



## Highlights

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## Editorial

### Glen Godfrey

Lucy has gone on a long, well deserved holiday and has delegated the compilation of this issue to me. As our holidays overlapped, I may have missed a contribution or two - I apologise now if I have.

This edition's theme is Decision Making and in our next edition we are intending to follow this with an article on

'taking the initiative' in decision making. There is much debate about the way Adjudicator's do and should reach their decisions: what they should and should not do or take into consideration. When does 'ascertaining the facts and the law' become 'making a case for a party'? We would like to hear from you: what are your views, what should Adjudicators do

(how far should they go) to ascertain the facts and the law, how do you do it and, moreover, why do you do it that way? We will be pleased to receive your contributions both in response to this edition and the next. Many thanks.

Finally, thank you to all our contributors

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## Chairman's Corner

### Bob Davies

Summer is upon us and change is afoot, for example and much to the despair of Martin Potter, England has a new cricket captain who hopes to rally his team and bring about a new dawn. Similarly the Construction Industry and in particular the dispute world is about to encounter change. After 10 years we are ever closer to an update to the Housing Grants Act. You may already be aware the Department for Business Enterprise and Regulatory Reform, BERR in short, have published the Draft Construction Contracts Bill which when enforced will they believe put paid to all of the ills which plagued its predecessor. It attempts to put right those areas of the existing act which have been abused by certain users and their advisors to the detriment of the Adjudication process which has so overwhelmingly been embraced by the Construction Industry. Will it achieve its aim, we shall see, time will be the judge of

this. Many commentators are already voicing concern over what may be shortcomings of the proposals contained in the draft however the chance is available to industry to have a final nibble at BERR as the draft bill is issued with an invitation for comments in relation to whether the drafting meets its overall objectives that a degree of technical scrutiny should be obtained in advance of any amendments being placed before Parliament. This process it is hoped will provide the best opportunity of getting the new clauses right. As with previous consultations the Society is collating the views of members and will provide a consolidated response. This exercise is being carried out by one of our Sub-committees and they would welcome any comment you may have on the recently published proposals. I suspect we are at the stage of put up or shut up i.e. this will be the last chance to voice any concern

before the amendments to the Act become a reality. May I recommend that if you have something to say don't miss your chance.

In concluding may I remind all members of our Annual Conference which will be held as ever in November this year. All members will have received notice of the event and the necessary booking details. I commend this event to you. This conference is the best value for money conference on the go at present. This year the Society are reverting to our afternoon round table workshop format which returns by popular demand and our cast of table leaders is drawn from all corners of the country.

Those of you who missed the circular can naturally find details of this event and the many other events organised by the Society on our excellent website.

I hope you all summer well.

# Adjudication Reporting Centre's 10th Birthday!

**Janey Milligan**

As it is now 10 years since the Adjudication Reporting Centre, at Glasgow Caledonian University was launched, it was only fitting that on the 12th of June 2008 the launch preview of the latest ARC report was held there. With a broad spectrum of professionals in the audience, the speakers outlined the latest trends in Adjudication as well as sharing some of their experiences of this process.

The speakers were: Peter Kennedy, Dean of The School of the Built & Natural Environment; Janey Milligan, Managing Director of Construction Dispute Resolution; Lisa Cattanach, Contract Consultant at CDR & Colin Fraser, a partner at UK Law Firm McGrigors.

Peter Kennedy, who was also chairing the event, began by introducing the topic, the speakers and then proceeded to discuss the statistics and trends in Statutory Adjudication that have emerged over the last 10 years. This was accompanied by an extensive array of slides explaining each of the trends and survey results. Peter Kennedy concluded by advising that it was hoped that the next ARC report with all the statistics discussed would be published in the near future.

Given the volume of information provided by ARC, we have selected only a few of graphs in particular to comment on in this article.

Previously, ARC had been predicting a 10% increasing in the number of Adjudication Referrals for the period up to the end of April 2007, based on the trends for the previous six months of that year. However when the actual figures were collated, the increase was only 5%, however this was still significant since the last increase in the number of Adjudication Referrals was recorded in the period of May 2001 to April 2002, at 1%.

The latest statistics, based on the returns from the Adjudicator Nominating Bodies (ANBs) indicate that the number of Adjudication Referrals has dropped by 5% for the period of May 2007 to April 2008. It therefore appears that the upturn was short lived and it remains to be seen how far this will drop or whether it will level off or indeed increase given the changing commercial climate. We can only wait and see. Table 1 below depicts the rise and fall of Adjudication Referral over the past ten years.

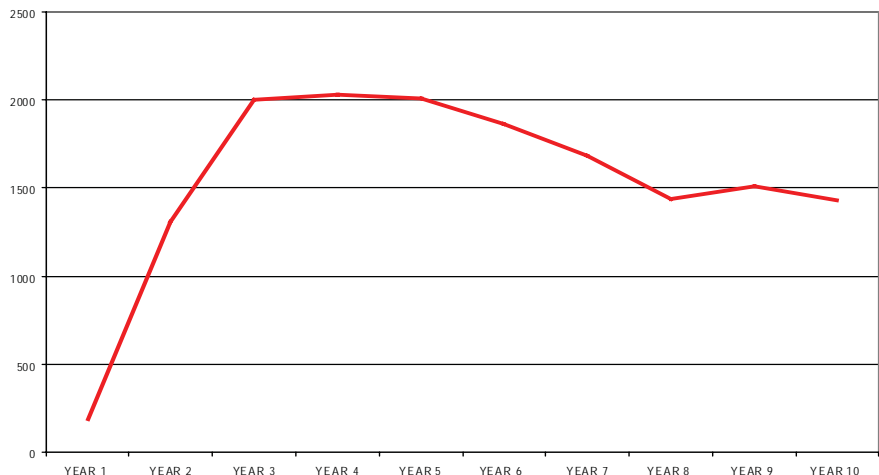


Table 1 -Growth Rate Adjudication Referrals in UK-

A further development that Peter Kennedy noted is the change in the profession of Adjudicators over the past 10 years. Although as in previous years the top three remain;

1. Quantity Surveyors
2. Lawyers
3. Civil Engineers.

Since October 2006 the number Quantity Surveyors and Civil Engineers has fallen while the number of lawyers has increased (as has the number of Architects, Table 2).

The number of complaints being made against adjudicators remains extremely low, and indeed out of these complaints made in Year 10 none were upheld (see Table 3). This continues to send a strong message as to the trust and confidence that is maintained in Adjudicators. This

linked with the number CPD hours each Adjudicator needs to maintain should ensure that standards are kept high and thus confidence continues to grow in the Adjudicators and the system.

Following Peter Kennedy's review of the latest statistics, Janey Milligan and Lisa Cattanach of CDR spoke about their practical experiences of Adjudication in general.

Firstly Janey produced comments from Tony Bingham, Geoff Brewer and John Riches as to each of their perception as to the success of Adjudication over the past 10 years. Janey then went on to discuss some of her personal experiences of Adjudication over the years.

Lisa Cattanach then spoke about some of the reasons behind the evolving nature of the adjudication process, especially in the past ten years, with case law being

DISCIPLINE	May 2002	Oct 2002	April 2003	Feb 2004	Oct 2004	Oct 2005	April 2006	Oct 2006	Oct 2007	April 2008
Quantity Surveyors	28.9%	39.1%	43.8%	41.6%	38.0%	38.8%	35.7%	35.1%	34.5%	31.4%
Lawyers	22.1%	21.9%	22.1%	21.6%	26.1%	26.3%	25.6%	26.6%	26.6%	28.4%
Civil engineers	14.6%	17.3%	13.2%	11.1%	11.6%	11.0%	15.8%	15.1%	15.0%	14.5%
Architects	7.8%	8.9%	10.2%	9.3%	9.6%	9.6%	9.0%	8.8%	8.7%	9.6%
CIOB/Builders	3.4%	3.4%	2.6%	5.2%	5.0%	4.9%	4.7%	5.3%	4.9%	7.5%
Building Surveyors	2.1%	1.7%	1.4%	1.0%	1.3%	1.4%	1.2%	1.2%	1.3%	2.5%
Construction Consultants	2.5%	0.3%	0.9%	4.1%	5.3%	4.7%	4.6%	4.8%	5.6%	1.9%
Structural Engineers	2.1%	3.4%	0.8%	2.2%	1.3%	1.3%	1.2%	0.9%	1.1%	1.3%

Table2 -Primary Discipline of Adjudicators-

Complaints Against Adjudicators	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10
Complaints Made	0.45%	1.97%	0.90%	1.07%	1.48%	1.46%	1.20%	1.19%
Complaints Upheld	0.05%	0.35%	0.00%	0.21%	0.00%	0.00%	0.07%	0.00%

Table 3- Number of complaints against adjudicators

a significant factor. She then went onto discuss her personal experiences of the process and how her experiences related to the statistics and trends published by ARC.

Finally, Colin Fraser presented a brief look at the legal aspects of the process. He discussed how at the introduction of statutory adjudication 10 years ago

dispute resolution was deemed old-fashioned, expensive and time-consuming and it was of no surprise to many that adjudication was extremely successful in bringing about a sea of change in formal dispute resolution in construction and engineering. He then discussed proposed changes to other dispute resolution methods and what the future may hold.

The event concluded with a question and answer. After which all that remained was for Peter Kennedy as Chair to thank everyone for attending and supporting the event. Peter also noted ARC's thanks to all the Adjudicators and ANBs who continue to contribute to the research as without them the publication of the statistics would not be possible.

## Evidence In Construction Adjudications Part 2 – Considering the Evidence

**Mark Entwistle**

### INTRODUCTION

The first paper on this subject, which appeared in an earlier edition, addressed the management related evidence issues that arise in adjudications. This paper will address the consideration of evidence by adjudicators and the presentation of that evidence on behalf of the Referring Party and the Respondent.

### SOME PRELIMINARY CONSIDERATIONS

As previously observed, the Housing Grants Construction and Regeneration Act 1996 (the "Act" hereafter herein) confers a wide discretion upon the adjudicator to make procedural decisions about evidence. It says nothing, however, about the parties' delivery of evidence to the adjudicator, or about the adjudicator's consideration of the evidence provided. The same is generally true of the various rules that may apply, including the Scheme for Construction Contracts Regulations 1998 ("the Scheme" herein).

The adjudicator possesses a statutory discretion to ascertain the facts and the law, but is not obliged to exercise that discretion in any established way, nor indeed at all. The question as to the extent that an adjudicator should exercise that discretion is at the root of the debate as to whether, or to what extent, (s)he should act inquisitorially. What the Act provides is that any contract, in order to be compliant with the Act, must contain a provision that enables an adjudicator to act that way (but does not require them to), which means that it can be considered perfectly in order for the adjudicator to merely consider what the parties themselves provide.

In any event, the notion that it is

appropriate for any adjudicator to take it upon themselves to delve into the facts and the law (so as to reach as best they can be the "correct" result), flies in the face of the essential practicalities of meeting the limited timescale that the Act lays down.

The best that might be said in this regard is that the adjudicator should, at least, consider in any case, whether it is helpful to him/her to make investigations that either serve to improve their understanding of the issues, or address key features of the dispute.

Contract provisions, or applicable rules, that require the adjudicator to make investigations of the facts or the law are likely to be unenforceable and unworkable, though such a provision would certainly assist the adjudicator in the management (or perhaps, rather, the manipulation) of the timescale.

### ASSESSING AND WEIGHING THE EVIDENCE

#### The burden of proof – the legal burden

The fundamental tenet of the law in this area, "he who asserts must prove", applies as much in adjudication as in respect of other tribunals, notwithstanding the absence of any statutory obligation upon the adjudicator to apply the strict rules of evidence.

The Claimant (or Referring Party) can, thus, normally be expected to bear the legal burden of proof, and is required to prove every element of the case brought.

There is normally no legal burden borne by the Defendant (or Responding Party). An exception to this rule would

occur where the Defendant raised a counterclaim – which situation would be extremely unusual in adjudication, though that could occur where the manner in which the Notice of Adjudication was framed admitted the possibility of a counterclaim, or where the defence raised (such as an allegation of defective works) was in the nature of a counterclaim.

The application of the general rule relating to the burden of proof means that the Claimant must prove its case even though the Defendant may take no part in the proceedings. In such a case as that, the adjudicator would be in error if (s)he merely accepted the evidence and submissions of the Claimant and ruled in their favour. The Claimant's case must be rigorously tested by the adjudicator and the Claimant should fail if the burden of proof is not discharged.

It appears to have been an understandable practice of some adjudicators to declare that the Claimant had failed to discharge the burden of proof so that some element of its claim fell. Whilst that is a perfectly acceptable result of the adjudicator's consideration of the case, there has been recent judicial pronouncement (Stephens – v – Cannon [2005] EWCA Civ 222) to the effect that the tribunal should, in those circumstances, give detailed reasons as to why and in what respect the party has failed to discharge the burden upon it. It is no longer acceptable merely to make the statement that the party has failed to discharge the burden or to persuade.

#### The burden of proof – the evidential burden

Whilst the legal burden always remains with the party which starts

with it, the evidential burden may pass between the parties.

The evidential burden may be expressed as the obligation to bring sufficient evidence of a fact in issue that it would be reasonable to decide, if all the evidence were believed, that the fact had been proved.

That burden starts with the party making the allegation, but will pass to the countering party to bring evidence in rebuttal. The relative cogency and persuasiveness of the evidence adduced by both parties will largely determine which of them will prevail.

The very nature of a moveable evidential burden means that an adjudicator is likely to be faced with repeated requests from parties to adduce further evidence in rebuttal of the last submitted by their opponent. The balance between allowing the parties such opportunities (and thus properly applying the rules of natural justice), and meeting the timescale for the adjudication, can cause adjudicators difficulties, and party representatives would do well to ensure that all relevant evidence is appended to that party's primary submission.

### **The standard of proof**

Naturally, the normal civil law standard – the balance of probabilities – applies in the case of adjudication proceedings in the same way as in other civil proceedings. This requires the claiming party to present its case in such a way as to render it more likely than not that its version of events and interpretation of the law are correct.

If the party subject to the legal burden can do no more than establish that particular alleged facts were “as likely as not” to have occurred, they will (or should) fail. Determining which way the balance tips is, of course, a key component of the Decision reached, and the reports of adjudicators reaching perverse Decisions are often founded upon inappropriate or unexplained determinations of how the balance of probabilities has been operated.

### **Weight given to evidence**

The key to deciding between conflicting evidence adduced by the parties, and often the outcome of the entire case,

rests upon which party's evidence is preferred by the adjudicator. In other words, which of the parties has been more persuasive?

In deciding between conflicting versions of events, the adjudicator should always keep in mind that, if asked to explain the reasons why (s)he has come to a particular conclusion, (s)he could in detail.

Whilst it is not uncommon practice for an adjudicator to state “I prefer the evidence of Mr X, or of party Y”, it is better for the adjudicator to state exactly why (see Stephens – v – Cannon (supra)).

The following factors should be amongst those considered by the adjudicator in assessing any evidence of fact where the parties are divided.

#### Documentary evidence

- Does the document concerned appear reliable?
- Is it an original or a copy?
- Is it a document of record?
- Is it clearly legible?
- Has a witness testified in relation to it?
- Was it produced by a reliable (or even authoritative or duty-holding) source?
- Is it possible that the maker of the document had an interest in projecting a particular view of the facts?
- To what extent is it corroborated by other evidence?

Naturally, it is crucial that the adjudicator can read and understand the documents presented. If there were any doubt in either respect, it would be expected that any uncertainty would be put to the party offering the document, for clarification.

As to those representing the parties, practice indicates that it is often the case that insufficient care is taken in copying the documents relied upon. This can take two forms; the sins of omission and inclusion. By way of omission, a document may be illegible or even omitted from the bundle presented. This can add to the

costs of the process by causing the adjudicator uncertainty or by causing an investigation into the facts that might have been avoided.

By way of inclusion, it is regrettably often the case that an adjudicator is presented with far too much irrelevant documentation. Whilst this is, to a degree, understandable for reasons of excess caution, failure of the representative to fully understand the case, or the desire to keep party costs down, the fact is that the costs of the adjudicator will inevitably be greater through having to at least consider documents which are ultimately irrelevant. The Referring Party, at least, should be in a position to be far more considered about the documents included with its submissions. The complaints about the adjudicator's charges, that are quite commonly heard, would be less vocal if the adjudicator were not to have to waste time considering irrelevant material.

Naturally, the pressure of time that the Respondent is frequently under means that it is more understandable if less care were taken in the selection and omission of documents. It would be perfectly in order for the adjudicator to take such matters into account in deciding how his/her costs should be borne between the parties.

#### Witness evidence

- Does the witness appear truthful and honest?
- Has their entire evidence been honestly given?
- Does their recollection appear reliable?
- Are they experienced and familiar with the subject of their testimony?
- Have they some reason to desire a particular outcome to the case?
- Is their testimony corroborated by other evidence, and to what extent?

The value of oral testimony is a subject that adjudicators are divided upon, with some habitually arranging meetings with the parties and others habitually not. To apply a hard-and-fast approach to the subject would seem to

have no merit, since the features and demands of any particular case should be the determinants of procedure.

That said, meetings with parties can be helpful, particularly where matters requiring inspection are in issue, or where one or both parties are unrepresented (and thus, perhaps, not proficient in expressing themselves in writing). Is it, however, important that the adjudicator advises the parties before any meeting takes place whether all things said are to be regarded as evidence to be considered, what the procedure is to be (and the degree of formality), and the precise subject matter that the meeting is to address.

It is increasingly common for submissions to contain witness statements (with or without statements of truth). Where conflicting statements are served from each party's witnesses, the adjudicator must consider whether there is merit in convening a meeting at which the differences can be explored and where corroborating or contradicting documentary evidence can be put to the witnesses concerned.

The answers to the above questions, and the application of an appropriate procedure, should enable the adjudicator to explain their reasons for preferring one party's evidence on a particular point to that of the other party.

#### Expert Witnesses

It is a commonly espoused view that adjudication is not a procedure that readily accommodates the giving of expert evidence. The impracticality attendant upon such evidence in a process as truncated as adjudication can readily be appreciated.

Nonetheless, where technical issues play a prominent part in the dispute (such as quality or programming matters), it is often very helpful for the adjudicator to receive the evidence of people better versed in those areas. That said, the subject is fraught with potential difficulties, which case law in adjudication has often demonstrated.

Two areas demand particular care from the adjudicator – forming alternative views to those of the experts, and the management of the process and the timescale. These

difficulties can be overcome by the adjudicator encouraging the parties to agree to release him/her to come to his/her own conclusions and to agree to a practical timescale. Where such agreements cannot be achieved, the adjudicator must take every care to ensure that the rules of natural justice are applied and that (s)he does not fall foul of the limitations of jurisdiction that apply.

#### Adjudicator appointment of experts

Though the Act is silent on the matter, certain rules (such as the Scheme, at paragraph 13(f)) permit an adjudicator to appoint experts and to consider their representations. It is suggested that even though there may be no applicable rules, or such rules as apply are silent on the matter, an adjudicator possesses a general power in this respect by virtue of s.108(2)(f) of the Act, which empowers the adjudicator to take the initiative in ascertaining the facts and the law. Naturally, costs incurred in appointing experts will represent expenditure that the adjudicator can charge on to the parties.

Where the applicable rules address the subject, varying provisions impose differing obligations upon the adjudicator. For example, JCT (SBC) 05 and IBC 05 (clauses 9.2.2.2) require the adjudicator to appoint an expert where (in relation to the validity of an instruction relating to opening up and testing) (s)he does not possess the requisite expertise. Beyond that, the incorporation of the Scheme into JCT contracts generally, brings with it the discretion (under paragraph 13(f)) referred to above. That removes the former obligation (as seen in JCT 98 clause 41A.5.5.7) to also provide a statement or estimate of the cost involved.

In every case, whether discretionary or not, the adjudicator must ensure that the advice received from the expert (whether in the law or in some technical discipline) is provided to the parties for comment or further submission.

Finally, it is to be kept firmly in mind that, regardless of the advice received, the decision (whether regarding the entire case or merely some aspect of contested fact or law between the

parties) is ultimately to be that of the adjudicator and not that of the expert appointed.

## MISCELLANEOUS ISSUES

### **Estoppel**

An adjudicator may well encounter submissions from a party to the effect that the other party is subject to an estoppel. In general terms estoppel is a rule which prevents a party from attempting to prove allegations which are directly contrary to those which have already been proved against it, or contrary to those which it has itself previously represented to be the facts.

Various types of estoppel are recognised, and each of them might be relied upon by a party to adjudication.

#### Estoppel by record

This may take the form of issue estoppel or cause of action estoppel.

In respect of the former, a party may be estopped (prevented) from making an assertion the correctness of which has been decided against him in previous proceedings. This represents one of the few occasions where the adjudicator might be required to consider the detail of previous contested proceedings.

In respect of the latter, the entire cause of action cannot be brought to the tribunal if it has previously been decided by another tribunal. In adjudication, of course, that rule is often embodied in the applicable rules (such as the Scheme paragraph 9(2)). In such a case the adjudicator's threshold jurisdiction would be negated.

#### Estoppel by deed

If a party has entered into a deed founded upon certain facts, that party is not permitted to deny those facts in any action on the deed. This example of estoppel is unlikely to trouble adjudicators.

#### Estoppel by conduct

This example is, perhaps, the most likely to arise in adjudication, and represents a complex area of law which many adjudicators may not be conversant with.

Where a person has, by words or conduct, led its contracting partner to believe that a certain state of affairs existed, and that has induced the other party to act in reliance upon that belief, that person is estopped from denying that the state of affairs existed.

The possibility of an adjudicator not fully appreciating the legal niceties of this area of the law, should alert party representatives to the need to spell out in detail what the law is that is relied upon, the matters that need to be proved and how they are said to be proved.

A meeting with the adjudicator might be sought and the adjudicator might consider it prudent to seek their own legal advice on the matter – remembering always to put the advice received to the parties for comment, and ensuring that the ultimate conclusion arrived at is the adjudicator's own and not that of the advisor.

### **Allegations of fraud**

Allegations of a criminal nature occasionally arise in adjudication proceedings, particularly in respect of the overstatement of financial claims which may be alleged to be fraudulent, or allegations of falsification of documents. The adjudicator should take great care where such allegations are made.

The adjudication tribunal is primarily constituted to address the particular claim referred and, since such claims are usually based upon a contract between the parties, the process is governed by the civil law and not the criminal law.

Though matters such as the accuracy of claims or the truthfulness of witnesses may be germane to deciding the dispute in question, the adjudicator should be very wary of making declarations in respect of criminal allegations that may be made.

In order to definitively declare whether criminal activity had taken place, the adjudicator would need to approach his/her role in an entirely different fashion and with use of a procedure to suit. That is no part of what the adjudicator is there to do, and there

is no example that comes readily to mind where it would be incumbent upon the adjudicator to make such a pronouncement in their Decision.<sup>1</sup>

The application of the appropriate standard of proof is also a fraught subject where personal allegations of this sort arise. It is accepted that, where allegations of criminality are made in civil proceedings, the tribunal should, whilst still applying the civil standard of the balance of probabilities, normally require more or stronger evidence to tilt that balance.

This subject is not one that would be expected to occur in the normal range of experience of the average adjudicator and it is better for the adjudicator to deal with such issues purely as matters of normal civil evidence, and to decide accordingly without making definitive (and possibly inflammatory, or even defamatory) statements about alleged criminal conduct.

### **Similar fact evidence**

Similar fact evidence is evidence, unrelated to the case in hand, which may lead to the conclusion that a party or witness behaved on the occasion in question as they had done in the past and that the previous behaviour made it more likely that the same behaviour had occurred this time.

The law is very cautious about allowing similar fact evidence to be admitted in both criminal and civil cases, for the reason that it may be more prejudicial than probative. Naturally, concern is greater in respect of criminal proceedings, where the liberty of the defendant may be at stake. Nonetheless, care should be taken in admitting such evidence in civil cases. Since the key issue in the admission of evidence is relevance (for example, the adjudicator is only required, by Scheme paragraph 17, to consider relevant evidence), the adjudicator should consider the relevance of any similar fact evidence sought to be adduced.

In Mood Music – v – De Wolfe (1976) Lord Denning indicated that:

“In civil cases the court will admit evidence of similar facts if it is logically probative, that is if it is logically

relevant in determining the matter in issue; provided that it is not oppressive or unfair to the other side; and that the other side has notice of it and is able to deal with it.”

It is suggested that, whilst the adjudicator is conferred a wide discretion as to the admission of evidence by the Act and/or the parties' contract rules, this statement provides useful guidance.

### **Evidence of character**

As with similar fact evidence, the character of a party or a witness should only be admitted in evidence if it is directly relevant to some issue between the parties. The adjudicator has discretion as to whether to admit or exclude such evidence, but must have a logical reason for making the decision either way, since to admit such evidence will be personally demeaning to a party or witness in the proceedings and to exclude it might deny a party the right to put its case at its highest.

Evidence of character might be relevant in two instances. Firstly, it may be germane to the dispute between the parties. Secondly, it may go to the credibility of a witness. In the first instance it is likely that the adjudicator would lean towards allowing the evidence in; in the second example, character (even if allowed in) should only be one factor in determining whether a witness's evidence is to be believed.

### **SUMMARY**

The volume and quality of evidence presented to an adjudicator, naturally, varies according to the complexity and scale of the case. It is also determined by the precision with which a party's case is put together. The nature of adjudication renders it crucial that all concerned - adjudicator and party representatives – keep in mind the golden rule on the admissibility of evidence – relevance.

*1. This paper does not consider the implications of the Proceeds of Crime Act or the Money Laundering Regulations.*

# Decision Making

**John Riches**

## Introduction

It is a fact that Adjudication has obtained a much wider popularity than was ever thought possible or probable. It may be that Adjudication is being used in areas where it was never intended to be used.<sup>1</sup> The fact is that Adjudication has had a wide press some of it good, some of it bad. There are lawyers in the construction press who have been very supportive of Adjudication and equally those who have been very negative. There are suggestions that the process is inherently flawed and unfair, the Human Rights battle is far from dead.

There has also been a great deal of criticism of Adjudicator's and the quality of their decisions. Much of this is anecdotal rather than based on any real research. In contrast the success has been the degree of support the legal system has given to Adjudicator's and Adjudication through enforcement of Adjudicator's 'Awards'.

We also live in a 'complaining' society where parties or individuals are simply prepared to complain or have 'another shot' by whatever means necessary regardless of merit. The upshot of all of this is that Adjudicator's and the bodies who nominate them are under attack. In the majority of instances the instrument of the attack, the 'window on the world' is the one document that is the product of the whole process, the Decision.

The areas of jurisdiction and procedure and particularly procedural fairness can both overlap into the Decision itself.

The RICS are not alone, although at the forefront of, in consciously seeking to move 'up a gear' not simply to avoid complaints, but to recognise that the whole process has become more complex, more demanding and more subject to scrutiny. The idea is not simply to avoid complaints but to generate new confidence in the process of Adjudication.

## The Decision

There are two aspects of the Decision which need to be examined. The first and by far the most difficult is the Decision making process itself. Those things, which go to you deciding that a point falls one way or the other. The other is much easier, writing the Decision itself. The Decision writing process will form the basis of a future article.

There are many Adjudicator's who have seen Decisions from all perspectives. A critical eye on their own work, worse, some have seen hundreds of Decisions through being active in assessment and training processes. Anecdotally although the courts are not their to give the Decision marks out of 10, as it were, the feedback is generally they think Adjudicator's Decisions to be of a high standard.

Many have represented parties on both sides of the fence, and seen ultimately the Decision both from the perspective of joy and dismay. This paper is simply shared thoughts

from the perspective of experience. There is not necessarily a right or a wrong way in which to present a Decision. There might be a better way and this paper will be perfect when it reflects the collected thoughts from all reading this article.

## Basic Ground Rules

The primary legislation is clear on what the whole purpose of the process is.

### *Adjudication*

*PART II 108 Right to refer disputes to adjudication*

*(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose "dispute" includes any difference.*

*(2) The contract shall—*

*(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;*

*(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;*

*(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;*

*(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;*

*(e) impose a duty on the adjudicator to act impartially; and*

*(f) enable the adjudicator to take the initiative in ascertaining the facts and the law.*

*(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration*

<sup>1</sup> See the comments of His Honour Judge Humphrey Lloyd Q.C. in *Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth*

*or the parties otherwise agree to arbitration) or by agreement. The parties may agree to accept the decision of the adjudicator as finally determining the dispute.*

*(4) The contract shall also provide that the adjudicator is not 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 that any employee or agent of the adjudicator is similarly protected from liability.*

*(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.*

1996c.23

*(6) For England and Wales, the Scheme may apply the provisions of the Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate. For Scotland, the Scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator's decision.*

Simple isn't it? A party to a construction contract may refer a dispute or difference to Adjudication, at any time. As Adjudicator's all you have to do is make a Decision on the matters in dispute.

The primary legislation itself does nothing, other than interfere with contracts. This is nothing unusual other legislation has done the same thing, such as the Sale of Goods Acts etc.<sup>2</sup>

There is more guidance on the Decision in the secondary legislation, the Scheme for Construction Contracts (England and Wales) Regulations 1998 and in the contracts which are compliant with the primary legislation.

However there is nothing here which requires the Decision to be in writing. Some pundits have suggested the possibility of a 'speaking Decision'. Let's be ultra high tech and deliver it on a CD rom as a wav file, so all those who receive it can play it back on their desktops. Too high tech for the average recipient! Most people are more comfortable with paper, most of us print pretty well everything we receive electronically.

The suggestion in the RICS Guidance Note for Surveyors Acting as Adjudicators is judging by the checklists, that the Decision should be written.

It is not until you look at rules in the various contracts that there is an express requirement to commit the Decision to writing. The JCT, TeCSA and CEDR rules all require that the Decision is in writing.

On balance many Adjudicator's have probably never questioned whether or not the Decision should not only be committed to writing but actually be made in writing. This has been common practice from the outset. To do other than commit your Decision to writing is beset with problems, not the least of which is what evidence does the party seeking to enforce have if there is nothing written.<sup>3</sup>

### The Duty to Decide

The job of the Adjudicator is to reach a Decision. The primary legislation<sup>4</sup> requires that the Adjudicator reach a Decision. The Scheme for Construction Contracts (England and Wales) Regulations 1998 provides:-

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

*(a) open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive,*

*(b) decide that any of the parties to the dispute is liable to make a payment under the contract (whether in sterling or some other currency) and, subject to section 111(4) of the Act, when that payment is due and the final date for payment,*

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

The expression decide the matters in dispute does not give jurisdiction for the Adjudicator to decide what the parties dispute is about (not very clever drafting) but he must decide those matters in dispute referred to him. Similarly the other rules all work on the basis of the Adjudicator reaching a Decision.

The Decision must be your own and not somebody else's. If you seek technical or legal assistance you must still make the Decision.<sup>5</sup>

You must reach a Decision on the issues in dispute. It is not enough to find some device that looks as if it may constitute a Decision but in fact amounts to a failure to reach a Decision or a way to avoid the task.<sup>6</sup>

<sup>2</sup>e.g. Sale of Goods Act 1979 & Supply of Goods and Services Act 1982

<sup>3</sup>Paragraphs 14.2 and 14.3

<sup>4</sup>s 108 (2) (c)

<sup>5</sup>See the discussion in *Barr Limited v Law Mining Limited on incorporation of legal advice in the Decision*

<sup>6</sup>*Ballast Plc v The Burrell Company (Construction Management) Limited*

It is the deciding bit we are interested in here. Never mind the bit on writing the thing up it's the process of reaching a conclusion or conclusions that is interesting.

### Judicial Process?

The Act provides:-

- s.108 (2) (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

The Scheme provides:-

*13. The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication.*

In many respects it is no different to the type of Decision making process that should be applied by architects and engineers in the day to day administration of the contract.

Even that process is not as straightforward as it might be as can be seen from the following quotation:-

*(3) In the circumstances of the case, the architect's assessment of the extension of the time due to the plaintiffs was fundamentally flawed because he did not carry out a logical analysis in a methodical way of the impact which the relevant matters had or were likely to have on the plaintiffs' planned programme; he made an impressionistic rather than calculated assessment of the extensions; he misapplied specific contractual provisions; where he allowed time for relevant events, the allowance made in important instances bore no logical or reasonable relation to the delay caused. Therefore, although there was no bad faith or excess of jurisdiction on the part of the architect, his determination of the extension of time due to the plaintiffs was not a fair determination nor was it based on a proper appreciation of the provisions of the contract and it was accordingly invalid.<sup>7</sup>*

It is questionable on how any Decision can be reached without an examination of the facts and application of the law to the facts. This exercise is a judicial process. It is analytical. A matter of weighing the evidence to the point that you can determine that a matter is more probable than not. You are simply trying to determine that an occurrence is as claimed based on the evidence you have. If you cannot do so then the claim concerning the occurrence fails.

Most Adjudications will not concern complex points of law. It will simply be a matter of applying the contract to an established set of facts. It is those facts that you must establish from the evidence you have.

The power that you may take the initiative in ascertaining the facts and the law is procedural in terms of your ability to inquire into the facts and the law rather than sitting back po-faced allowing the parties to proceed in an adversarial manner. The 'may' element does not give the option to ignore facts or law when actually making the Decision.

Under the Scheme you are required to carry out your

duties in accordance with the relevant terms of the contract and to reach a Decision in accordance with the applicable law in relation to the contract.<sup>8</sup>

The rules under the Standard Form Contracts all follow this pattern. The only exception is in the TeCSA rules:-

*15. Wherever possible, the decision of the Adjudicator shall reflect the legal entitlements of the Parties. Where it appears to the Adjudicator impossible to reach a concluded view upon the legal entitlements of the Parties within the practical constraints of a rapid and economical adjudication process, his decision shall represent his fair and reasonable view, in light of the facts and the law insofar as they have been ascertained by the Adjudicator, of how the disputed matter should lie unless and until resolved by litigation or arbitration.*

Some of the rules make it clear that the Adjudicator is not to reach a Decision on the basis of expert determination or acting as an expert. There is no room for imposing your opinion on what has happened you must reach a determination in accordance with the facts and the law.

### Decision Making

Those of us who have carried out a number of Adjudications have realised that a period of 28 days passes all too quickly. This often leads to exercise of the Decision making process all too late. The process of making the Decision must start on day one. Not in terms of making your mind up on receipt of the Referral but in terms of working to the objective of reaching the Decision.

The documents must be read as they arrive to at least attain a grasp of what is being said and claimed. There may be rare cases where it is immediately obvious that there is no cause of action at all. The contract does not contain a term either expressly or impliedly on which there can be reliance for breach. There may be a case here, at an early stage to tell the Referring Party that it is unlikely that the claim will succeed.

By the time you have received a Referral and a Response you should know what the issues are. This is a common area of weakness in Adjudicator's Decisions, identifying what the issues are. The expression issue comes from 'facts in issue' although there may also be issues on points of law.

Facts in issue, which are sometimes called "principal" facts, are those necessary by law to establish the claim, liability or defence, forming the subject matter of the proceedings; and which are in dispute between the parties. In civil cases, the court may give directions about the issues on which it requires evidence.<sup>9</sup>

For those who have attended Construction Arbrix conferences there have been a number of papers on issues most prominently the excellent paper given by Mark Entwistle entitled "Problems with identifying the issues". This paper should be obtained by those who did not attend.

<sup>7</sup> *John Barker v London Portman Hotel (Queen's Bench Division) 83BLR 31*

<sup>8</sup> *Scheme for Construction Contracts (England and Wales) Regulations 1998 paragraph 12 (a)*

<sup>9</sup> *Phipson on Evidence Fifteenth Edition 6-02*

Frequently what is stated under the heading of issues in a Decision is in fact the relief that the claiming party is seeking. The relief is the consequence of deciding the issues in the favour of the party who was seeking that particular piece of relief. To simply state the relief under the heading of issues must be incorrect and shows lack of analysis and understanding of the problem that the parties have put to you.

The issues are those things on which the parties do not agree. They are not the relief sought in the Notice of Adjudication or in the Referral. This is simply the remedy which will flow if the issues are decided as the Responding Party suggests.

As each of the set of documents in the form of the Referral and the Response arrives they should be read. Some analysis is required to determine those things on which the parties are agreed and those things on which they are in dispute. The things that are disputed are the issues.

There are a number of ways in which the documents can be analysed. Use of highlight pens and post-it notes can be used to analyse the matters in dispute and the evidence that goes to those matters in dispute. This exercise needs to be done before the adjudicator has any meeting with the parties.

If a meeting is to be called it is a sound practice to tell the parties what you consider the issues to be from your analysis of their documents. They should also be told on which items you wish to test the evidence, by questioning those who have given that evidence and what further evidence you require if any.

Requiring further evidence is part of your licence to investigate the facts and the law. However this does not extend to making out a case where there was none and to giving yourself evidence in substitution for the evidence of the parties.<sup>10</sup> Where you have thoughts of your own these must be expressed to the parties and an opportunity given for the parties to respond.

Whether or not you are required to publish reasons it is a fundamental part of the decision-making process that you have clear reasons for the decision you reach. These reasons come from weighing the evidence which then gives you a conclusion.

Weighing evidence is a common sense matter. The weight of evidence cannot be determined by arbitrary rules; it depends mainly on common sense, logic and experience.

*"For weighing evidence and drawing inferences from it, there can be no canon. Each case presents its own peculiarities and in each commonsense and shrewdness must be brought to bear upon the facts elicited."*<sup>11</sup>

*"The weight of evidence depends on rules of common sense."*<sup>12</sup>

Your own common sense and expertise should enable you to sort through which documents are relevant to which issues and what witness statement evidence goes to those issues. It is simply then a matter of deciding whether or not the facts are more likely to be the case than not.

This exercise needs to be done in the decision making process rather than in the writing process.

In reaching a decision to finally determine the matters before you, you are deciding facts and then applying the law, usually the law of the contract between the parties, to those facts. This is what determines the remedy and not merely an analysis of the remedy itself.

The things that persuade you from the evidence are the reasons why you have gone one way or the other.

The whole process of decision making is relatively simple if logical and progressive analysis is applied from the outset. Who knows if you follow this process you may even surprise the parties when you write your Decision because it will reflect that you have understood their dispute and the issues and have reached a Decision for good reason based on what they have told you and the evidence they have given you.

<sup>10</sup>*Fox v Wellfair [1981] 2 Lloyd's Rep 514. and Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth.*

<sup>11</sup>*R v Madhub Chunder 1874 21 WR Cr 13, 19 (Ind) per Birch J*

<sup>12</sup>*Lord Advocate v Blantyre (1879) 4 App Cas. 770*

## Writing Effective Dispute Adjudication Board Decisions

**Dr Cyril Chern**

Those new to Dispute Boards, particularly those serving as Dispute Board Members make the fundamental mistake of confusing a Dispute Board Decision with that of an Arbitration Award. The two are different. Whilst there is no set formula for writing a Decision in a Dispute Board setting those new to the process should remember that above all else what is needed is clarity of thought and clarity of writing. A noted Construction Practitioner (whose

name will go unmentioned) who was new to Dispute Board work and who was acting as the Chair of a Dispute Board recently wrote the following:

*"It was during the course of the aforementioned five-day Dispute Board Hearing of this reference (held on site), that the ambit of the matters in dispute changed considerably and I must note that such changes are not uncommon in Dispute Boards but accordingly I must note that these have, not surprisingly,*

*given us difficulty in rendering this Decision because these issues reviewed in the parties' original written submissions have been overtaken by recent realisations, agreements and clarifications that only emerged as a result of discussions held during the week of the hearings and consequently, we are faced with a series of additional sheets, drawings, e-mails, personal notes of final meetings and sundry documents, which we must try and make sense of and ideally and accordingly the Dispute*

*Board Hearings should have been placed on hold at the end of the second day of hearings whilst the parties clarified and re-established the matters that remained in contention before making re-submissions to the Board but even though I gave the parties an opportunity to take this course of action, both sides were keen to progress, leaving the Board to sort out the contending positions as best we can and of course this is not an ideal situation at all."*

This excerpt is 207 words long and to make matters worse is only one sentence. Worse yet the entire sentence gave the reader nothing helpful. From there the Decision went from bad to worse and the rest of that particular Decision dragged on and on adding to the general confusion. This was detrimental to the parties and to the entire Dispute Board process.

### **Purpose of the Decision**

Again what is needed is clarity. This is the first question any Dispute Board Member should ask is for whom are you writing the Decision. In most instances the immediate purpose of the Decision is so that the Claims made can have some immediate determination. The secondary purpose of the Decision and yet another reason it needs to be clear and concise is so that an arbitrator can make sense of it in any resulting arbitration or enforcement proceeding. Additionally the Dispute Board Decision writer should remember that each Decision is important in respect of the use that may be made of it during the remaining contract period.

### **Should Reasons Be Given**

Another issue that arises is whether or not reasons should be given with a Dispute Board Decision. This is usually part of the underlying contract between the parties. FIDIC, for instance, requires the Adjudicators to give reasons with their decision.<sup>13</sup> The reasons must therefore be included in the written Decision. Other procedures only require the Dispute Board Members to give reasons if requested by either party. Under those other contracts and procedures which do not require the Dispute Board to give

reasons it is up to the Dispute Board members to decide how much of their reasoning they desire to include in the written decision, if any.

The argument in favour of giving reasons is that if the parties then know how the Decision was reached and that it was made on a logical basis, taking this into account, the parties are then more likely to accept the Decision.

The argument against giving reasons is that the Decision has either to be accepted or rejected and giving reasons only give grounds for further argument and may provide a basis for the losing party to contest the Decision.

On balance, 'reasons' in the arbitral sense are not normally desirable. It is necessary however to include the background to the claim and some explanation. The decision must be clear and concise and must define precisely the scope of the claim and how the issues have been decided. It must not include unnecessary material (such as the sentence shown earlier as an example), which will either confuse the reader, or is intended by the Dispute Board Members to demonstrate their skills and knowledge – or worse yet their lack thereof. Either way it is wise for Dispute Board Members to draft, for their own benefit, their reasons in order to check that they have reached a logical decision.

### **Checklist**

A simple checklist for Dispute Board Members writing a Decision includes the following points:

- (a) What do the parties have to do? It must be written so that they can act upon it, and
- (b) If a party fails to act then an Arbitrator or a Court can act. The Arbitrator and/or Court will want to know:
  - (i) What the Claim amount is;
  - (ii) How it came into being; and
  - (iii) That the Dispute Board

heard and understood what the claim was about and that it gave its reasoned recommendation/decision accordingly

The Dispute Board must also address all the points raised in the submissions of the parties, and either accept or reject them.

In order to do this the Dispute Board, in addition to making a final decision, may first have to make decisions concerning:

- (i) Facts - when the evidence in the submissions of the parties is contradictory.
- (ii) Interpretation of the contract.
- (iii) Other points of law that may be at issue.

### **Decision vs. Recommendation**

The majority of Dispute Boards today require the writing of a Decision, yet there are situations that only require a Determination and not a Decision. However there is no difference in the actual writing of either a Decision or a Recommendation. The thought processes are exactly the same and the manner in setting out the paperwork is the same. The distinction comes in how the actual finding of the Dispute Board is set forth. In a Dispute Adjudication Board the Board Members are giving their binding Decision. In the Dispute Review Board the Board Members are giving their non-binding Recommendations. In both, it is essential that the Dispute Board remember that their sole purpose is to reduce conflict and that whatever decision or recommendation they are going to give should deal with all of the issues before them and effectively give an explicit answer to the parties. If there is not enough information then the Dispute Board should ask for more or using their inquisitorial powers seek it out themselves. Nothing is worse for the Dispute Board process than for a Dispute Board to come back and say, in its written Decision or Recommendation that "The Board was unable to determine the Claim of the Contractor (or Employer)". Such a response leaves the parties

<sup>13</sup> FIDIC General Conditions Section 20.4 "Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause."

without an effective determination and over time will prove harmful to the relationship which should properly develop between the parties and the Dispute Board. The Chair of any Dispute Board should ensure before the conclusion of any Hearing that all of the relevant information is properly before the Board so that there is sufficient information upon which to decide or recommend.

### **How to Start and Finish the Decision**

All Decisions (Recommendations) have the same sort of beginning. For example they all should start with

the cover page listing the Contract that is before the Dispute Board, who the Dispute Board members are and whether the document is a Decision or a Recommendation. It should also number the Decision or Recommendation, give a short title telling the reader where this particular Decision fits within the scheme of all of the disputes before the Dispute Board and finally on the cover it should state the date. The rest of the Decision should cover each item of dispute individually and reach a decision on each item. Finally at the end the Decision should have a recapitulation of the entire Claim being

made and its resolution by individual part with a specific direction of who is to do what and by what date.

Most importantly, and going back to the first example of the 207 word sentence, have some disinterested person read your Decision and make sure that sentences and thoughts are kept short and clear and that nothing is added which does not move the Decision forward, i.e. thoughts, unrelated comments, needless information. The Decision in a Dispute Board setting is more of a directive to the parties and should be written that way – short and concise.

## **Consistency in Adjudication – following reader response**

### **Martin Boyes**

I am pleased that my original article obviously struck a chord with many readers, and grateful to Lucy for selecting and printing two thought provoking replies – from Steve Rudd and Jeremy Hackett. Fortunately, the June newsletter also contained a table of complaints made against adjudicators, compiled by Janey Milligan. All points are worthy of further comment.

Jeremy's experiences have plainly been similar to my own in terms of the quality and comprehensibility of a particular decision, thus confirming to a degree my own fears on how well our industry is performing. These fears are unfortunately not allayed by official statistics of formal complaints upheld, and if you will permit me the analogy of reported crime statistics (being widely understood to represent only a fraction of the total crime actually committed) you will also perhaps agree that Janey Milligan's table isn't necessarily any comfort to me. And of course it will be no comfort at all to those who find themselves at the wrong end of a bad Decision.

Steve's article contained much of interest, and the comment attributed to Guy Cottam brought a wry smile of acknowledgement to my face! Steve also reasonably asked some questions of detail, I will answer these shortly but I would not want readers to be distracted into looking at one particular case when it is the accuracy and consistency of the industry as a whole that I wished to concentrate attention on. I admit to Steve that one of the reasons Adjudicators make mistakes

is because they are fallible, I do not agree however that this is an adequate excuse. Further, that Adjudicators are human is also no excuse in my view – we are supposed to be trained to bring the good qualities of our humanity to our tasks while leaving aside bad qualities such as our preferences, prejudices or lack of an open mind, and we demand and are paid substantial sums on the premise that such training has been effective. Our clients also expect that our training makes us fully conversant with the law. Perhaps this arena is where part of the problem lies, outside of our immediate sphere as individuals.

In England the law is in a constant state of flux, established at any given moment by case precedent. Sometimes we find that there is apparently no relevant case law. But it is our duty as Adjudicators to ascertain that state of law and apply it, and our duty as party representatives to argue logically within what we know of it. Text books such as Keating and Hudson can assist us in that regard, but perhaps there is good reason to question the way the Court service itself disseminates its findings. Why should it be left to third-party practitioners to collate and express the law, after all? Maybe Judge Coulson's own personal volume is the nearest we will get to an official, user-friendly analysis and reference at this time, but what happens as and when the law moves further on? Can the professional institutions assist with this beyond their usual newsletters and quarterly publications, for in-

stance? Can the Courts be persuaded to report all cases and to set up and maintain a single, comprehensive database accessible to all, for instance?

In my example case, I freely admit that I did not myself find the appropriate case reference, but I made a clear and logical argument based on the wording of the contract. In bringing to an end the entitlement to make an interim application, the JCT Minor Works contract does not require the certification of Practical Completion, it merely requires PC to have occurred. In this regard it is different from other forms of contract, but it is the form in question which matters and not any other. The contract also does not stipulate at what date a certificate of PC ought to be issued, it is silent on this and certainly states no sanction for 'failure' to issue a certificate of PC by a given date. In any event certification of PC is a matter for the Contract Administrator, but the parties themselves had already agreed by written exchanges that PC had occurred, although there was a squabble over the exact date. Even taking the later of the two dates contended for, the contract plainly prohibited the contractor from making a valid further interim payment application due to PC having occurred as an agreed fact.

This was a simple issue, not a complex matter and the Adjudicator had plenty of time to grasp it.

Imagine my delight when the Adjudicator himself found and put forward relevant case law, in which the Judge's

comments were so similar to mine that you might think I had copied them. The Adjudicator asked for the parties' comments, I briefly pointed out the above and the Referring Party said nothing. Imagine my surprise then at the eventual Decision, which expressly agreed that PC had occurred but ruled against the Employer owing to the lack of a Certificate of PC from the contract administrator at the date of the interim application. I was always taught that an Adjudicator may not go behind the agreement of the parties, since he is there precisely so as to implement the parties' agreement for them. Further, he must then prefer such agreement to any action/inaction of a contract administrator. So what was this Adjudicator taught?

Steve's final point is that the main

purpose of a Decision is that it will resolve, on a temporary basis, cash flow constipation. I think my original article implied acknowledgment of that fact as a general principle and one which big business can easily cope with, but expressed concern at the cost to a small business of fighting a bad Decision where compliance with it will ruin that business to the point that insolvency law and practice will prevent actual recovery of overpaid sums. Such cases will, I agree, be in a minority but that doesn't mean that we in the industry should happily accept them just because they might be few in number. On the contrary I believe that we should ensure that our actions/inactions do not cause them to occur, as each bad Decision may be the ruin of another human being's livelihood. (Clients are

human beings too).

The irony of my original example is that the Adjudicator's Decision did not even give the Referring Party the value of the cash flow declared by the Adjudicator – they had been so late in bringing the matter to adjudication that by the time the Decision was issued, I had taken the precaution of persuading the contract administrator to sharpen up his act and the Final Certificate had already been issued and was never challenged. It showed a repayment due to the Employer. Further, it's Final Date for Payment had already passed. You might think therefore that all that really happened is that the party representatives and the Adjudicator got paid, for a non-event. So that's all right then.....???

## Nicholas Gould's Case Law Corner

*Fenwick Elliott LLP, Case Editor*

Transcript of these cases, if available, can be downloaded from the Society's website ([www.adjudication.org](http://www.adjudication.org)). Simply go to the case summaries.

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### CASE NOTE NO. 3 OF 2008

**Makers UK Limited v The Mayor and Burgesses of the London Borough of Camden** [2008] EWHC 1836 (TCC), 25 July 2008, HHJ Akenhead

*Jurisdiction – Apparent bias – Adjudicator nominating bodies*

The Defendant ("Camden"), a local authority, engaged the Claimant ("Makers") under a 1998 JCT Intermediate Form of Building Contract to carry out refurbishment works at Wittington Estate in Highgate, London. Issues arose between the parties over variations and delays. Camden issued a "Default Notice" alleging that Makers was in default of their contractual obligation to proceed regularly and diligently, and later issued a "Determination Notice" purporting to determine Makers' employment under the Contract as the default had continued for 14 days from the receipt of the Default Notice. Makers subsequently commenced an

adjudication.

The parties, under Clause 9A.2 of the contract, had agreed that the adjudicator nominating body was to be the President or a Vice-President of the RIBA. Accordingly, the solicitor for the Claimant phoned an adjudicator on the RIBA panel, Mr Harris, as he was a qualified solicitor, to see if he was available. He subsequently wrote to the RIBA to request a nomination, and suggested Mr Harris be appointed if available. Once Mr Harris was appointed and the Referral was served, Camden reserved their position that the adjudicator had not been validly appointed and therefore had no jurisdiction to decide the dispute.

The adjudicator found in favour of Makers, and accordingly they commenced proceedings for summary judgment following default on the sum due. Camden argued that there is an implied term of the Contract whereby "neither party may seek to influence unilaterally the nominator's determination regarding the identity of an adjudicator..." and as such the appointment was null and void. It also argued that apparent bias arose when the Claimant's solicitor contacted the adjudicator prior to his appointment.

Mr Justice Akenhead held, referring to the principles set out in *BP Refinery (Westernpoint) Pty Ltd v Shire of*

Hastings (1979) ALJR 20, that the implied term cannot or should not be implied as there is nothing in Clause 9A.2 which expressly bars a party from making representation to the RIBA, and there had been no suggestion that the RIBA, an independent and respected institution, would be in breach of its own rules if it listened to and even acted upon representations made to it. The Judge, referring to *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWCA Civ 1418, also accepted that "it is at least not uncommon for parties seeking a nomination to suggest either a particular individual...".

In respect of the alleged apparent bias, Mr Justice Akenhead held that there was no apparent bias in this case:

"One must judge apparent bias objectively, by the standards of the "fair-minded and informed observer" referred to in *Porter v Magill*. The fact that individuals within Camden are subjectively concerned or distressed by what has happened is not in itself material. Parties to adjudications must avoid making mountains out of molehills even where something happens which is outside their immediate experience."

He concluded by giving judgment in favour of Makers and set out three

general observations:

“(1) It is better for all concerned if parties limit their unilateral contacts with adjudicators both before, during and after an adjudication...

(2) If any such contact, it is felt, has to be made, it is better if done in writing so that there is a full record of the communication.

(3) Nominating institutions might sensibly consider their rules as to nominations and as to whether they do or do not welcome or accept suggestions from one or more parties...”

\* \* \*

**Fleming Buildings Limited v Mrs Jane Forrest or Hives and Mr William Forrest**, [2008] CSOH 103, 15 July 2008, Lord Menzies

*Identity of the parties to a contract – Jurisdiction – Natural Justice*

In 2005, the Defender engaged the Pursuer to demolish their existing house in Bothwell, Scotland and to rebuild a new one on the same site. The Defenders’ chartered surveyor wrote to the Pursuer stating that they had been authorised by the client “KWF Holmes” to accept their tender for the works. However, throughout the course of the works, the client was generally referred to as “Mr & Mrs Forrest”. A dispute arose in relation to payment and the Pursuer commenced adjudication.

During the course of the adjudication proceedings, the Defender’s solicitors submitted that there was no contract between the parties and accordingly, the adjudicator did not have jurisdiction and should resign. The adjudicator held that the parties to the contract were the Pursuer and the Defenders, and accordingly found for the Pursuer in the sum of £112,598.75. The defenders made no payment to the pursuers in respect of these sums and proceedings were commenced in October 2007.

At a preliminary proof the court considered: (1) whether or not the Adjudicator’s decision is ultra vires; (2) whether or not the Defenders may plead retention and set-off on the basis of an unspecified claim for damages;

(3) the question “if no notice of intention to withhold was given, does that preclude the right of retention or set off by the defenders?”; and (4) whether the adjudicator’s decision should be reduced as being contrary to the rules of natural justice.

As both parties laid great importance on the question of credibility and reliability of various witnesses, the court considered evidence from four witnesses on behalf of the Pursuer and four on behalf of the Defenders in order to determine whether there was a contract and, if so, between whom.

Lord Menzies was more convinced by the Pursuer’s evidence and submissions, and accordingly held that the adjudicator had jurisdiction in this matter. Furthermore, as the F10 form sent to the Health & Safety Executive had scored out the provision for a planning supervision, and as such no one was appointed, this was concrete evidence that the clients were intended to be domestic clients. Finally, the Judge held that there was nothing to suggest that the adjudicator’s decision was contrary to the rules of natural justice and that there are no grounds on which the defenders may seek to retain or set-off sums against the adjudicator’s decision.

\* \* \*

**T&T Fabrications Limited, T&T Fabrications (A Firm) v Hubbard Architectural Metal Work Limited**, [2008] EWHC B7 (TCC)

*Contract in writing – Section 107 – key terms not agreed in writing – assignment – whether adjudication was the appropriate procedure*

The Claimant applied for summary judgment under Part 24 of the Civil Procedure Rules for immediate enforcement of an Adjudicator’s Decision. There was a contract between the Second Claimant and Hubbard, the Defendant. It related to atrium bridges, staircases and metalwork items for a development in London in 2003.

In September 2006, the assets and liabilities of T & T Fabrications were assigned to T & T Fabrications Limited. On 12 November, T & T Fabrications (the firm rather than the limited company) commenced adjudication.

It was not possible for the firm to be the beneficiary of any Decision made by the Adjudicator because the rights and remedies had been assigned to the limited company.

The main issue in this case related to whether there was a Contract in writing for the purpose of the Housing Grants, Construction and Regeneration Act 1996. The Contract was a simple one, and did not contain adjudication provisions. Nonetheless, it was a construction contract within the meaning of the Act and so the Referring Party in the Adjudication argued that the Adjudication Scheme had been implied pursuant to the Act. The Defendant argued that while there may be a Contract, there was not a Contract “in writing” within the meaning of Section 107 of the Act.

The Defendant argued that two terms had not been recorded in writing. The first related to the provision of drawings, and the second related to the timing of the works. The Claimants provided witness statements that denied these assertions.

HHJ Wilcox considered the evidence put forward by the witnesses. The evidence was conflicting, and in the Judge’s view it was not possible to resolve quickly in a summary judgment application. A full hearing would be required. There was credible evidence to suggest that the two material terms might have been agreed, but they were certainly not reduced to writing. He therefore held that there was an arguable case as to the jurisdiction of the Adjudicator as the contract may not have complied with Section 107. He therefore refused to enforce the Judgment.

Interestingly, he also noted that the claim that had been referred to adjudication was for a small amount. It had also taken 3 to 4 years for the claim to be brought before an Adjudicator. Even then it was unenforceable. The Judge stated that the costs of taking the matter to adjudication and then trying to enforce it were, in his view, “out of all proportion”. He went on to state that these final account matters could have been dealt with many years before while recollections of the witnesses were fresh, and that the matter should really have been dealt with in the County Court where issues about compliance of Section 107 would

have been irrelevant.

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**Cubitt Building & Interiors Ltd v Richardson Roofing (Industrial) Ltd** [2008] EWHC 1020,

TCC, 09 May 2008, HHJ Akenhead

*Contract terms – arbitration – adjudication – stay of proceedings*

Cubitt Building and Interiors Limited (“Cubitt”), as main contractor, engaged Richardson Roofing (Industrial) Limited (“Richardson”) as its roofing subcontractor.

This was a battle of the forms. The parties disagreed on which terms and conditions were incorporated into the Subcontract. Richardson argued that the Subcontract incorporated the DOM/1 terms and conditions whilst Cubitt argued that its own standard terms and conditions were incorporated (which did not provide for arbitration). Before the works commenced, the parties met and exchanged an invitation to tender, quotation, revised quotations, a letter purporting to be a letter of intent and a formal subcontract order.

Richardson commenced an arbitration relying on DOM/1 and Cubitt brought these proceedings seeking, primarily, a declaration that the Subcontract did not contain an arbitration agreement and incorporated Cubitt’s terms and conditions.

The Judge held that the Subcontract incorporated the DOM/1 provisions even though all the options within it had not been selected. In relation to the claim for a stay for an adjudication, as a matter of construction both of the DOM/1 contract conditions and the 1996 Act there was no pre-condition or indeed obligation requiring either party to refer any disputes to adjudication. There was simply a right on a party to proceed to adjudication at any time.

The Judge referred to the case of *DGT Steel v Cubitt*. The Judge held that this case was primarily concerned with what a Court would do when faced with a binding agreement to adjudicate. There was no such binding agreement in this case. In relation to a stay being

available, the Judge stated:

“Of course, it is open to any party to apply for relief to the requisite tribunal to enable it to exercise its right to adjudicate. I do not accept however that there must be a stay of any legitimately constituted proceedings, whether in arbitration or in court proceedings, where there is merely a discretionary right to adjudicate as opposed to a binding pre-conditional adjudication requirement. I suspect that what the learned judge and author really intended was that the proceedings in question, in terms of timetable and the like, should not be so conducted as to prevent a party from pursuing its contractual or statutory right to adjudicate. Thus, it may be appropriate in certain circumstances to build into the timetable in court or arbitration proceedings a 28-day period to enable one party to adjudicate if, for any good reason, it cannot sensibly pursue adjudication at the same time as its court or arbitration proceedings. Thus, having regard to the Overriding Objective, if the Court believes, following representations, that there is a measurably good prospect that adjudication will finally resolve the disputes or some of them the court may well build into its timetable for trial some time to enable a party to adjudicate. That however is different from a stay. A party who has started court or arbitration proceedings is entitled to have those proceedings resolved as reasonably expeditiously as the Court can achieve and justice demands; it should not be forced to have those proceedings delayed or stayed by it itself being forced to adjudicate when it does not want to exercise its right to do so.

...

However, the question of whether or not there should be a stay is not a matter which this Court can consider. Richardson effectively seeks to argue that any dispute between the parties as to whether or not there should be a stay is entirely a matter for the arbitrator. I agree; this aspect of the matter is part of the dispute and timetabling referred to arbitration. If this

matter proceeds in arbitration, the arbitrator is entitled to lay down a timetable as he or she thinks fit. The arbitrator may have regard to the contents of this judgment as to what is appropriate in terms of any timetabling to enable Cubitt to adjudicate if it really wishes to do so but he or she is not bound by the views which I have expressed.”

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**Avoncroft Construction Limited v Sharba Homes (CN) Limited** [2008] EWHC 933, TCC,

29 April 2008, HHJ Frances Kirkham

*Set-off – Entitlement to LADs – Validity of Withholding Notice – Stay of execution*

The claimant, Sharba Homes (CN) Ltd, engaged the defendant, Avoncroft Construction Ltd, in September 2006 on the JCT 1998 Private Without Quantities contract. When a dispute arose and the matter was referred to adjudication, the adjudicator awarded the claimant £56,380. The defendant refused to pay and the claimant applied for summary judgement. The defendant resisted the application on the ground that it was entitled to set off LADs against the sum awarded.

The claimant argued that as the contract lacked a provision for sectional completion, and the defendant took partial possession, there was no underlying entitlement to LADs as the clause failed according to the principle in *Bramall & Ogden v Sheffield City Council* (1983) 29 BLR 73. The defendant disagreed that this principle applied as unusual circumstances arose when the claimant barricaded a show room and prevented access when payment was not received. It was submitted that partial possession was frustrated by the actions of the claimant. HHJ Kirkham was not persuaded by this and held that ‘it is a question of law whether, partial possession having been obtained, LADs are payable at all’.

On the question as to whether the defendant was entitled to set off its claim for LADs against the sum due pursuant to the decision of the adjudicator, HHJ Kirkham, at paragraph 9, referred to the guidance Jackson J gave in *Balfour Beatty Construction Ltd v Serco Ltd*

[2004] EWHC 3336:653:

“(a) Where it follows logically from an adjudicator’s decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator’s decision...

(b) Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator’s decision, then the question whether the employer is entitled to set off ... will depend upon the terms of the contract and the circumstances of the case.”

When applying Jackson J’s guidelines, HHJ Kirkham held that the defendant was not entitled to set-off any LADs due. The adjudicator did not decide the question of entitlement to LADs, as it was not argued, and there was not an express provision in the contract entitling the defendant to deduct and withhold LADs.

HHJ Kirkham further considered, albeit obiter, the validity of a withholding notice. As the contract did not provide for service of a withholding notice against the decision of an adjudicator, she referred to s.111(3) of the HGCR Act 1996 and held that Part 2 of the Scheme would therefore apply. Accordingly, the notice had been served one day late. The defendant argued that it would have been impossible to serve the notice on time as the adjudicator’s decision was released exactly seven days before payment was due. They argued that court should recognise this impossibility and an allowance should be made. She rejected this submission and upheld the general approach of the courts which is to strictly comply with the time limits provided by the Act.

HHJ Kirkham further rejected the application for a stay and the application for an order that the defendant pay the judgment sum into court. She was not persuaded by the defendant’s argument that the claimant would probably be unable to repay the judgment sum and that there are special circumstances

within the meaning of RSC Order 47 Rule 1. Equally, applying the decision in *Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd* [2006] EWHC 741 (TCC), she rejected the defendant’s application for a stay as they wished to await the outcome of a second adjudication which was due in two week’s time.

\* \* \*

**Aedas Architects Limited v Skanska Construction UK Limited** [2008] CSOH 64, 17 April 2008, Lord McEwan

*Withholding notices – Set-off – Section 111 of the HGCR Act*

The dispute arose out of works done on contracts to renovate several schools in Midlothian. The Pursuer sought periodical payments but was met with refusal as the Defender claimed that it had large and on-going contra set-offs which were much more than what the Claimant was pursuing.

The Pursuer argued that where monies are withheld, the notice (“counter-notice”) must specify an amount, grounds and then an attribution to each ground in order to be effective under section 111 of the Housing Grants, Construction and Regeneration Act 1996 (“the Act”). He claimed that though the Defender had issued counter-notices, none of them were effective. However, the Defender argued that the counter-notices should not be subjected to a fine, textual analysis. They were not addressed to lawyers, but rather contract managers and others who were aware of what was happening on site in an ongoing contract concerning several places. The Defender claimed that the grounds and amounts had been specified and that was therefore enough.

The issue before Lord McEwan was whether or not the counter-notices specified in sufficient detail, the grounds for set-off. Though the *Melville Dundas* case was referred to, he held that it was not relevant for present purposes. Lord McEwan did however accept that the *Melville Dundas* case does “stress the need for clarity when interim payments are withheld. That is set against the background of the machinery of adjudication. Section 111 of the Act is also intended to strike at “set-off abuse”

and promote confidence in “cash flow”. He stated that both the *Melville Dundas* case and the *Reinwood Ltd v Brown & Sons Ltd* case reinforce that on interim payments, parties should know in advance where they stand.

Lord McEwan appreciated the problem which is presented to both sides: the Pursuer wished the clarity demanded by the Act, and the Defender, who say that they have a substantial and on-going set-off, may not want to part with any money. “In any commercial matter there is always the risk of insolvency or delays and cash flow difficulties.”

Given that this was an issue of summary decree, the judge applied the test formulated by the House of Lords in *Henderson v Nova Scotia Limited* 2006 SC (HL) 85, and was unable to say that the defence was bound to fail. He did not think that the matter could be properly disposed of, only on the evidence of counter-notices. Issues of fact could arise and this would allow evidence of meetings and conversations to explain the letters and the events surrounding the notices. In any event, it was held that the documents themselves were effective under section 111. Sufficient attribution was made against five of the enumerated grounds. That in itself was enough to find that it cannot be said that the defence was bound to fail.

\* \* \*

**BSF Consulting Engineers Ltd v MacDonald Crosbie** [2008] All ER (D) 171 (Apr),

14 April 2008, Judge David Wilcox

*Contract in writing – s.15 Supply of Goods and Services Act 1982 – s.107 HGCR Act*

The Defendant contractor engaged the Claimant, a firm of civil and structural engineers, and a dispute arose as to the Claimant’s entitlement to be paid for their services. The matter was referred to adjudication and the adjudicator found in favour of the Claimant. When the Defendant failed to pay, the Claimant applied for summary judgment under CPR Part 24.

The Defendant argued that the Claimant’s fees had not been agreed and accordingly there was no contract

in writing for the purposes of s.107 of the HGCRA. Therefore, the statutory scheme for adjudication could not be implied into the contract. The Claimant relied on s.15 of the Supply of Goods and Services Act 1982 in that a reasonable charge would be paid for the services, and as such the requirements of s.107 had been complied with.

Judge Wilcox held that:

“Whilst there might be circumstances in which a term might be implied under s.15 of the 1982 Act as to the payment of a reasonable charge for services provided, those circumstances did not arise in cases such as the present where it was sought to rely on the statutory adjudication scheme being implied into the contract, rather than adjudication provisions in the contract itself.”

In this case, there was no written evidence as to any agreed scope of works or charges so as to render the contract compliant with s.107. Accordingly, it followed that it was arguable that the adjudicator did not have jurisdiction. Summary judgment was therefore not granted and the Claimant was given leave to defend.

\* \* \*

**Reinwood Limited v L Brown & Sons Limited** [2008] UKHL 12, 20 February 2008, House of Lords, Lord Hope of Craighead, Lord Scott of Foscote, Lord Walker of Gestingthorpe, Lord Brown of Eaton-under Heywood, Lord Neuberger of Abbotsbury

*Contract – Withholding Notices – Interim Certificates – Extensions of Time*

This was an appeal by a contractor, L Brown & Sons (“Brown”) against a Court of Appeal decision which had held that Brown had not been entitled to determine a contract (JCT Standard

Form 1998 edition) between it and the respondent employer, Reinwood Limited (“Reinwood”), on the basis that Reinwood had unfairly withheld a sum which was due under the contract. There was a specified a completion date under the contract as well as provisions for extensions of time (“EOT”), damages for non-completion and the right of the contractor to determine the contract on certain specified defaults by the employer

Brown applied for an EOT in December 2005. The architect issued a certificate of non-completion and an interim certificate for payment in which the final date for payment was 26 January 2006. On 17 January, Reinwood issued a withholding notice based on the LADs resulting from the issue of the Certificate of Non-Completion and paid the remainder of the certificate in 20 January.

On 23 January the architect issued an EOT. The following day Brown ordered Reinwood to pay the outstanding balance of the payment certificate by the final date for payment. Reinwood did not pay by the due date and citing this as a specified default under the contract Brown determined its employment. Brown submitted that Reinwood was entitled to rely on the Certificate of Non-Completion at the time it served the Withholding Notice. However, Reinwood had lost that entitlement by the final date for payment since it could no longer rely on the Certificate of Non-Completion as a basis for withholding payment from Brown.

The Court of Appeal held that Reinwood’s right to LADs crystallized at the time of the Withholding Notice thus upholding its right to levy LADs. The effect of the EOT meant that the balance of the damages properly due to Brown should be paid in a reasonable time though not by the final date for payment. Brown appealed to the

House of Lords.

The House of Lords dismissed the appeal.

Reinwood as employer, was entitled to deduct LADs specified in the Notice of Non-Completion from the amount stated to be due in the Interim Certificate. The withholding notice was effective when it was given because the Architect had not yet issued a certificate fixing a new completion date. The EOT granted by the Architect on 23 January could not retrospectively alter the fact that the employer had, on 20 January, paid the sum then properly payable by it. But an employer in this situation is obliged to pay or repay any LADs that were recovered, allowed or paid after he has been informed by the Architect of the fixing of a new completion date. This must be done within a reasonable time after receipt of that information.

If the EOT had been granted before 11 January, Reinwood would not have been entitled to deduct the LADs. It follows that where the necessary preconditions are satisfied and an employer has served a withholding notice, both parties are entitled to proceed on the basis that payment will, and can properly, be made in accordance with that notice. This was reinforced by the fact that part of the purpose of the notices required by Sections 110 and 111 was to enable parties to a construction contract to know where they stand.

\* \* \*

**Nicholas Gould** is the case note editor for the Adjudication Society. Please assist him by forwarding judgments to him for inclusion in future Newsletters. Credit will be given to the source of any judgments that are published as case notes. Nicholas can be contacted on +44(0)20 7421 1986 or [ngould@fenwickelliott.co.uk](mailto:ngould@fenwickelliott.co.uk).

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## London region

The first two of the Adjudication Workshops organised by the London Region have worked excellently well and have been very well received – thanks to all involved in the organisation and delivery of them. Workshop 3 (details below) will cover the Decision with the emphasis being on the Adjudicator.

The Workshops explore best practice for adjudicators and parties alike, including the content and drafting of Referrals, Responses and Decisions.

Attendees will be sent a scenario (professional negligence) and any other relevant material prior to the Workshop so that they can acquaint themselves with the dispute. The Workshop will cover a number of issues proposed by the Workshop leaders. Each issue will be discussed in groups, followed by a general discussion where the Workshop leaders will give their views as well.

Workshop	Leaders	Date	Location
3	Jeremy Glover of Fenwick Elliott LLP and Liam Holder of EC Harris LLP	Thursday 18th September 2008, 5.30pm for 6pm	EC Harris Head Office, ECHQ, Regent Quarter, 34 York Way, London, N1 9AB

The Workshop will be followed by refreshments kindly provided by the host.

The Workshop is free for members and guests, but places must be booked in advance by email to [adjudicationsociety@mcms.co.uk](mailto:adjudicationsociety@mcms.co.uk)

## Regional Events

Booking forms for all events can be found on the website ([www.adjudication.org](http://www.adjudication.org))

### London region

Thursday 18 September 2008 - 5.30 for 6pm

London

Adjudication Workshop 3

Lead by Jeremy Glover of Fenwick Elliott LLP and Liam Holder of EC Harris LLP

Venue: EC Harris Head Office, ECHQ, Regent Quarter, 34 York Way, London, N1 9AB

#### ELECTION ANNOUNCEMENT

The membership of the Executive Committee for the London & South East Region 2008-2009 is required to be elected at the 2008 Annual General Meeting of the London & South East Region. The AGM is to take place prior to the 3rd Adjudication Workshop on Thursday 18 September 2008 at EC Harris Head Office, ECHQ, Regent Quarter, 34 York Way, London, N1 9AB. Full details of the process and timetable are available on the website ([www.adjudication.org](http://www.adjudication.org)).

### South West region

Wednesday 10 September 2008 - 5.30 for 6pm

Bristol

The tricky bits in adjudication and the tricky bits when adjudicating

Speaker - Tony Bingham

Venue: Clarke Willmott, 1 Georges Square, Bath Street, Bristol , BS1 6BA

### Midland region

Tuesday 16 September 2008 - 6 for 6.30pm

Birmingham

The Proposed Amendments to the Construction Act: Problem or Solution?

Speakers - Tony Bingham, John Riches, Tim Willis and others to be confirmed

Venue: Austin Court, 80 Cambridge Street, Birmingham, B1 2NP

## Notices

### The Adjudication Society

Proudly and with malice aforethought announces its

#### Seventh Annual Conference

### The Environmentally Friendly Conference???

To be held at

#### The Radisson SAS Portman Hotel

Portman Square, London W1H 7BG

(Nearest Tube Station: Marble Arch)

**On Thursday 13th November 2008**

**Commencing at 0900 hours**

Registration from 0830 hours

**Speakers will include: Mr Justice Akenhead QC, John Redmond,  
Mark Entwistle, Brian Rogan and Bob Davis.**

*Returning by popular request Revolving Workshops featuring:*

Lucy Garrett	Lindy Patterson	Eric Mouzer
Hamish Lal	Liam Holder	Neville Tait
Andrew Milner	Peter Aeberli	Guy Cottam
Victoria Russell	Shona Frame	Chris Dancaster
Nick Henderson	Delia Dumaresq	Steve Jackson

**The following charge will be made for this event:**

*If Booked on or before 31st August 2008:*

*Non-members: £200.00*

*Members: £150.00*

*If booked on or after 1st September 2008:*

*Non-members: £230.00*

*Members: £180.00*

**Bookings may be made through the Website [www.adjudication.org](http://www.adjudication.org) where payments can also be made or by post using the attached form.**

## Schedule for Adjudication Society Conference 2008

### The Environmentally Friendly Conference??

#### (The effective management of the Adjudication process)

Morning Session			
Topic	Speaker	Timing	Room Location
Registration and Coffee		08:30 – 0900	Ballroom 1
Introduction and Administration	Martin Potter	09:00 – 09:05	Ballroom 3/4
Welcome and Introduction of Key Note speaker	John Tackaberry QC	09:05-09:10	Ballroom 3/4
Key Note address	Mr Justice Akenhead QC	09:10-09:40	Ballroom 3/4
Chairman	John Tackaberry QC		
Questions		09:40-09:50	Ballroom 3/4
Solar Energy (Adjudicators)	Mark Entwistle	09:50-10:20	Ballroom 3/4
Chairman	John Tackaberry QC		
Questions		10:20-10:30	Ballroom 3/4
Coffee		10:30- 10:45	Ballroom 1
<b>The Wind Farm</b> (Lawyers)	<b>John Redmond</b>	10:45-11:15	Ballroom 3/4
Chairman	John Tackaberry QC		
Questions		11:15-11:30	Ballroom 3/4
Biodegradable Fuels (Users)	Brian Rogan	11.30-12:00	Ballroom 3/4
Chairman	John Tackaberry QC		
Questions		1200-1215	Ballroom 3/4
Annual General Meeting	Bob Davis	12:15-12:45	Ballroom 3/4
<i>MEMBERS WHO ARE NOT ATTENDING THE CONFERENCE ARE WARMLY INVITED TO THE ANNUAL GENERAL MEETING</i>			
Lunch		12:45-14:00	Ballroom 1/2

Afternoon Session			
Chairman:	Martin Potter		
Wave Power			
Workshops (30 minutes each)			
Jurisdictional Challenges	Lucy Garrett	Lindy Patterson	Eric Mouzer
Bullying	Hamish Lal	Liam Holder	Neville Tait
Late Referrals	Andrew Milner	Peter Aeberli	Guy Cottam
Costs	Victoria Russell	Shona Frame	Chris Dancaster
Extensions of time for Decisions	Nick Henderson	Delia Dumaresq	Steve Jackson
Workshop Session 1		14:00 - 15:30	Ballroom 3/4
Tea		15:30 -15:45	Ballroom 1
Workshop Session 2		15:45 -17:15	Ballroom 3/4

Followed by drinks until 18:30,

**The Conference is recommended for 5.5 hours CPD for the RICS, CIArb and ICE. The Society is accredited by the Bar Council and the Law Society, the Conference qualifies for 5.5 hours CPD. The Society's Law Society's accreditation number is CVM/ADSO.**

Please note that as a courtesy to the speakers all mobile phones and pages must be switched off during these sessions. Offenders will be personally "invited" by the Chairman of the session to make a contribution of £10.00 for each interruption to CRASH.

**Centre of Construction Law, King's College London  
and  
Society of Construction Law**

**AMENDING THE CONSTRUCTION ACT**

Thursday 11 September 2008 from 2:00 to 6:15 pm  
Arthur Lucas Lecture Theatre, Strand Campus

The Government has published a draft Construction Contracts Bill to amend key provisions of the *Housing Grants, Construction and Regeneration Act 1996, Part II*, and intends to put the Bill before Parliament before the end of this year. The Bill includes a major re-write of the payment provisions of the Act, as well as reforms on adjudication costs, conditional payment clauses and writing.

BERR has invited the industry to comment on the draft Bill. This major event, organised by the Centre of Construction Law and the Society of Construction Law, will bring together leading experts to describe and critically analyse the proposals. Contributions will be encouraged from all participants, as the basis for a submission to BERR.



Speakers include: Professor Phillip Capper, Julia Court, Nicholas Gould, Rudi Klein, Chris Parker, Frances Paterson, Marion Rich, and Graham Watts, along with representatives of Government and of all sectors of the industry.

Following the conference, participants are invited to join the hosts and speakers for cocktails.

Special thanks to **Merrill Legal Solutions** for kindly donating a transcript of the afternoon's discussions.

# The Adjudication Society

Seventh Annual Conference

Booking Form

To:

Edward Quigg,  
Quigg Golden Limited,  
1-3 Brunswick Street,  
Belfast BT2 7GE

Name of Firm: .....

Names of Delegates: .....

.....  
.....  
.....

Any special dietary requirements:

**I/We wish to book.....places at the Adjudication Society’s Seventh Annual Conference and enclose a cheque in the sum of £..... made payable to “The Adjudication Society”.**

N.B. The Conference rate per delegate:

If Booked on or before 31st August 2008:

Non-members: £200.00; Members: £150.00

If booked on or after 1st September 2008:

Non-members: £230.00; Members: £180.00

*Receipts will only be issued if this booking form is accompanied by a stamped self-addressed envelope.*

**Refunds Policy:**

**Cancellation received by the Society more than 28 days prior to Conference Date – 100%;**

**Cancellation received by the Society 14-28 days prior to Conference Date – 50% plus fee conference pack;**

**Cancellation received by the Society less than 14 days before Conference Date – 0% plus free conference pack.**

**Please note that the Society is not registered for VAT purposes.**



**AMENDING THE CONSTRUCTION ACT**

Thursday 11 September 2008 from 2:00 to 6:15 pm  
Arthur Lucas Lecture Theatre, Strand Campus  
BOOKING: please print and use black ink

Your name .....  
Organisation .....

Address .....  
.....

E-mail ..... Phone .....

*REGISTRATION FEE OF £55 INCLUDES ATTENDANCE, DOCUMENTATION  
and a RECEPTION FOLLOWING THE SEMINAR.*

I enclose a cheque payable to Society of Construction Law.

I prefer to pay by VISA/MASTERCARD/ MAESTRO

Card number .....|.....|.....|.....

3-digit security code (on the signature strip on your card) .....

Holder's title and name (as on the card) .....

Expiry date .....month/.....year (Maestro only) Issue number .....

Please send me a receipt (no VAT is charged)

Signature .....

For further information, including our policy on cancellations and substitutions by  
conference delegates, phone Frances Whitehead (+44)(0) 1708 731476.

If paying by credit or debit card, complete this form and fax it to 01708 731476; if  
by cheque, mail it with your cheque to Frances Whitehead, SCL Administration, 114