



Fenwick Elliott

## ADJUDICATION AND ITS DEVELOPMENT IN THE UNITED KINGDOM

Victoria Russell

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The Housing Grants, Construction and Regeneration Act 1996

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### Introduction

The Housing Grants, Construction and Regeneration Act 1996 (“HGCRA”) became law on 1 May 1998, giving new life to a dying breed of construction industry trouble shooter, the adjudicator.

Adjudication is a process of dispute resolution often referred to as “a quick fix” or “rough justice”. It is not the invention of the construction industry; it is provided for by statute in a number of areas and is a technique which is also used in other non-statutory contexts. The common feature of all adjudication processes is that they endeavour, in one way or another, to resolve some sort of dispute or question by means of something other than litigation or arbitration.

Adjudication clauses have been present in standard form English construction sub-contracts for some 40 years, principally enabling sub-contractors to challenge, within strict time limits, the amounts that the main contractor had set-off or deducted from an interim payment that was due to be paid to the sub-contractor. The sub-contractor would refer the dispute to an adjudicator who was normally named in the sub-contract.

The important feature of all these adjudication provisions was that they were limited to disputes about the main contractor exercising set-off against sums otherwise due to the sub-contractor and were not concerned with any other issues such as valuation or certification.

Part II of the HGCRA implements certain recommendations set out in “Constructing the Team”, a joint industry and government sponsored study by Sir Michael Latham published in 1994. Sir Michael made a series of proposals relating to the contractual framework in which the UK construction industry operates, including:-

1. That a system of adjudication should be included in all standard form contracts, underpinned by legislation;
2. There should be no restrictions as to the issues capable of being referred to the adjudicator;
3. The award of the adjudicator should be implemented immediately and payments to stakeholders should only be permitted if both parties agreed or if directed by the adjudicator;
4. Appeals against the decision of the adjudicator should only be allowed after practical completion and should not delay implementation of the decision.

The HGCRA embodies some, but not all, of Sir Michael’s recommendations. It includes provisions for adjudication in construction contracts; the government has also produced a scheme of fallback provisions for adjudication where the contract itself is defective in some way, i.e. does not comply with the requirements of the legislation, or where the contract expressly provides that the Government scheme will apply. This is known as the Scheme for Construction Contracts (England and Wales) Regulations 1998 (“the Scheme”). Similar schemes operate in Scotland and Northern Ireland.

When the adjudication provisions first came to be debated in Parliament, there was a great deal of uncertainty whether adjudication would, in practice, be any different from arbitration. Some clarity was introduced into the debate by Lord Ackner (a former Law Lord) in the House of Lords, who described adjudication as follows:-

*"What I have always understood to be required by the adjudication process was a quick, enforceable interim decision which lasted until practical completion when, if not acceptable, it would be the subject matter of arbitration or litigation. That was a highly satisfactory process. It came under the rubric of "pay now, argue later"."*

Adjudication was to be wholly different from arbitration. It was to be an interim procedure governing the position between the parties until such time as they had either settled a dispute or received an arbitral award or judgment, following referral of the dispute to arbitration or the courts. It was to be conducted within a defined and tight timescale with costs kept to a minimum. This is what the industry and its clients wanted - a rare example of unity.

S.108 HGCRA was, in legislative terms, an experiment, as there was no statutory precedent for adjudication in commercial disputes.

S.108 provides as follows:-

*"(1) A party to a construction contract has a 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 seven 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;*

*(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 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 employer or agent of the adjudicator is similarly protected from liability.*
- (5) If the contract does not comply with the requirements of sub-sections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply."*

**Is there a "construction contract"?**

**Is there a contract for "construction operations"?**

The statutory adjudication provisions will only apply if there exists a "construction contract", which involves a consideration of Ss.104 and 105 HGCRA. In addition, it is necessary to look at any express exception created by S.106 and/or by any statutory instrument issued under the Act.

S.104 provides that:-

- " (1) In this Part a "construction contract" means an agreement with a person for any of the following:-*
  - (a) The carrying out of construction operations;*
  - (b) Arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;*
  - (c) Providing his own labour, or the labour of others, for the carrying out of construction operations.*
- (2) References in this Part to a construction contract include an agreement -*
  - (a) to do architectural, design or surveying work, or*
  - (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape,*

*in relation to construction operations."*

The professional appointment of architects, engineers and quantity surveyors are therefore all included, as well as normal building contracts, sub-contracts, management contracts and construction management agreements. Contracts of employment of individuals are not caught but it is possible that some performance bonds could be included.

A statutory instrument has now excluded Private Finance Initiative contracts, finance agreements, development agreements and agreements made pursuant to statute, for example to adopt a road.

The "construction operations" referred to in S.104 must be carried out in England, Wales or Scotland; "construction operations" themselves are defined in S.105 as including construction, alteration, repair, maintenance, extension and demolition of buildings or structures including civil work such as roads, docks and harbours, reservoirs and sewers; they also include the installation of heating, lighting, air conditioning, ventilation, power or water supply, drainage, fire protection and security systems, site clearance, excavation, laying of foundations, erection of scaffolding, landscaping, painting or decorating.

The second part of the Section sets out what is not included, such as the extraction of oil, gas or minerals and the manufacture of building or engineering components (except under a contract which also provides for their installation).

S.106 excludes from the effects of HGCRAs contracts with a residential occupier. It will not, however, exclude sub-contracts between sub-contractors and contractors working for a residential occupier. "Construction operations" is thus given an extensive meaning.

#### The meaning of an "agreement in writing"

S.107(1) states that the provisions of Part II of the HGCRAs:

*"apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing".*

S.107(2) provides that:-

*"There is an agreement in writing -*

- (a) if the agreement is made in writing (whether or not it is signed by the parties),*
- (b) if the agreement is made by exchange of communications in writing, or*
- (c) if the agreement is evidenced in writing."*

This definition is further widened by sub-sections (3) to (6), which provide as follows:-

S.107(3) *"Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing."*

S.107(4) *"An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement."*

S.107(5) *"An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in*

*writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged."*

S.107(6) *"References in this Part to anything being written or in writing include its being recorded by any means."*

Sub-sections (1) to (4) were considered in detail in the case of *RJT Consulting Engineers Ltd v. DM Engineering (Northern Ireland) Limited*.

RJT was a firm of consulting engineers who had been retained by The Holiday Inn to provide the outline design for mechanical and electrical works to be carried out as part of a refurbishment of a hotel.

DM was the mechanical and electrical sub-contractor.

In April 2000, DM asked RJT at a meeting whether RJT would complete the design of some of the mechanical engineering works and RJT agreed to do so. The agreement was made orally.

DM subsequently became dissatisfied with RJT; they claimed that RJT were both negligent and in breach of contract on a number of grounds, including failure to design the works adequately and within the time allotted. DM claimed £858,000 as compensation for non-payment of sums due and its liability to the main contractor for direct loss and expense due to disruption to the works. DM referred the dispute to an adjudicator but RJT argued that as the agreement was not in writing it was not covered by the HGCRA.

The adjudicator decided that the agreement was sufficiently evidenced by the drawing schedules and by a letter of 31 January 2001 in which DM asked RJT: *"Can you provide us with your professional indemnity insurance...?"*.

RJT then sought a declaration from the Court that the agreement was not in writing.

The judge looked at the written evidence that existed to determine whether or not it was capable of supporting the existence of an agreement between the parties. He took into consideration a fee account from RJT to DM with a number of invoices setting out the nature of the work, the names of the client and the identity of the place of work, together with meeting minutes identifying the parties and the nature of the work which, at the particular time when the minutes were taken, needed to be carried out.

The judge applied what he considered to be a purposive approach, holding that it was not necessary for all the terms to be evidenced in writing where there was evidence in writing as to the existence of the agreement. He refused the declaration. RJT appealed to the Court of Appeal.

Lord Justice Ward considered in detail the scope of S.107. He said:-

*"Writing is important because it provides certainty. Certainty is all the more important when adjudication is envisaged to have to take place under a demanding timetable. The adjudicator has to start with some certainty as to what the terms of the contract are.*

*S.107(2) gives three categories where the agreement is to be treated in writing. The first is where the agreement, whether or not it is signed by the parties, is made in writing. That must mean where the agreement is contained in a written document which stands as a record of the agreement and all that was contained in the agreement. The second category, an exchange of communications in writing, likewise is capable of containing all that needs to be known about the agreement. One is therefore led to believe by what used to be known as the eiusdem generis rule that the third category will be to the same effect namely that the evidence in writing is evidence of the whole agreement.*

*Sub-section (3) is consistent with that view. Where the parties agree by reference to terms which are in writing, the legislature is envisaging that all of the material terms are in writing and that the oral agreement refers to that written record.*

*Sub-section (4) allows an agreement to be evidenced in writing if it (the agreement) is recorded by one of the parties or by a third party with the authority of the parties to the agreement. What is there contemplated is, thus, a record (which by sub-section (6) can be in writing or a record by any means) of everything which has been said. Again it is a record of the whole agreement...*

*...the written record of the agreement is the foundation from which a dispute may spring but the least the adjudicator has to be certain about is the terms of the agreement which is giving rise to the dispute."*

Lord Justice Ward held that the judge had been wrong to conclude that as a matter of law it was sufficient that there was evidence in writing capable of supporting merely the existence of an agreement or its substance, being the parties to it, the nature of the work and the price. He said:-

*"Even if that were all that was required, the documents relied on in this case are wholly insufficient...*

*...all of this is evidence of the existence of the contract, some evidence of the consideration and some indication that the nature of the work was design and advisory. But it is not evidence of the terms of the oral agreement that was made between the two gentlemen back in April 2000. It is certainly not evidence of the terms of the contract on which the respondents rely in the adjudication...*

*On the point of construction of S.107, what has to be evidenced in writing is, literally, the agreement, which means all of it, not part of it. A record of the agreement also suggests the complete agreement, not a partial one."*

Lord Justice Robert Walker said:-

*"It is the terms, and not merely the existence, of a construction contract which must be evidenced in writing. The judge aimed at a purposive approach but he did not in my view correctly identify the purpose of S.107. No doubt the general purpose of Part II of the 1996 Act is to facilitate and encourage the process of adjudication. But it is intended to be a swift and summary process, as is apparent from the time limits in S.108(2). Parliament definitely decided...that it was inappropriate for an adjudicator to have to deal with the disputes which often arise as to the terms of an oral contract."*

Lord Justice Auld added:-

*"Although clarity of agreement is a necessary adjunct of a statutory scheme for speedy interim adjudication, comprehensiveness for its own sake may not be. What is important is that the terms of the agreement material to the issue or issues giving rise to the reference [to adjudication] should be clearly recorded in writing, not that every term, however trivial or unrelated to those issues, should be expressly recorded or incorporated by reference. For example, it would be absurd if a prolongation issue arising out of a written contract were to be denied a reference to adjudication for want of sufficient written specification or scheduling of matters wholly unrelated to the stage or nature of the work giving rise to the reference..."*

*...There will be many cases where there can be no sensible challenge to the adequacy of the documentation of the contractual terms bearing on the issue for adjudication, or as to the ready implication of terms common in construction contracts".*

The Court of Appeal thus decided that the construction contract made orally between the parties was not an "agreement in writing" for the purposes of S.107 and the adjudicator had therefore not had jurisdiction to deal with the dispute.

The Court of Appeal's conclusions are of some concern. As Lord Justice Ward acknowledged, it would be *"a pity if too much "jurisdictional wrangling" were to limit the opportunities for expeditious adjudication"*. He hoped that *"adjudicators will be robust in excluding the trivial from the ambit of the agreement and the matter must be entrusted to their common sense"*.

In the case of *Debeck Ductwork Installation Limited v. T & E Engineering Limited*, HHJ Kirkham had to deal with the meaning of S.107(2)(c); in her judgment, she said that she found Lord Justice Ward's judgment in *RJT* *"extremely helpful in giving guidance as to the approach that the courts should take when considering this section of the Act."*

In the Debeck case the claimant argued that there was an agreement which was evidenced in writing. The claimant relied upon a fax which was sent by a director of the claimant company to the defendant. The claimant submitted that the fax recorded all the relevant terms of the agreement and was therefore sufficient to constitute written evidence of the agreement.

HHJ Kirkham rejected that submission on two counts. The first was that the fax did not in fact set out or record all of those matters on which the claimant itself sought to rely in pursuing its



claim. She said that the fax did not explain "*even in summary terms the scope of the works to be undertaken*". For example, it was not clear whether or not materials were to be supplied, etc.

A director of the defendant made a statement saying that there were further terms of the contract between the parties, upon which the defendant relied. They included references to the specification of the standards to which work was to be carried out, matters as to quality and issues as to timing during which work was to be undertaken.

The judge said that even if the fax from the claimant had contained all terms relevant to the claimant's claim (which she did not accept was the case) "*it seems to me to be quite wrong that a claimant should be entitled to rely on a document which it said contained all of the relevant terms and to ignore and invite the court completely to disregard the additional terms which the defendant says were agreed orally.*"

*It is clear from the judgments in the RJT case that the writing must evidence the whole of the agreement. S.107 does not permit the claimants to identify those parts of the agreement on which he relies and ignore the matters which the defendant says were agreed between the parties."*

In answer to the rhetorical question posed by the claimant as to what a claimant should do in these circumstances if it wished to obtain the benefit of the protection of the Act, the judge commented:-

*"It seems to me that the answers are quite straightforward. A contractor can require a contract to be reduced to writing. A contractor can at some later stage clarify the terms which he believes have been orally agreed and invite the other contracting party to agree that those are indeed the agreed terms of the agreement. The door is by no means shut to a contractor in these circumstances."*

The next case was *Carillion Construction Limited v. Devonport Royal Dockyard Limited* (referred to as *DML*).

HHJ Bowsher QC agreed that the decision by the Court of Appeal in *RJT Consulting v. DM Engineering* was authority for the following propositions, per Ward and Walker LJJ:-

- (a) A contract is not evidenced in writing merely because there are documents which indicate the existence of a contract;
- (b) All the terms of the oral agreement must be evidenced in writing;  
and per Auld LJJ
- (c) The material terms of the agreement must be evidenced in writing.

### What is "a dispute"?

S.108(1) of the HGCRA states:-

*"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."*

S.108 refers to the singular - a dispute. Paragraph 8(1) in the Scheme states:-

*"The adjudicator may, with the consent of all the parties ....adjudicate at the same time on more than one dispute under the same contract."*

The Interpretation Act 1978 provides that words in legislation expressed in the singular should also include the plural unless a contrary intention appears. Paragraph 8 above clearly suggests that only one dispute may be referred to the adjudicator unless there is consent from the parties for more than one dispute to be referred. It is submitted that reference to "a dispute" in S.108(1) of the Act is also confined to the singular. The speed and nature of adjudication would not permit the referral of numerous disputes to adjudication.

In *Fastrack Contractors Ltd v. Morrison Construction Ltd*, however, HHJ Thornton QC appeared to encourage the possibility of all manner of disputes being referred to adjudication. In his view a dispute would embrace *"whatever claims, heads of claim, issues, contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference."*

In *Barr Ltd v. Law Mining Ltd*, a Scottish case, Barr Ltd had brought enforcement proceedings in respect of two separate adjudications arising under separate contracts relating to road construction and improvement works. In one of the adjudications Barr had referred two issues that included amounts due under two interim certificates and an issue as to extensions of time. Law Mining argued that this was an attempt to refer more than one dispute to adjudication which was not permitted under the Scheme. Similar issues were raised in respect of the other adjudication.

Lord MacFadyen had this to say:-

*"The question in my opinion therefore comes to be whether, despite the defenders' contention that what was referred to the adjudicator was more than one dispute, the adjudicator was correct in holding, or was at least entitled to hold that, all the issues referred to him constituted a single dispute. Whether what is in issue is a dispute or several disputes is, in my view, a matter of circumstance which the adjudicator must, in the first instance, decide for himself if the point is raised. It is very easy to subdivide and analyse what is in substance one dispute into its component parts and to label each part a separate dispute. That is not, however, the correct approach. A realistic view must, in my view, be taken."*

Lord MacFadyen was not comfortable with Judge Thornton's analysis of what constituted a dispute.

*"If everything currently in dispute between the parties forms a single dispute, paragraph 8(1) is severely restricted in scope or perhaps even deprived of content."*

In the event Lord MacFadyen held that the adjudicator had not fallen into error in regarding all the matters referred to him as giving rise to a single dispute as to what was (at the time of the reference) due under the contract.

In *David McLean Housing Contractors Ltd v. Swansea Housing Association Ltd* the reference to the adjudicator embraced a number of issues including loss and expense, an extension of time, valuation of variations, retention release and expenditure of provisional sums. It was claimed that all these matters related to one application for payment. It was argued that the adjudicator had become involved with more than one dispute but the court held that there was only one dispute. It was concerned with the payment that ought to have been made under the particular application.

At what point does a dispute arise or crystallise? Not surprisingly, this issue has generated a fair amount of litigation even before adjudication was thought of. Here is Lord Denning MR in *Monmouthshire County Council v. Costelloe and Kemple Ltd*:-

*"The first point is this: was there any dispute or difference arising between the contractors and the engineer? It is accepted that, in order that a dispute or difference can arise on this contract, there must in the first place be a claim by the contractors. Until that claim is rejected you cannot say that there is a dispute or difference. There must be a claim and a rejection in order to constitute a dispute or difference."*

Thirty years later HHJ Gilliland QC in *Cruden Construction Ltd v. Commission for the New Towns* had to consider whether a dispute had arisen within the context of arbitration:-

*'The words "dispute or difference" are ordinary English words and unless some binding rule of construction has been established in relation to the construction of those words in cl. 35 of the JCT contract I am of the opinion that the words should be given their ordinary everyday meaning.'*

As far as adjudication is concerned HHJ Thornton QC in *Fastrack Contractors Ltd v. Morrison Construction Ltd*:-

*"A dispute can only arise once the subject-matter of the claim, issue or other matter has been brought to the attention of the opposing party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion."*

It is helpful to refer to other 'soundbites' from Judge Thornton's judgment in *Fastrack*:

*“The term includes any claim which the opposing party has been notified of which that party has refused to admit or has not paid, whether or not there is any answer to that claim in fact or in law.”*

*“The dispute could only arise when the claim is rejected in clear language. Obvious refusal to consider the claim or to answer it can, however, constitute such a rejection...”*

The “package” of evidence and arguments that are used to underpin a dispute will have changed or evolved through negotiations and discussions before the dispute crystallises. What happens if the claim has remained - essentially - the same but the underlying arguments and evidence have changed? This issue arose in *Edmund Nuttall Ltd v. R&J Carter Ltd*. Nuttall was a sub-contractor to Carter. Nuttall had submitted a claim for an extension of time for completion of the sub-contract works together with a claim for payment of loss and expense in respect of delays allegedly caused by Carter. A claim document was drawn up by Nuttall and submitted to Carter in May 2001. The claim was rejected by Carter which argued that it had claims against Nuttall. In December 2001 Nuttall notified Carter of its intention to adjudicate followed by referral of the claim adjudication.

The referral notice was accompanied by a newly prepared claim document. The claim for an extension of time of 235 days was the same as that in the earlier May claim. However, the justification for the claim was entirely different. For example, the May claim listed certain occurrences which were indicated as having no significant delaying effect. On the other hand, the December claim regarded the same occurrences as significantly causing the delays complained about. Also, some of the matters in the May claim that were being alleged as a cause of delay were not regarded as significant in the December claim. Similarly, the sums claimed in the loss and expense claim were different.

Counsel for Nuttall argued that a “dispute” should be identified by reference, at least principally, to what was being claimed; the extension of time sought by Nuttall had always been 235 days. It was irrelevant that the facts and arguments advanced in the December claim differed significantly from those relied upon in support of the May claim. Again, it did not matter that some elements of the loss and expense claim had been reformulated resulting in a disparity in the amounts sought in the May and December claims; the overall amount now sought was less than the May claim.

HHJ Richard Seymour QC did not agree. The notice of adjudication was concerned with the May claim. The package of arguments relied upon for that claim did not comprehend any of the fruits of the reconsideration of the May claim set out in the report. The adjudicator had decided a dispute which had not been referred to him for decision. His decision was thus made without jurisdiction and was unenforceable.

The judge said:-

*‘In my judgment, both the definitions in the Shorter Oxford Dictionary and the decisions to which I have been referred in which the question of what constitutes a “dispute” has been considered have the common feature that for there to be a “dispute” there must*

*have been an opportunity for the protagonists each to consider the position adopted by the other and to formulate arguments of a reasoned kind. It may be that it can be said that there is a "dispute" in a case in which a party which has been afforded an opportunity to evaluate rationally the position of an opposite party has either chosen not to avail himself of that opportunity or has refused to communicate the results of his evaluation. However, where a party has had an opportunity to consider the position of the opposite party and to formulate arguments in relation to that position, what constitutes a "dispute" between the parties is not only a "claim" which has been rejected, if that is what the dispute is about, but the whole package of arguments advanced and facts relied upon by each side. No doubt, for the purposes of a reference to adjudication under the 1996 Act or equivalent contractual provision, a party can refine its arguments and abandon points not thought to be meritorious without altering fundamentally the nature of the "dispute" between them. However, what a party cannot do, in my judgment, is abandon wholesale facts previously relied upon or arguments previously advanced and contend that because the "claim" remains the same as that made previously, the "dispute" is the same. The whole concept underlying adjudication is that the parties to an adjudication should first themselves have attempted to resolve their differences by open exchange of views and, if they are unable to, they should submit to an independent third party for decision the facts and arguments which they have previously rehearsed among themselves. If adjudication does not work in that way there is the risk of premature and unnecessary adjudications in cases in which, if only one party had had a proper opportunity to consider the arguments of the other, accommodation might have been possible. There is also the risk that a party to an adjudication might be ambushed by new arguments and assessments which have not featured in the "dispute" up to that point but which might have persuaded the party facing them, if only he had had an opportunity to consider them. Although no doubt cheaper than litigation, as [the adjudicator's] fees in the present case indicate, adjudication is not necessarily cheap."*

There is concern that, because of the need to reduce the opportunities for ambush, Judge Seymour has unnecessarily adopted a narrow definition of dispute. In particular, his suggestion that: -

*'... for there to be a "dispute", there must have been an opportunity for the protagonists each to consider the position adopted by the other and to formulate arguments of a reasoned kind .....*

A different approach was taken by HHJ Kirkham in *Cowlin Construction Ltd v. CFW Architects*. CFW had been appointed as the architect by Cowlin, the design and build contractor on a Ministry of Defence project. Cowlin had submitted a claim to CFW for costs that were said to have been incurred as a result of delays by CFW. Cowlin had written to CFW enclosing full supporting documentation in connection with the claim. CFW rejected this and a meeting failed to produce a settlement. Ultimately, Cowlin wrote to CFW providing a deadline for an offer of settlement failing which "immediate and substantive action" would be taken. CFW did not respond

whereupon Cowlin referred the claim to adjudication. CFW argued that there was no dispute since the issue was still under discussion.

Judge Kirkham held that the failure of CFW to respond to the deadline suggested that there was a dispute between the parties. Although there had not been a rejection of Cowlin's claim, failure to accept their claim constituted a dispute. Judge Kirkham placed reliance upon the test adopted by Swinton Thomas LJ in *Halki Shipping v. Sopex Oils Ltd*:-

*".....there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable."*

Those involved in adjudication should wholeheartedly endorse the following comments made by Judge Kirkham:-

*"While I accept that the adjudication process involves short timescales, and that there is a risk that a responding party may be ambushed, those are not in my judgment reasons to construe the word "dispute" more narrowly in the context of adjudications than in other contexts. I bear in mind the practical difficulties faced by an adjudicator whose jurisdiction is challenged on the ground that there is no dispute. The court should not add unnecessarily to those difficulties by giving a narrow meaning to the word "dispute" which would in turn permit a responding party to introduce uncertainties which might be difficult for an adjudicator to deal with. Otherwise, there is a risk that the purpose of HGCRA may be defeated."*

The case of *Carillion Construction Limited v. Devonport Royal Dockyard Limited (DML)* (see above) also considered whether or not a dispute had crystallised at the date on which the notice of adjudication was served.

DML argued that there had been an exchange of correspondence between the parties in which DML had sought clarification of, and further information in relation to, the claims made against it by Carillion, and time in which to consider those claims. They said that Carillion nevertheless served its notice without providing the clarification, information and time requested and therefore without affording DML any proper opportunity of considering and either accepting or rejecting the claims.

HHJ Bowsher QC said:-

*"DML did not just ignore Application 33, it asked for further information. That is an everyday occurrence in the construction industry and if every request for information was regarded as a dispute leading to adjudication, there would not be enough adjudicators to go round".*

The judge found that a dispute had not crystallised at the date on which the Notice of Adjudication was served and the adjudicator was therefore lacking in jurisdiction.

In *Costain Limited v. Wescol Steel Limited*, the main contractor claimant argued that, as of the date of the letter sent by the solicitors acting for the steelwork sub-contractor defendant stating

their intention to refer to adjudication "*the dispute between the parties as to the value of the final account*", there was in fact no dispute, as they had previously advised the defendant that they were looking into the matter. They had advised the defendant to this effect some five weeks previously, saying that they were "*continuing to give attention to the material sent with your letter and ... will respond in detail in due course*".

HHJ Havery QC considered HHJ Thornton QC's remarks in *Fastrack*; he said that although the claimant had not, at any rate expressly, refused to pay the money claimed by the defendant, or denied that the amount was correct, they had denied that the money was at present due and had not accepted that the amount claimed was correct, and, taking a common sense view of the matter, he therefore concluded that there was a dispute as to the amount of the final account as of the date of the defendant's solicitor's letter.

Another point argued in that case was that the Notice of Adjudication was defective because it contained reference to two disputes, namely the amount of the final account and whether an extension of time for delay should be granted, which related to the interim payment application. The judge said that he felt that "*the whole of these matters really are bundled together. It is not clear that the interim payment matter differs from the question of the final account, except insofar as the date for payment of the final account may still be in issue before the adjudicator.*"

The question came before HHJ Seymour QC again in the case of *R. Durtnell & Sons Limited v. Kaduna Limited*. Durtnell served a Notice of Adjudication contending that Kaduna was in breach of contract for a number of reasons and seeking a further extension of time under the contract. The adjudicator found that the contract period had been delayed and should be extended but in subsequent enforcement proceedings HHJ Seymour QC decided that the adjudicator had had no jurisdiction to make this decision as the time allowed in the contract for the architect to make a determination in respect of Durtnell's application for an extension of time had not yet expired, and the architect had not yet made a determination.

In the case of *Beck Peppiatt Limited v. Norwest Holst Construction Limited*, Mr Justice Forbes endorsed HHJ Lloyd QC's definition of a "dispute" in *Sindall v. Solland*, in which he said:-

*"For there to be a dispute for the purposes of exercising the statutory right to adjudication it must be clear that a point has emerged from the process of discussion or negotiation that has ended and that there is something which needs to be decided."*

Mr Justice Forbes found that "*That is a statement of principle which is easily understood and is not in conflict with the approach of the Court of Appeal in Halki. I would have been very surprised if it was. It has to be borne in mind that, as observed in Halki, "dispute" is an ordinary English word which should be given its ordinary English meaning. This means that there will be many types of situation which can be said to amount to a dispute. Each case will have to be determined on its own facts and attempts to provide an exhaustive definition of "dispute" by reference to a number of specified criteria are, in my view, best avoided. I therefore reject the suggestion that the word "dispute" should be given some form of specialised meaning for the purposes of adjudication.*"

### The right to adjudicate "at any time"

S.108(2) says that:-

*" The contract shall*

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

How have the courts so far interpreted the words "at any time"?

### Contractual pre-dispute procedures

The first case to consider the impact, if any, of contractual pre-dispute procedures on the right to adjudicate "at any time" was *John Mowlem & Company Plc v. Hydra-tight Limited (t/a Hevilifts)*.

Mowlem sent Hydra-tight a contract offer letter, which had annexed to it conditions to be included in the sub-contract.

Clause 90.4 provided as follows:-

*" The parties agree that no matter shall be a dispute unless a Notice of Dissatisfaction has been given and the matter has not been resolved within four weeks. The word dispute (which includes a difference) has that meaning."*

The judge said that the contract between the parties did not comply with Ss.108(1) and 108(2)(a), since the parties had no immediate right to refer "at any time" or to give notice of an intention to refer a dispute to adjudication.

In the case of *R.G. Carter Limited v. Edmund Nuttall Limited*, there was an application for an injunction relating to an adjudication, or potential adjudication, between the parties.

The contract included a clause which was an add-on tailored by the claimant and which provided for mandatory mediation prior to any adjudication procedure being commenced. The clause stated as follows:-

*" 41.1 Every effort should be made by both parties to resolve any differences between them but if this appears impossible the parties shall seek the assistance of a Mediator to attempt to resolve such differences as quickly and amicably as possible.*

*41.2 The parties shall not resort to adjudication or arbitration (save in the case where arbitration arises out of the dissatisfaction of either party with any decision of an Adjudicator) in accordance with this clause unless informal attempts to reach a settlement by way of mediation under this clause have been unsuccessful.*



41.3 *If no settlement has been reached within six weeks of the first appointment of or attempt to appoint a Mediator the mediation shall be deemed to have been unsuccessful."*

The clause thus envisaged that what was previously a difference would only become a deemed dispute if and when the mediation provided for had been unsuccessful.

The judge said:-

*"I am clear in my mind that, since Clause 41, if it has the meaning contended for by the defendant, would fetter the unqualified entitlement to an adjudication provided for by the Act, the claimant would not be entitled to injunctive relief, even if there had been a complete failure by the defendant to comply with the requirements of mediation provided for in Clause 41."*

#### Impending or concurrent court/arbitration proceedings

The first case to deal with the issue of the propriety of a reference to adjudication pursuant to the HGCRA of a dispute which, at the time of the reference, was already the subject of pending court proceedings was *Herschel Engineering Limited v. Breen Property Limited*.

In its submission to Mr Justice Dyson, the defendant argued that the court should not countenance two concurrent proceedings in respect of the same cause of action.

The defendant also argued that, by starting proceedings in the county court, the claimant had waived or repudiated the benefit of the adjudication provisions contained in the contract. The defendant contended that, once a party has waived or repudiated a clause which provides for some form of dispute resolution as an alternative to court proceedings, it can no longer rely on that clause without the consent of the opposing party.

The claimant emphasised the fact that S.108(2) provides that a party can give notice "at any time" of its intention to refer a dispute to adjudication. The claimant argued that adjudication is a special creature of statute and that the jurisprudence relied upon by the defendant had no application. There was nothing in the HGCRA to indicate that two sets of proceedings in respect of the same cause of action may not proceed concurrently. Further, commencement of proceedings in court does not amount to a waiver or repudiation of the right to refer the subject of those proceedings to adjudication. That right was statutory, not contractual, and therefore was not capable of being waived or repudiated.

Mr Justice Dyson said *"Let us consider the facts of this case. It is true that the issues that were referred to the county court were the same as those that were referred to the adjudicator, namely, whether the claimant was entitled to be paid the amounts claimed by the two invoices. The decision of the adjudicator, however, was not final. It was only of temporary effect: see paragraph 23(2) of the Scheme. A decision of the county court, if made, will be final and binding for all time, subject only to any subsequent challenge in the higher courts."*

The judge said:-

*"If Parliament had intended that a party should not be able to refer a dispute to adjudication once litigation or arbitration proceedings had been commenced, I would have expected this to be expressly stated. The relationship between adjudication on the one hand and litigation and arbitration on the other, was what informed the content of S.108(3) of the Act. ...*

*The mischief at which the Act is aimed is the delays in achieving finality in arbitration or litigation. Why should a claimant have to wait until the adjudication process has been completed before he embarks on litigation or arbitration?"*

Describing them as "*not mutually exclusively routes to dispute resolution*", the judge said there was "*no question of a party being put to his election or committing a breach of contract if he refers a dispute both to adjudication and to the court or an arbitrator*".

#### **Following a repudiatory breach of contract**

The first case on this subject was *A & D Maintenance & Construction Limited v. Pagehurst Construction Services Limited*.

The claimant was a sub-contractor, who had undertaken the installation of a boiler and flue at Ashdown School for the defendant, who was the main contractor. The claimant started work on site in July 1998 and issued a series of invoices to the defendant. Six days after the claimant asserted that they had completed the sub-contract works, the main contract was determined, with the reason given being serious defects and default in the claimant's work. On the same day, the defendant purported to determine the claimant's sub-contract and gave notice of intention to withhold further payments until completion of the works and making good defects.

Just over a week later a fire occurred causing considerable damage to the school; the employer's loss adjusters reported that the cause of the fire was the negligent installation of the boiler.

The claimant served notice of adjudication on the defendant in respect of the balance of the invoices it had issued, claiming some £98,802. After the adjudicator was appointed, the defendant's representative wrote to the claimant and to the adjudicator saying that:-

*"The aim of the Scheme is for disputes to be determined during the term of the contract so that when a contract comes to an end, the dispute is then finally determined by arbitration or legal proceedings. The contract in this instance has come to an end and it is our client's intention to commence legal proceedings against A&D for the losses they have suffered directly consequential to A&D's work."*

The defendant said that the adjudication process was no longer the appropriate forum to decide the dispute between the parties as they said the sub-contract had ended and the process of adjudication was primarily supposed to be used for minor disputes during the course of the contract.

HHJ Wilcox said:-

*"Even if the contract had been terminated, the matters referred to the adjudicator remain disputes under the contract. Where there is a contract to which the Act applies, as in this case, and there are disputes arising out of the contract to be adjudicated, the adjudication provisions clearly remain operative just as much as an arbitration clause would remain operative.*

*Had it been the intention of Parliament to limit the time wherein the party could give notice of his intention to refer a matter to adjudication, in the exercise of his right under S.108(1), it could have imposed a clear limit. Precise limits as to the appointment of adjudicators and the timetabling of the process of adjudication are clearly set out in the Scheme. By contrast there is no such limitation under the Act or the Scheme as to when a notice of intention to refer a matter to adjudication may be made."*

The judge held that the adjudicator had been properly appointed under the Scheme and had considered matters arising under the contract. He gave summary judgment for the claimant.

In the case of *Northern Developments (Cumbria) Limited v. J & J Nichol*, Northern Developments applied to court for a declaration that the adjudication decision obtained by J&J against them was null and void and ought not to be enforced; J&J applied for summary judgment, and a declaration that the decision was valid.

Disputes arose between the parties over delays to the sub-contract works and the standard of J&J's workmanship.

J&J then started adjudication proceedings. They claimed payment of outstanding monies. In their Response, Northern Developments contended that J&J's claim should be reduced by set-offs to take account of defective work, delays and damages arising out of J&J's alleged repudiation of the contract by withdrawing from site.

The adjudicator said that the question concerning the alleged repudiatory breach did not arise under the contract and decided not to deal with it in the adjudication. He felt that the matters arising out of the alleged repudiation were necessarily connected with the dispute but did not arise under the contract and for that reason he would not deal with repudiation. In the subsequent enforcement proceedings, HHJ Bowsher QC held that the adjudicator was wrong in law in deciding that matters arising out of the repudiatory breach did not arise under the contract.

HHJ Bowsher QC said:-

*"Acceptance of repudiation is often said to bring the contract to an end, but that is loose language which misstates the true position. Acceptance of repudiation brings performance of the contract to an end. The contract still exists and rights arising under it are enforced"*

He stated:-

*“Accordingly, if there was in this case a repudiation and an acceptance of repudiation (which has not been established) the performance of the contract was terminated but any rights arising under the contract remained to be enforced under the contract. Such rights would include rights enforceable in adjudication. The repudiation issues were matters arising “under the contract”.”*

### The adjudication process

There is no definition of adjudication as such but S.108 sets out the eight features of a compliant adjudication procedure. If the contract itself, or any adjudication rules which that contract incorporates by reference, complies with these eight requirements, then the contractually agreed scheme applies. In all other cases, the Government’s Scheme will apply instead.

The first step to take is to serve Notice of Adjudication.

Very careful consideration has to be given to the contents of this Notice; the contract itself may define what is to be included in it either directly or by reference to an incorporated set of adjudication rules.

If the contract does not define what is to be included, then the Scheme will step in. This provides that the Notice of Adjudication shall briefly set out:-

- (a) the nature and a brief description of the dispute and the parties involved;
- (b) details of where and when the dispute has arisen;
- (c) the nature of the redress which is sought;
- (d) the names and addresses of the parties to the contract.

A number of cases have established the need for care and clarity in the Notice of Adjudication.

The first of these was *Ken Griffin and John Tomlinson (t/a K&E Contractors) v. Midas Homes Limited*. This case made it clear that a Notice of Adjudication should clearly state what the dispute was. In this case, instead of properly setting out the dispute to be referred, the Notice made reference to numerous invoices and letters. The court held that whilst a Notice can refer to other correspondence, it is incumbent on the author of the Notice properly to extract and re-state the relevant parts in the terms required by the Scheme. The outcome of the claimant’s solicitors’ failure to do so in this case was that only one of many claims for payment was validly referred to adjudication and the adjudicator’s decision in respect of all the others was outside his jurisdiction. The claimant was held responsible for the adjudicator’s costs in respect of those claims.

In *KNS Industrial Services (Birmingham) v. Sindall Limited* the court again emphasised the importance of getting the Notice of Adjudication right by including everything that needs to be decided. In that case a defendant could rely upon clauses not mentioned in either the Notice of Adjudication or the Referral Notice, holding that the adjudicator had jurisdiction to consider their effect because they were relevant to the issue identified in the notice of Adjudication.

The scope of the adjudication may be extended beyond those matters set out in the Notice of Adjudication by agreement or by reference to the adjudication provisions incorporated into the contract between the parties.

The Scheme allows the adjudicator to adjudicate on more than one dispute under the same contract and/or to adjudicate on related disputes under different contracts with the consent of all the parties to the dispute.

HGCRA only imposes one provision to be included within a contract in respect of the nomination and appointment of an adjudicator, namely in S.108(2)(b) which says that the contract:-

*"shall provide a timetable with the object of securing the appointment of the adjudicator and the referral of the dispute to him within seven days of such notice."*  
[i.e. the Notice of Adjudication].

The procedure for nomination and appointment will either be found in the contract or in the Scheme, which has detailed provisions for nomination and appointment, providing various default options. It is important to comply with these; the most common mistake made by a referring party at the nomination and appointment stage are the failure to appoint an adjudicator within the timescale, the failure to use the right nominating body at the right time for nomination and appointment and the failure to appoint the correct adjudicator.

The parties may agree to appoint a named individual or use a specified appointing body, either in the contract or subsequently. In the absence of such an agreement, the adjudicator can be appointed by one of a number of appointing bodies such as the CIOB, Chartered Institute of Arbitrators, RICS, RIBA etc. There is no government approved list of appointing bodies but most of the professional institutions have panels of adjudicators whom they are happy to appoint.

Although it might be thought that it would save time to name the adjudicator in the contract, there is of course no way of telling whether the named adjudicator will be able to act in respect of the dispute which might arise or have the expertise to tackle the subject matter, which might be the question of measurement/valuation, an argument over design or the legal interpretation of a contract clause.

If an appointing body is used, then the Scheme provides that it must identify an adjudicator within five days.

Once the adjudicator has been appointed, the referring party has to refer the dispute in writing to him. As stated above, this must be done within seven days from the date of the Notice of Adjudication.

Copies of, or appropriate extracts from, the construction contract and other relevant documents must accompany the Referral Notice, which sets out in detail the dispute set out in brief in the Notice of Adjudication.

There is as much a need for clarity in the Referral Notice as there is in the Notice of Adjudication. It is important for a party to set out its case fully but just as important that the

Referral Notice should not widen the issues referred beyond the dispute contained within the Notice of Adjudication. This is to avoid jurisdictional problems.

The case of *FW Cook Limited v. Shimizu (UK) Limited* shows both the need for clarity in notices and the need to state clearly what remedies are sought. Cook went to adjudication against Shimizu and, in its Referral Notice, sought the valuation of certain items within the final account. The adjudicator made a decision on the items; his decision distinguished between the contra charges which Shimizu was entitled to deduct and those which had been wrongly deducted but was silent as to whether the sums deducted had already been deducted or not.

In the subsequent enforcement proceedings, the judge agreed that the adjudicator was not required to take into account what amounts had or had not already been paid on account of some of the items in dispute. He had not been asked to do so. Although Cook did get a decision on what it had asked for in the adjudication, i.e. the valuation of the items, it did not immediately get any money.

In the case of *Jerome Engineering Limited v. Lloyd Morris Electrical Limited*, Jerome's Notice of Adjudication referred to Lloyd's failure to make proper interim valuations and payment but did not expressly state that Jerome was seeking payment as such. Jerome's subsequent formal Referral Notice did, however, set out the relief which they were seeking, by asking for an interim payment. The adjudicator held that the interim payment should be made and the court, in the subsequent enforcement proceedings, held that although the Notice did not expressly state that Jerome was seeking relief by way of interim payment, it did refer to Lloyd's failure to make such payments as the basis of the Notice and so must have been obvious to Lloyd and, in any event, the Notice of Adjudication and Referral Notice were to be read together as combining to define the dispute upon which the adjudicator was to adjudicate.

Following referral, the responding party (defendant) is usually given seven days to serve their response. A referring party (claimant) may then be allowed to reply.

One of the key features of adjudication is the ability of the adjudicator to conduct the procedure as he sees fit. The HGCRA enables the adjudicator to take the initiative in ascertaining the facts and the law. His powers are both conferred and limited by the terms of the relevant contract or the applicable Rules/Scheme, albeit constrained by the principles of natural justice.

Paragraph 13 of the Scheme lists in detail the adjudicator's powers, which include asking for documents, meeting and questioning the parties, making site visits and inspections, carrying out tests or experiments and (providing he has notified the parties of his intention to do so) appointing experts or legal advisers. He has the power to issue other directions relating to the conduct of the adjudication, as necessary.

The adjudicator is under a duty to act impartially; this is the only duty imposed upon him by the HGCRA, other than having to reach his decision within 28 days of referral (or such longer period as is subsequently agreed).

A major concern in the aftermath of the legislation was the extent to which failure by adjudicators to abide by the relevant procedure and maintain impartiality would enable their decisions to be attacked on the ground of lack of jurisdiction.

In *Balfour Beatty Construction Ltd v. London Borough of Lambeth* HHJ LLOYD QC made the position clear:-

*"It is now well established that the purpose of adjudication is not to be thwarted by an overly sensitive concern for procedural niceties."*

Therefore, procedural errors would not necessarily invalidate an adjudicator's decision. The adjudicator can go behind the evidence provided by the parties because he can take the initiative in ascertaining the facts and the law; he can actively seek other information and utilise his own knowledge and experience. But, must the adjudicator inform the parties of the information that he has obtained from his own knowledge and experience or from other sources and, based upon that information, the conclusions that he has reached?

With regard to adjudication, HHJ LLOYD's view was:-

*"In my judgment it is now clear that, in principle, the answer may be: Yes. Whether the answer is in the affirmative will depend on the circumstances. The reason lies, at least in part, in the requirement that the adjudicator should act impartially. That must mean that he must act in a way that will not lead an outsider to conclude that there might be any element of bias, ie that a party has not been treated fairly. In addition impartiality implies fairness although its application may be trammelled by the overall constraints of adjudication. Lack of impartiality carries with it overtones of actual or apparent bias when in reality the complaint may be better characterised as a lack of fairness."*

Judge LLOYD explained that the matters which should be brought to the attention of the parties must be either decisive or of "*considerable potential importance to the outcome*":

*"It is now clear that the construction industry regards adjudication not simply as a staging post towards the final resolution of the dispute in arbitration or litigation but as having in itself considerable weight and impact that in practice goes beyond the legal requirement that the decision has for the time being to be observed. Lack of impartiality or of fairness in adjudication must be considered in that light. It has become all the more necessary that, within the rough nature of the process, decisions are still made in a basically fair manner so that the system itself continues to enjoy the confidence it now has apparently earned."*

In *Balfour Beatty v. Lambeth* the adjudicator did go beyond the bounds of what was acceptable. Balfour Beatty had submitted claims to Lambeth in relation to a multi-million pound refurbishment contract. These claims related to extensions of time and repayment of liquidated damages that had been deducted by the Council. The evidence presented to the adjudicator by Balfour Beatty in support of its claims was meagre to say the least. The adjudicator had to ask

the contractor to provide schedules setting out each *Relevant Event*, the date of the event and the activity directly affected by the *Event*. Reliable programming information was non-existent.

The Council argued that the adjudicator had not acted impartially or had been in breach of natural justice because:

- He had constructed an “as built” programme.
- He had then developed a critical path through the works as actually carried out.
- He had not asked the parties to comment on whether the “as built” programme was a reliable record of the sequence of the works executed and on his analysis of the critical path (or whether this was a suitable basis from which to derive a reliable critical path).
- He proceeded to determine the effect of each of the *Relevant Events* upon which Balfour Beatty had relied without inviting the parties to comment on his conclusions.

The upshot was that the adjudicator had attempted to make good deficiencies in the case submitted by Balfour Beatty. In not allowing Lambeth to comment on his approach and methodology, Judge Lloyd held that the adjudicator had not acted fairly and was in breach of natural justice. This rendered his decision a nullity since he had acted without jurisdiction.

In the context of procedural fairness, there are three cases which are worth referring to. Before proceeding it needs to be made clear that these cases and other similar cases are primarily concerned with the issue of ‘*bias*’. As Judge Lloyd explained in the *Glencot* case, which is considered below, the duty upon adjudicators to act impartially under the HGCRA requires that adjudicators conduct themselves in a way that does not display *bias*. *Bias* may either be ‘*actual bias*’ or ‘*apparent bias*’. *Actual bias* is self-explanatory. There may be clear evidence that an adjudicator favours a particular party. *Apparent bias* would arise where a fair-minded observer would conclude that there was a likelihood of bias notwithstanding that the motives for the conduct in question were entirely innocent.

The first case is *Discain Project Services Ltd v. Opecprime Development Ltd*. The referring party had had telephone conversations with the adjudicator which were material to the adjudicator’s eventual decision. The subject matter of the calls was not disclosed to the other party which, following the adjudicator’s decision in favour of the claimant, refused to abide by it. The matter came before HHJ Bowsher QC who held that the adjudicator’s decision was outside his jurisdiction because there was a breach of the rules of natural justice. The failure to keep the other party informed of the nature of the calls constituted “*a very serious risk of bias*”. In an addendum to his judgment, Judge Bowsher explained:-

*“The intention of the Act is that there is to be a speedy decision which is to be enforced speedily, right or wrong, subject to being put right, if necessary, in subsequent legal proceedings or arbitration or by agreement between the parties. That scheme makes regard for the rules of natural justice more rather than less important.*”



*Because there is no appeal on fact or law from the Adjudicator's decision, it is all the more important that the manner in which he reaches his decision should be beyond reproach. At the same time, one has to recognise that the Adjudicator is working under pressures of time and circumstance which make it extremely difficult to comply with the rules of natural justice in the manner of a Court or an arbitrator. Repugnant as it may be to one's approach to judicial decision making, I think that the system created by the Housing Grants, Construction and Regeneration Act can only be made to work in practice if some breaches of the rules of natural justice which have no demonstrable consequence are disregarded."*

In *Woods Hardwick Ltd v. Chiltern Air Conditioning* the main complaint was that the adjudicator had taken evidence from the claimant and from third parties which was not passed on to the defendant for comment. HHJ Thornton held:

*"....the statutory requirement to act impartially requires the adjudicator to act in a way that does not lead to a perception of partiality by one party which might objectively be held by that party..... [the adjudicator] acted in a manner which could readily be perceived to be partial in approaching one side without informing the other, in seeking much additional information from third parties and in then making adverse findings against the party left in ignorance of these steps."*

Finally, in *Glencot Development and Design Company Ltd v. Barratt & Son Contractors Ltd* the complaint was that the adjudicator resumed his adjudication after attempting to act as a mediator away from the actual adjudication. HHJ Lloyd QC concluded that, in taking on the role of mediator, he had become privy to "off the record" discussions and "without prejudice" offers which could have influenced his ultimate decision as adjudicator. As such there was a risk of apparent bias in that:

*"the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased."*

A rather more worrying development, in terms of its possible impact upon adjudication, was the Human Rights Act 1998. The Act incorporates the European Convention on Human Rights. Article 6.1 states:

*"Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

S.21 of the Human Rights Act applies to public authorities which are defined as including "a court or tribunal".

Whilst Judge Thornton has stated, extra-judicially, that Article 6 could apply to adjudication, the judges in the two cases that considered the matter did not agree. In *Elanay Contracts Ltd v. The Vestry* HHJ Havery QC held that:-

*"Article 6 of the European Convention of Human Rights does not apply to an adjudicator's award or to proceedings before an adjudicator and that is because, although they are the decision or determination of a question of civil rights, they are not in any sense a final determination."*

In *Austin Hall Building Ltd v. Buckland Securities Ltd* HHJ Bowsher QC came to the same conclusion but for different reasons. The judge considered the definition of "tribunal" in section 21 of the Human Rights Act:

*"Tribunal means any tribunal in which legal proceedings may be brought."*

Judge Bowsher held:-

*"Applying the definition of 'tribunal' in S.21 of the HRA in the light of the decisions to which I have referred, I do not regard an adjudicator under the 1996 Act as a person before whom legal proceedings may be brought. Legal proceedings result in a judgment order that in itself can be enforced. If the decision at the end of legal proceedings is that money should be paid, a judgment is drawn up that can be put into the hand of the Sheriff or Bailiff and enforced. This is not the case with an adjudicator. The language of the 1996 Act throughout is that the adjudicator makes a decision. He does not make a judgment. But the decision of an adjudicator, like the decision of a certifier, is not enforceable of itself. Those decisions, like the decisions of a certifier, can be relied on as the basis for an application to the court for judgment, but they are not in themselves enforceable."*

### Adjudicator errors

It has been generally accepted that the success of adjudication would stand or fall on the approach adopted by the courts in relation to adjudicators' errors. To what extent would the courts regard an adjudicator's error as going to the issue of jurisdiction? In *C&B Scene Concept Design Ltd v. Isobars Ltd* Sir Murray Stuart-Smith in the Court of Appeal approved the following formulation of the position by HHJ Thornton QC in *Sherwood & Casson v Mackenzie Engineering Ltd*:-

- "(i) a decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced;*
- (ii) a decision that is erroneous, even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced;*
- (iii) a decision may be challenged on the ground that the adjudicator was not empowered by the Act to make the decision, because there was no underlying construction contract between the parties or because he had gone outside his terms of reference;*

- (iv) *the adjudication is intended to be a speedy process in which mistakes will inevitably occur. Thus, the Court should guard against characterising a mistaken answer to an issue, which is within an adjudicator's jurisdiction, as being in excess of jurisdiction."*

Thus it has been acknowledged by the courts that the nature of adjudication is such that errors will occur. Perhaps, more fundamentally, the hands-off approach of the courts is intended to reflect the perceived intention of Parliament that, pending ultimate resolution of a dispute, the adjudicator's decision should be binding in the meantime. The first authoritative case on this issue was *Bouygues UK Ltd v. Dahl-Jensen (UK) Ltd*.

The Court of Appeal upheld the judgment of Mr Justice Dyson at first instance that, provided the adjudicator has as in this case answered the question put before him, a mistake in answering that question does not invalidate his decision. The judge had applied the principle stated by Knox J in *Nikko Hotels (UK) Ltd v. MEPC plc* dealing with the jurisdiction of an expert valuer:-

*"If he answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity."*

A similar approach has been taken in Scotland.

In *C & B Scene Concept Design Ltd v. Isobars Ltd* the adjudicator decided that the contract did provide for an "*adequate mechanism*" of payment. It was argued in enforcement proceedings that this was an error of law.

If so, did this error of law invalidate the adjudicator's decision? The matter went to the Court of Appeal and Sir Murray Stuart-Smith, following the trend already set by previous judgements, upheld the adjudicator's decision:-

*"Errors of procedure, fact or law are not sufficient to prevent enforcement of an adjudicator's decision by summary judgment."*

#### **Enforcement of adjudicators' decisions: jurisdiction and other issues**

When the Construction Bill was going through Parliament, the *Constructors' Liaison Group* submitted an amendment to the Bill to provide that adjudicators' decisions should be enforceable free of set-off, abatement or counterclaim. Unfortunately, this amendment did not find its way into the Act with the result that much litigation has been spawned (both in Scotland and England/Wales) over this issue. Again, we come back to the root of the adjudicator's decision-making powers. His powers are rooted in contract - the adjudicator is not a statutory decision-maker.

It was clearly Parliament's intention that adjudicators' decisions be complied with. In fact, S.108(3) of the Act could not be more clear. The decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, arbitration or by agreement. This is reflected in paragraph 23(2) of the Scheme.

There is little point in requiring compliance with the adjudicator's decision unless the decision is capable of enforcement *ubi jus ibi remedium*: where there is a right there is a remedy.

Unfortunately, on this issue some of the decisions in the Technology and Construction Court have not been in alignment. For example, in *David McLean Housing Contractors Ltd v. Swansea Housing Association Ltd* HHJ Lloyd QC held that since the adjudicator's decision was declaratory of the parties' rights and obligations under the contract, it did not create a debt in its own right. Accordingly a party that was bound to make payment under an adjudicator's decision could serve a valid notice to withhold sums from the amount determined as due by the adjudicator. On the other hand, in *Solland International Ltd v. Daraydan Holdings Ltd* HHJ Seymour QC's approach was that the parties had contracted to be bound by the adjudicator's decision so that monies could not be set-off against the adjudicator's decision.

HHJ Thornton in *Bovis Lend Lease v. Triangle Developments Ltd* held that:-

*".....where other contractual terms clearly have the effect of superseding, or provide for an entitlement to avoid or deduct from a payment directed to be paid by an adjudicator's decision, those terms will prevail."*

This statement effectively meant that the future of adjudication was in some doubt.

Judge Thornton placed some reliance on the judgment of HHJ Lloyd in *KNS Industrial Services (Birmingham) Ltd v. Sindall Ltd*. In that case Judge Lloyd had this to say:-

*"An adjudicator is appointed to decide whether in the circumstances of the dispute a particular right exists and should be enforced. Unless the parties specifically agree, an adjudicator is not appointed to adapt the terms of the contract or to vary, add or take away from the terms of the contract. An adjudicator's powers are limited to those conferred by the contract and thus no more than those of a contract administrator, such as an architect, engineer or surveyor, when entrusted with the resolution of disputes. Their role is to apply the terms of the contract. An adjudicator does the same, but the decisions of an adjudicator are now more immediately enforceable pending the result of litigation or arbitration."*

Judge Thornton was also influenced by the Court of Appeal case of *Parsons Plastics (Research & Development) Ltd v. Purac Ltd*. This case was concerned with a contract not within the scope of the HGCRA but which contained provisions for adjudication that followed S.108. In these circumstances it was not surprising that the Court of Appeal had permitted a right of set-off to be exercised against the adjudicator's decision.

The Scottish courts have had greater regard for the overall objective of the legislation. Lord MacFadyen in *The Construction Centre Group Ltd v. The Highland Council* summarised the position as follows:-

*"It is in my view well settled that the purpose of the Act was to secure that every construction contract contains provisions which enable the parties to the contract to obtain from an adjudicator in respect of any dispute arising under the contract a speedy*

*decision which is binding and enforceable but at the same time merely provisional pending final determination by litigation, arbitration or agreement ... It follows, in my opinion, that a party that holds an adjudicator's award finding him entitled to payment of a sum of money, either forthwith or at a fixed date which is passed, is ordinarily entitled to take steps to enforce it, and may do so by raising an action for payment of the sum awarded. Not to allow enforcement of an adjudicator's award in that way would, in my view, obstruct the attainment of the purpose of S.108."*

The approach of Judge Thornton in *Bovis Lend Lease* was not followed by the Court of Appeal in *Levolux A. T. Ltd v. Ferson Contractors Ltd*. The facts of the case are characteristic of so many main contractor and sub-contractor relationships in the industry. Levolux had agreed to supply and fit brise soleil and louvre panelling at a site in Filton in Bristol. Levolux was the sub-contractor to the main contractor, Ferson Contractors. The sub-contract complied with the adjudication provisions in S.108 of the HGCRA, providing that:-

*"The Contractor and the Sub-contractor shall comply forthwith with any decision of the adjudicator; and shall submit to summary judgment/decree and enforcement in respect of all such decisions."*

The adjudicator had found that Ferson was not entitled to withhold payment from Levolux as they had done and ordered them to repay it.

Ferson did not make payment and, therefore, Levolux brought proceedings to enforce the adjudicator's decision.

Everyone involved in adjudication should pay close attention to the extract from Lord Justice Mantell's judgement in the Court of Appeal which is set out below:-

*"The intended purpose of S.108 is plain.... The contract must be construed so as to give effect to the intention of Parliament rather than to defeat it. If that cannot be achieved by way of construction, then the offending clause must be struck down."*

Lord Justice Longmore reinforced this view:-

*"I have no doubt that Parliament's intention was to avoid just the kind of arguments to which we have listened in the present case."*

He added that the parties themselves chose to reinforce Parliament's intention when they included clause 38A.9. Lord Justice Longmore concluded:-

*"Even without this particular clause 38A.9, I would conclude for the reasons given by Mantell LJ that the obligation to pay the amount stated in an adjudicator's decision must take precedence over (other) clauses of the contract to the extent that there is a conflict but clause 38A.9 puts the matter completely beyond doubt."*

The Court of Appeal has, in crystal clear terms, reflected the objectives of S.108. Adjudicator's decisions must be complied with irrespective of contractual provisions designed to frustrate this.

Essentially, an adjudicator's decision can only be challenged on jurisdictional grounds or because of procedural unfairness.

## Costs

### 1. The Parties' Costs

The first case to look at the question of whether or not an adjudicator can make an award for costs was *John Cothliff Limited v. Allen Build (Northwest) Limited*.

In that case, the contract contained no express provision for adjudication and the Scheme therefore came into effect. The referring party asked the adjudicator to determine the payment of costs of and in the adjudication and the adjudicator decided that, under the HGCRA, he had power to do so.

The adjudicator said "*whereas in arbitration it is normal for costs to follow the event, in adjudication under the Scheme I may make my decision based on the behaviour of the parties in attempting to resolve their differences ...*". He then effectively awarded the referring party 70% of the costs of the adjudication.

The responding party failed and refused to pay those costs and contested that there was any power to award them lying in the adjudicator. The case then came to court for enforcement of the adjudicator's decision.

The claimant in the enforcement proceedings argued that, under *Macob Civil Engineering Limited v. Morrison Construction Limited*, this decision by the adjudicator was a decision which should be enforced and the Scheme was a straightforward scheme which should be given a purposive interpretation. To avoid challenge to decisions of adjudicators in the courts, the decision should simply be enforced subject to the overriding review provisions which, in this case, would take place in an arbitration, should there be one.

The defendant said that the adjudicator had no power to award costs because that would require a statutory power, alternatively a contractual power, which was not present.

The judge noted in passing that "*There are conflicting policy reasons for and against the award of costs ... there are arguments, it has to be said, for and against having awards of costs in any sort of adversarial proceedings*".

He decided that the adjudicator had got power to award costs in this case, as costs had been expressly sought in the application before him.

He concluded by commenting that "*bearing in mind that this was plainly a substantial construction contract ... I would myself incline to the view that it would be appropriate to imply a term that the adjudicator should have power to award costs, if an adjudication under the Scheme took place, to give what in reality is business efficacy to the contract*".

HHJ Bowsler QC disagreed with the judgment in the *John Cothliff* case, in his judgment in the case of *Northern Developments (Cumbria) Limited v. J & J Nichol*. In that case, which came

under the Scheme, the adjudicator decided that the responding party was to pay the referring party's costs of the adjudication as well as the costs of the adjudicator. The adjudicator was not requested under paragraph 22 of the Scheme to give reasons, and did not do so. In the subsequent enforcement proceedings, this award of costs was challenged. HHJ Bowsher QC considered the judgment in the *John Cothliff* case and said "*If Parliament had intended by the Act or the Statutory Scheme to give the power to award costs, it would have said so. There is no implied statutory power granted to the adjudicator to award costs.*"

The case of *Bridgeway Construction Limited v. Tolent Construction Limited* considered the following way in which the adjudication procedure had been amended to provide:

*"The party serving the Notice to Adjudicate shall bear all the costs and expenses incurred by both parties in relation to the adjudication, including but not limited to all legal and experts' fees ...*

*The party serving the Notice to Adjudicate shall be liable for the adjudicator's fees and expenses".*

The claimant asked for a declaration that these contractual terms were void as they had the "*effect of inhibiting people from pursuing their remedies under the 1996 Act*". The judge decided that he should not interfere with this contract. He said

*"I do not consider that the terms are either void or - and it was not used in this particular case but I say so to resolve any doubt - voidable. It seems to me that main contractors and sub-contractors are entitled to develop contracts to implement Acts of Parliament. There are good grounds for saying that a system for costs is important and relevant. The mere fact that in this particular case the claimants are disgruntled, perhaps understandably so, about their costs situation does not entitle me to say "well, these clauses are a bit unfair. Let's change them" ...*

*It seems to me that contracting parties can contract how they like and it is unsatisfactory legally if, at the end of the day, a disappointed party can come along and say "well, the contract was entirely wrong".*

*Therefore, I find that the terms are not void and that the application to remove them and to alter the parties' position as a consequence is unsuccessful ...*

*The mere fact that the claimants must pay the costs of the other side in the adjudication is not in excess of jurisdiction ..."*

This is an invidious position and one that is all too frequent. The good news, however, is that something will be done, at least in terms of amending the Scheme. The Government's proposed amendments to the Scheme, which it is hoped will take effect early next year, include an amendment to make clear in paragraph 20 that the role of adjudicators does not extend to determining an allocation of the parties' legal or other costs, thereby giving effect to the policy that, in adjudication, each party should bear their own. It is not, however, presently intended

to amend the HGCRA, as the Government has bowed to the arguments that such a provision would unduly constrain freedom of contract.

## 2. The Adjudicator's Fees and Costs

Paragraph 25 of the Scheme provides that:-

*"The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned".*

This provision is mirrored in most contractual or other adjudication procedures, save that some have a cap on the daily fee an adjudicator is allowed to charge.

As to what "*such reasonable amount*" may comprise, paragraph 12 (b) of the Scheme says that the adjudicator shall "*avoid incurring unnecessary expense*".

In helping him "*take the initiative in ascertaining the facts and the law*" paragraph 13(f) enables the adjudicator "*provided he has notified the parties of his intention, [to] appoint experts, assessors or legal advisers*": Note that he must tell the parties before doing so.

Although at the outset of statutory adjudication, it was feared that adjudicators might over use their powers to appoint independent experts to advise them in areas which required special skills, thereby escalating the costs of the process, the result of research carried out by Glasgow Caledonian University does not support this concern.

They found that the total number of adjudications in which experts of any kind were appointed was less than 9%. Perhaps unsurprisingly, the most frequent expert adviser is the lawyer.

After analysing the average cost of the adjudicator's fees, and the average charges of the adjudicator nominating bodies, they concluded that, on average, the cost of the adjudication process is 3.05% of the sums in dispute. This does not include the cost of each party in preparing their case, the costs of their advisers or, indeed, the opportunity costs of their in-house time spent on dealing with the adjudication.

The Scheme also contains provisions dealing with payment of an adjudicator's fees and costs where:-

- (a) he has ceased to act because a dispute is to be adjudicated on by another person (paragraph 8(4)),
- (b) he has resigned because the dispute is the same, or substantially the same, as one which has previously been referred to adjudication, and a decision has been taken in that adjudication, or where a dispute varies significantly from the dispute referred to him in the referral notice and for that reason he is not competent to decide it (paragraph 9(4)),



- (c) his appointment has been revoked by the parties agreeing to do so (paragraph 11(1)) and
- (d) the revocation of the appointment of the adjudicator is due to the adjudicator's default or misconduct (paragraph 11(2)).

#### **Differences between adjudication and ADR/litigation/arbitration**

Unless a particular construction contract is excluded from the requirement to have an adjudication clause, for one of the reasons given in S.105 or S.106, the parties have no choice. If they do not expressly include an adjudication clause, then one will be implied by virtue of the HGCRA.

In this respect, adjudication is to be contrasted with Alternative Dispute Resolution (ADR) and arbitration. No contracting party is obliged to accept a clause in the contract which requires them to pursue one or more form(s) of ADR, nor are they obliged to accept that any disputes will finally be decided by means of arbitration. However, once a contract does include a provision for ADR and/or arbitration, then a party to such a contract can insist on the ADR procedure being followed and/or the dispute being referred to an arbitrator.

Adjudication produces a decision which is contractually binding, but which can be reviewed by a court, or by an arbitrator where there is an arbitration agreement in the contract. This is to be contrasted with the final award of an arbitrator, or the judgment of a court, which, subject to any appeal being made, is final, binding and enforceable. A review should not be confused with an appeal. Parties to a construction contract have the absolute right to have the decision of the adjudication reviewed (although they will have to comply with the terms of the decision in the meantime). The right of appeal to a court against a lower court judgment or an arbitrator's award is relatively limited. In brief terms, there has to be something fundamentally wrong with the way the judge or arbitrator arrived at his conclusion, or a significant point of law to be ruled upon by the Court of Appeal.

ADR when defined to exclude arbitration does not lead to either an interim or a final decision which is imposed upon the parties. The parties to ADR have to come to an agreement at the conclusion of the ADR process.

An adjudicator's decision is imposed on the parties and is contractually binding. In that respect, an adjudication clause is similar to expert determination clauses, where disputes are referred to an individual nominated "to rule as an expert and not as an arbitrator". The decision of such an expert is contractually binding.

#### **Adjudication five years on: success or failure**

Since the HGCRA came into force on 1 May 1998, it is estimated that there have been in the region of 15,000 adjudications.

At the time the HGCRA was being passed into law, two fears hovered. One was that the adjudication process, for all its theoretical promise, might fall down in practical use and under

legal challenge. The other was that there would be a flood of demand for adjudication and not enough adjudicators to deal with it.

Fortunately, both these fears have been dispelled. Adjudication is working very smoothly and the process has been fully supported by the judiciary.

Further, there appears to be sufficient capacity of adjudicators to meet current demand. This does not preclude the possibility that there could be shortages in some specialities or in some geographical areas. Of these two possibilities, the former would be the more serious, as geographical proximity is a practical advantage rather than a necessity.

Research has established that adjudicators mainly come from the quantity surveying discipline, followed by civil engineers, architects and lawyers. The most "popular" adjudicators are those who are quantity surveyors also holding a law qualification.

Main contractors and their domestic sub-contractors are the principal protagonists, followed by main contractors and their clients. As for who initiates the adjudication, it is generally true that the party further down the supply chain is the one who exercises the right to adjudication, despite the fear of reprisals by those in a position to deny them the opportunity to tender.

Domestic sub-contractors are the main instigators of adjudication, followed by main contractors, consultants and clients.

In approximately 66% of the cases referred to adjudication, adjudicators found for the claimant. In 14% they found for the respondent and in 20% of cases their decision was split. It would therefore appear that the party who initiates the proceedings is most likely to win.

The main subject of the dispute referred is usually money. The following list shows the subjects of the disputes covered by the research, in descending popularity:-

- Payment
- Loss and expense
- Defective work
- Extensions of time
- Final account value
- Determination of contract
- Mixture of the above
- Complex - no main cause, but rather the effect

When analysis was carried out of the payment issues being referred to adjudication, these were broken down as follows:-

- Failure to comply with payment provisions
- Valuation of variations
- Valuation of final account
- Other

The most common issues involve sums of money between £10,000 and £50,000, followed by the £50,000 to £100,000 range. There have been substantial numbers of adjudications dealing with sums of up to £500,000 but it is now becoming more common for disputes covering many millions

of pounds to be referred to adjudication, even if only to establish liability rather than the quantum itself.

The mean sum in dispute in the adjudications covered by the research was found to be £117,535.

Further research has looked at adjudicators' hourly fees, the hours spent on each adjudication, the cost of the expert advisers and the fees charged by the adjudicator nominating body.

Although at the outset of statutory adjudication, it was feared that adjudicators might overuse their powers to appoint independent experts to advise them in areas which required special skills, thereby escalating the cost of the process, the results of the research did not support this concern.

The most frequent expert adviser is the lawyer! But, in fact, not very often. The total number of adjudications in which experts of any kind were appointed was less than 9%.

After analysing the average cost of the adjudicator's fees and the average charges of the adjudicator nominating bodies, the conclusion is that, on average, the cost of the adjudication process is roughly 3.05% of the sums in dispute. This does not of course include the costs of each party in preparing their case, the costs of their advisers or, indeed, the opportunity costs of their in-house time spent on dealing with the adjudication.

Approximately 60% of adjudications have entailed the adjudicator holding meetings; in approximately 18% of adjudications, the adjudicator's jurisdiction has been challenged and in 73% of adjudications the adjudicator has given his/her decision with reasons.

The advantages and disadvantages of adjudication may briefly be summarised as follows: -

#### *Advantages*

(a) Cost

Inevitably, the scope for detailed and therefore expensive preparation is curtailed by the tight timetable.

(b) Speed of redress

The system provides a rapid means of obtaining a decision and payment of sums due. The courts are prepared to support adjudication by providing summary judgment when required to enforce the adjudicator's decision.

(c) Privacy

In contrast to court hearings which are in public and could be reported in the press and law reports, any adjudication hearing will take place in private.

(d) Keeps project going

One of the principal purposes of the HGCRA was to ensure disputes could be resolved while work continues on site and that the disruption caused by insolvency would be reduced by encouraging prompt payment.

*Disadvantages*

(a) Unsuitable for complex cases

The timetable may be too short for some disputes, although parties are now dealing with this by breaking a larger dispute into several smaller issues or, alternatively, agreeing a longer period in which the adjudicator is to reach his/her decision.

(b) Ambush

If the referring party has taken a lengthy time to put their claim together and has then taken the responding party by surprise, the adjudicator will usually deal with this "ambush" by allowing the responding party a reasonably long period to respond, albeit within the constraints of the overall 28 day timescale.

(c) Insolvency

A party who pays money in accordance with an adjudicator's decision may be unable to recover it if he successfully reverses the decision in subsequent court or arbitration proceedings but in the interim the recipient of the payment has become insolvent.

It is generally felt, both in the construction industry and in the legal profession, that the advantages of statutory adjudication under the HGCRA far outweigh any perceived any disadvantages and that the process of adjudication has so far proved a great success.

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Victoria Russell

Fenwick Elliott LLP