does fit all.

This concern was also voiced by the Judiciary in the case of London Amsterdam Properties Ltd (2003) where issues of natural justice were raised, explaining that even when an Adjudicator was prepared to exercise the powers vested in him by the Statutory Adjudication process, there may be some cases in which the complexity of the case and or/conduct of a claimant prevent a case from being adjudicated fairly and impartially as a result of the imposed timetable and other constraints. It was at this point that the HHJ Wilcox suggested that a review as to the working of the Act in practice was perhaps timely.

The comments by HHJ Wilcox in the above case ignited the debate regarding the suitability of adjudication in complex construction disputes. In 2003 Peter Sheridan and Dominic Helps in their Construction Act Review do not accept this view suggesting that the learned Judge's approach appears to ignore the wording of the Act, in that any dispute (of whatever complexity) that arises under a construction contract can be referred to adjudication at any time. Sheridan and Helps go further to suggest that had Parliament intended to limit the use of the Act to simple disputes then the Act would have said so. .

Even before the introduction of The Act in 1998 Peter Sheridan voiced his concerns over the introduction of Statutory Adjudication making the following observations.

> *"....some disputes are far too complex and important for that type of quick fix for which the statutory adjudication is designed. The statute provides for decisions within 28 days of appointment, which has its attractions for straightforward payment disputes but is hopelessly inadequate for, say, a delay and disruption claim or a dispute concerning negligent design. Complex disputes are normal in construction and are not amenable to quick-fix."*

Therefore Peter Sheridan even without the benefit of case law identified that some disputes did not favour the "rough and ready" approach of statutory adjudication.

Sheridan and Helps clearly support The Theory of Adjudication and substantiate their argument by referring to the actual wording of the Act which reflects parliaments intention at the time of drafting. It is very difficult to dispute the wording of The Act as there are no express provisions to exclude complex disputes from the adjudication process.

Adding to the debate HHJ Toulmin in 2004 in the case of AWG Construction Services Ltd and Rockingham Motor Speedway Ltd supports the comments of HHJ Wilcox and introduces a further concept: that of a possible conflict between the principles of natural justice and the rough and ready nature of the adjudication procedure. HHJ Toulmin concentrated on the development of adjudication since its introduction through to present day, describing it as a completely different process to that implemented by Parliament in 1998. The initial process was designed to achieve a quick, easy and cheap answer, however HHJ Toulmin considered that adjudication had now developed into an expensive, elaborate and confrontational process.

HHJ Toulmin suggested that whilst it was unlikely that a challenge to an adjudicators' decision would be successful on the basis that the case referred was 'too complicated', he felt that a challenge on the basis of a breach of natural justice through time constraints due to the complexity of the case may be successful.

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It seems that growing disquiet within the Judiciary, based on case law, is moving towards the view that a review of the working Act may be appropriate.

This is not an open and shut case: the debate is set to continue with cases being referred to adjudication becoming increasingly complex.
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Adjudicators can therefore look forward to more of the same: complex disputes involving a catalogue of issues such as loss and expense, variations and extensions of time and rapid timescales in which to resolve them.

The debate goes on!!!

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