Adjudication Society

Newsletter

November 2011

In this issue

Chairman's Corner

John Riches

This edition of the newsletter sees a new editorial team. Welcome to our new editors Claire Packman and Jennie Gillies of 4 Pump Court, who bring with them the support of their chambers.

We thank William Webb, the outgoing editor, of Keating Chambers for his sterling work in keeping our newsletter both alive and lively. Few people realise how much hard work takes place on a voluntary basis on the newsletter.

I also take this opportunity to thank Glenn Godfrey for his hard work on the newsletter, he collates all of the material which makes up the content and pressgangs us all until he has enough to make his quota.

Conference

This edition has gone to press before the Conference so our Conference round-up will be included in the February edition

Editorial

Claire Packman & Jennie Gillies

It is fitting that the introduction of the amendments to statutory adjudication in England, Wales and Scotland should coincide with a changing of the guard amongst this newsletter's editorial team. It is thanks to the many contributors to this newsletter that we are able to mark the advent of these amendments with a bumper issue covering various aspects of the changes introduced by the new Construction Act.

If there is a common thread among the majority of the articles in this issue, it is that the law of unintended consequences is alive and kicking and the outwardly conservative changes introduced through the new Construction Act may have far reaching, and quite unplanned, effects. The repeal of section 107 will prove to be a fertile area for debate in the years to come, with arguments likely to be had in adjudication and enforcement proceedings on whether a contract exists which is capable of giving rise to an entitlement to adjudicate. In a helpful article, Andrew Hales summarises the legal position on the use of 'subject to contract' labels and provides useful practical guidance on the topic. Hamish Lal's article on the views of smaller enterprises on the repeal of section 107 also makes for illuminating reading (particularly given Government estimates that 99% of the 185,000 construction enterprises in England and Wales are 'small or micro enterprises'). In Jonathan Copes' article on payment provisions under the new Construction Act, readers get the opinions of five distinguished professionals for the price of one, with a helpful summary of the various predictions made during a recent question and answer session held in October 2011.

Our new Construction Act theme continues with a review of draft legislation and adjudication case law. James Golden provides a useful update on the progress of amendments to the construction regimes across the Irish Sea and an invitation for members to get involved. Thirteen years is a long time in the law and many of us may now have forgotten some of the early decided cases concerning the Housing Grants Construction and Regeneration Act 1996. Bringing us all up to date, Nicholas Gould (and colleagues) provide us with an update on important adjudication cases, both old and new, including those most relevant to the changes wrought by the new Construction Act.

And once you've had your fill of the new Construction Act and hanker for the good old days, we bring you words of wisdom from JR Hartley on a professional conduct issue for parties' representatives and adjudicators alike; in the small construction world players and practitioners will always want to be on their toes to avoid the pitfalls associated with the appearance of bias.

Claire Packman

Jennie Gillies

Changes to the Construction Act - Contract Formation and Letters of Intent

Andrew Hales

One of the key changes to Part II of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") is that construction contracts no longer have to be "in writing" to fall within its remit. This means that contracts that are (1) wholly in writing but have subsequently been amended orally, (2) partly in writing and partly oral, and (3) wholly oral, are now subject to the payment and adjudication provisions within the HGCRA (as amended).

The express intention behind the repeal of s 107 was to widen the scope of eligibility to adjudication. The restrictive definition given by the Court of Appeal in *RJT Consulting Engineers Ltd v DM Engineering (NI) Ltd [2002] EWCA Civ 270* of what constituted a contract in writing served to exclude many, especially the smaller sub-contracts, from the adjudication process. The RJT definition required evidence in writing of "*literally, the agreement, which means all of it, not part of it. A record of the agreement also suggests a complete agreement, not a partial one.*"

Undoubtedly this change will lead to more parties being able to refer disputes to adjudication. Practically, it is likely that this change will also serve to increase the time and costs involved in dealing with the adjudication process.

One interesting observation arising from the inclusion of oral agreements within the scope of the HGCRA relates to a statement made by Ward LJ in RJT that *"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".* This mirrored a submission made by counsel for the appellant that *"the whole agreement has to be evidenced in writing in order to provide the certainty which would enable the adjudicator to move swiftly to a decision within the short timetable provided by the Act".* These comments are more valid today than ever and parties seeking to assert that there is a contract should keep them carefully in mind.

Subject to Contract

In light of the new rules, what key things must one think about in relation to contract formation in order to be more certain whether you have entered into a contract (whether that be on purpose or inadvertently)? After all, without a contract you cannot adjudicate.

A variety of issues may now arise in adjudication as to (1) whether there was a contract in existence at all, (2) whether the oral element of the contract was incorporated into the written contract, and (3) what the terms of any oral contract are. Inevitably, letters of intent will also be contentious. This is likely to increase the range of issues to be resolved, and the amount of witness evidence that will be presented and tested, in adjudication proceedings. Typically, an adjudicator may well require a hearing to test the credibility of those witnesses before making a decision on the existence and/or terms of any contract. It is fair to say that adjudicators will likely now have a more difficult task in ascertaining whether a contract exists and what the terms of that contract are, within the restrictive time frame allowed. It may well be that to a certain extent adjudicators have already been grappling with some of these issues in deciding whether they have jurisdiction to decide a dispute.

Adjudicators will need to start by looking at the basic requirements for the formation of a contract, i.e. that there needs to be an offer, acceptance, consideration and an intention to create legal relations (which must, of course, be determined objectively). Failure to satisfy these conditions will lead to a conclusion that there is no contract between the parties. For example, in *Adonis Construction v O'Keefe Soil Remediation [2009] EWHC 2047 (TCC)* the claimant argued that the contract was concluded by the defendant's acceptance by performance of the claimant's order. The judge held that the order did not amount to an offer because it was referred to as a draft and the actual offer contemplated by the draft was made by the despatch of a signed and numbered sub-contract at a later date. Furthermore, if the draft order was an offer, it was not capable of acceptance by conduct because it specified a mode of acceptance requiring a signature and a seal, which never happened. Thus there was no offer and acceptance and the adjudicator had no jurisdiction.

To avoid the difficulties that will undoubtedly arise with oral or partly oral contracts, tender reviews, notes of pre-contract meetings, and all pre-contract discussions should be marked "subject to contract" to reduce the risk of a contract being created inadvertently. In *Immingham Storage Company Ltd v Clear plc [2011] EWCA Civ 89*, the Court of Appeal held that the use of the words "a formal contract will then follow in due course" in an email accepting a signed quotation, did not mean that a binding contract had not been formed in circumstances where all essential terms of the contract had been agreed, the necessary internal approval had been obtained and, notably, the negotiations were not conducted "subject to contract". In the circumstances the suggestion that a formal contract would follow was *"a mere expression of the desire of the parties as to the manner in which the transaction already agreed to, will in fact go through".*

Contracts can be created in circumstances where one party holds a genuine view that no formal contract was ever concluded and, following the *Immingham case*, it is more important than ever that the words "subject to contract" are used as standard. In *Bennett Electrical Services Ltd v Inviron Ltd [2007] EWHC 49 (TCC)* it was held that no contract came into being where a letter of intent was marked *"subject to contract".* All the elements of a contract must be present to create a binding letter of intent and in particular circumstances these have been held to constitute contracts in writing that complied with s107 of the HGCRA where they included all matters that the parties were required to agree.

With the abolition of the requirement for contracts to be in writing, these cases will still be relevant to determining whether there is a contract at all, such that a dispute under the contract could be referred to adjudication. Although each case will turn on its own facts, parties drafting a letter of intent should address

(1) see Coulson on Construction Adjudication The Honourable Sir Peter Coulson (Second Edition, Oxford University Press 2011) paragraph 2.72.

(2) See for example Harris Calnan Construction Co Ltd v Ridgewood (Kensington) Ltd [2007] EWHC 2738 (TCC); Cubitt Building and Interiors Ltd v Richardson Roofing (Industrial) Ltd [2008] EWHC 1020 (TCC) and more recently Ellis Building Contractors Limited v Vincent Goldstein [2011] EWHC 269 (TCC). See also Coulson on Construction Adjudication The Honourable Sir Peter Coulson (Second Edition, Oxford University Press 2011) paragraph 2.75.

the following key provisions in order to ensure certainty:

- the aim of a letter of intent
- the terms and conditions applying to the works referred to in a letter of intent
- the requirements for quality of work and timing of work or completion of work
- any insurances required to be maintained
- a copyright licence (if the contractor is to carry out the design)
- a payment clause and any cap on payment
- a dispute resolution clause
- how the parties may end a letter of intent arrangement, including what happens if they enter into the formal contract
- any boilerplate requirements, such as a governing law clause.

Oral Variations

One further issue that is likely to be put to an adjudicator is the allegation that there has been an oral variation to the contract. The adjudicator will now have jurisdiction to decide the issue. Previously it had been held that a contract in writing could be taken outside the scope of the HGCRA if there was an oral variation to the terms of the contract.

A contract may provide that any variation to the terms of the contract must be in writing and must refer the actual provision that is being varied. In such cases it is arguable that an oral variation to the terms of the contract will not be valid and enforceable. In any event, parties need to be very careful when agreeing oral variations to the actual terms of the contract, as well as oral instructions or agreements to vary the scope of work. These should ideally be reduced to writing as soon as possible and sent to the other party as a contemporaneous record of the agreement. Any dispute over the terms of the oral variation would hopefully then be resolved before either party has taken irreversible steps to implement the variation or acted in reliance on the varied terms. In practice this often does not happen and the contractor duly carries out the works in accordance with its interpretation of what has been orally agreed and it is not until a dispute arises that the parties recognise that they should have recorded the varied terms in writing.

Contracts not in writing: Be careful what you wish for…

Hamish Lal

The most provocative amendment made by the "new" Construction Act is, of course, the repeal of the Section 107 restriction that previously meant that only contracts "in writing or evidenced in writing" counted as construction contracts.

It is, of course, now purely academic to discuss whether it was better to leave things unchanged and thereby force the industry to try and evidence all agreements in writing, although one wonders how often the themes in early judicial statements will be re-cast in future cases dealing with oral or partly oral contracts.

In *Grovedeck Limited v Capital Demolition Limited [2000] BLR 181* HHJ Bowsher QC commented:

"Disputes as to the terms, express and implied, of oral construction agreements are surprisingly common and are not readily susceptible of resolution by a summary procedure such as adjudication. It is not surprising that Parliament should have intended that such disputes should not be determined by Adjudicators under the Act …"

Ward LJ also stated in *RJT Consulting Engineers Limited v DM Engineering (Northern Ireland) Limited [2002] BLR 217:*

"… 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".

Previous research in favour of repeal

All the published responses to the Government Consultations on the "new" Act tended towards the view that *"almost all of the respondents supported our proposal to remove the requirement that contracts should be in writing"* and sought to make a financial case justifying repeal. In the second consultation on proposals to amend Part II of the Housing Grants Construction and Regeneration Act 1996 the Government referred to two sources :

- a report published by the Glasgow Caledonian University; and
- annual reports published by the Technology and Construction Court in 2005/2006.

In the report published by the adjudication reporting centre at the Glasgow Caledonian University in August 2005 it was stated that as many as 10% of all challenges to adjudicator's decisions arose as a result of the 'contracts in writing rule'. This report found that challenges to the adjudicator's appointment featured in 40% of adjudications and of these, 3% related specifically to whether the contract was in writing and a further 7% related to unspecified challenges to the adjudicator's jurisdiction which was likely to include challenges alleging an oral agreement.

The second consultation on proposals to amend Part II of the Housing Grants Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (England and Wales) Regulations 1998 also considered the annual reports of the Technology and Construction Court for 2005 and 2006. These reports suggested that, on average, approximately 100 claims for enforcement of adjudications were submitted each year, of which 15% related to whether the construction contract was in writing. The Government then sought to convert both sets of research into a financial metric that

(3) For a detailed analysis of each of these provisions see K Gidwani, A note on letters of intent in the construction and engineering industries Practical Law Company - PLC Construction, www.construction.practicallaw.com.

(4) Carillion Construction Ltd v Devonport Royal Dockyard [2003] BLR 79.

could be used to explain why Section 107 ought to be repealed :

"…Improving payment practices in the construction industry found that on average [challenges to the enforcement of an adjudicator's decision] may cost £12,500. The total approximate cost is therefore 100 x 15% x £12,500 = £187,500.

Based upon Glasgow Caledonian University's reports, we believe it is reasonable to assume that approximately 1,750 adjudications are conducted each year in England and Wales. This is an estimate based on construction output in England and Wales as a proportion of that in the UK and taking an average of 2,000 adjudications per year in the UK based upon the survey. The average cost of enforcement proceedings per adjudication is therefore 187,500 / 1,750 = £107."

The view amongst Small and Medium Enterprises

Recent research published by the University of Central Lancashire paints a less optimistic picture, especially amongst small and medium enterprises (SMEs). The picture becomes even darker if one considers that the changes, whose provenance was ostensibly anchored in saving money for UK plc, may in fact lead to increased costs (for SMEs and more generally).

The University of Central Lancashire's Research is statistically significant (which is important when one seeks to draw empirical conclusions) and perhaps, more importantly, because it assessed the differences in views between SMEs and larger organisations. The differences are sophisticated. For example, only 60% of the SMEs thought that abolition of the 'contracts in writing rule' was now a good idea.

So why do many SMEs, now, think that repeal of Section 107 is less than helpful?

- Analysis of disputes about formation and/or terms of an oral contract are highly likely to require a hearing before the adjudicator. In turn, this could lead to two or three days of preparation time for the individuals involved and it will certainly involve additional travel costs and time. Hearings can be complex and the lay client may have concerns that legal issues may eventuate which in turn can lead to the instruction of external legal advisors (who would need to catch-up with the adjudication process). One can readily understand how the costs of adjudication can be increased considerably by the need for a hearing to analyse facts and discuss matters with witnesses of fact.
- The need for written witness statements will only further increase costs – costs which are ordinarily irrecoverable and costs which can have serious consequences for SMEs.
- It is also likely that jurisdictional challenges at the Enforcement Stage will increase, a point made by *Coulson J in Construction Adjudication* (First Edition) :

  Jurisdictional wrangling is unlikely to be diminished by [the repeal of Section 107]. Thus whilst there is no doubt the change might prevent a handful of jurisdictional challenges every year, it may create other difficulties which are identified … It would also introduce fresh uncertainties into a topic which, at present, it might be said that the law is tolerably certain".

Outlook for the future

The perception was that Section 107 'wasted money, wasted adjudicator and court time' and had led to 'jurisdictional attacks on adjudicators that have nothing to do with the merits of the referring party's case'. But, now we may just have created a bigger problem for business and the entities that perhaps most need speedy and cost efficient dispute resolution. Paradoxically, such costs could, in practice, act as a tangible fetter to recourse to statutory adjudication for SMEs.

It is also interesting to see how many in the professional services sector are now offering training targetted at SMEs so that SMEs can better understand how contracts can be created, how oral discussions need to be carefully noted and the dangers of oral variations to written contracts. Putting aside the fact that training is rarely completely without cost or internal expense it is clear that some SMEs must be thinking that the 'contracts in writing rule' was in retrospect no bad thing and that adjudications were better when it was more feasible to have a "documents only adjudication". Keen participants in the various Government consultations may recall that Government thought that repeal of Section 107 would save about £600 per adjudication in the UK. Isn't it ironic that a hearing can easily cost more than £600 and that repeal may, in fact, increase the overall costs of adjudicating such some SMEs may, now, consider it more efficient to litigate.

'Simplified' Construction Act payment provisions

Jonathan Cope

Whilst the amendments to the adjudication provisions of the Housing Grants, Construction and Regeneration Act 1996 are interesting, the changes to the payment provisions will have a more significant impact on the industry – both on contractors as they try to grapple with the various different notices and on lawyers, adjudicators and judges dealing with the inevitable payment disputes that will arise. I'm not alone in this view and in October 2011 the London and South East Region of the Society held a panel debate to discuss the new payment provisions and some of the problems that we might encounter. I sat on the panel (along with John Bradley of Reynolds Colman Bradley LLP and the Contractors Legal Group, Chris Ennis of Davis Langdon, Rudi Klein of the Specialist Engineering Contractors' Group and the regular PLC contributor, Lynne McCafferty of 4 Pump Court) and thought I'd share some of what was discussed.

Pay-when-certified, etc

What are the likely effects of the prohibition against pay when certified clauses in s110(1A)?

The general consensus amongst the panel was that we are likely to see an extension of payment periods, particularly where final payments are concerned. However, opinion was divided on whether the prohibition would therefore be good for payees. One of the panellists expressed the view that the prohibition of such clauses might be an 'own goal' for payees, whilst another panellist thought the changes were positive because payees would now have certainty as to when they will receive payment (even if payment periods are extended).

Payment notices

Is a payer relieved of its obligation to make payment in the event that a payer fails to issue a payment notice under s110A(1)(a) and the payee fails to issue a default notice under s110B(2)?

As one of the panellists pointed out, this situation is unlikely to arise, as most

contracts provide for the payee to make an application (which would therefore become the default payment notice under s110B(2)) and the payee's right to payment will therefore have arisen.

However, what if the payee's application is deficient, for example it fails to state the *"the basis on which that sum is calculated"* – is the payee not then back in the situation where the payer is not obliged to make payment? Another panellist made the point that it's not clear that the payee will not be entitled to payment because the payer's original failure to issue the payment notice will be a breach of the contract.

Personally, I think that this might catch a few payees unaware but they will soon get used to it. If I was a payee, I would submit an application and if the payer failed to submit a payment notice, I would also submit a further default notice, just in case.....

In the event that a contract provides for a 'specified person' to issue a payment notice and he or she fails to issue an effective notice, could this expose the 'specified person' to any liability to the payer?

The general consensus of the panel was that this is unlikely, as it's doubtful the payer would suffer any loss as a result of the 'specified person's' failure. In particular, the failure could simply be corrected in the next payment. Even if the payee becomes insolvent before the next payment, it's not certain that the 'specified person' would be liable because there is a question of causation (i.e. was the loss caused by the 'specified person's' failure to issue an effective payment notice or the payer's failure to issue a pay less notice?)

Pay less notices

Can a payer challenge the sum due to a payee even where an effective pay less notice had not been given?

Under the previous payment regime, in the absence of third party certification, the payer can still challenge the sum due even in the absence of a withholding notice. This is because it is not the payee's application or invoice that determines the sum due but the amount of work done (see *SL Timber Systems Ltd v Carillion Construction Ltd [2001] ScotCS 167)*. The panellists were asked for their views on whether this will still be the case under the new payment regime.

The majority view was that payers will no longer be able to challenge the sum due because s111 states that payers must pay the "notified sum" which is the sum stated in a notice, and not the value of the works undertaken.

Personally, I consider that this change has the potential to have a significant impact. I have come across a number of disputes where the adjudicator found that the main contractor was entitled to rely on *SL Timber v Carillion* in order to challenge the sum due even though they had failed to issue a withholding notice, and it appears that such a defence might no longer be available. However, as one of the panellists pointed out, payers will still be able to challenge the sum due on the grounds that a default payment notice issued by a payee under s110B is deficient, in particular it might not specify "the basis on which that sum is calculated".

One point on which the panel was unanimous was that this is likely to be a fertile ground for disputes under the new provisions.

The relationship between sections 111(3) and 111(4)

A member of the audience raised the point that s111(4) states that a pay less notice must specify the sum the payer considers due on the date of the pay less notice, and given that the pay less notice may be issued some weeks after the due date for payment, the sum the payer considers due might conceivably be more rather than less....confused! The same point was also made at a recent meeting of Arbrix Construction Group that I attended.

The general view at both meetings was that, given that s111(3) refers to the payer giving notice of its "...intention to pay less than the notified sum" [emphasis added], the wording of s111(4) is only relevant where the payer wishes to pay less than the notified sum.

All in the detail …

The debate also touched on the question of the detail required in order for a pay less notice to comply with the requirements of s111. The general view was that there should be as much detail as possible, but it may be acceptable for payers to refer to previously issued documents. However, the prize for the best analogy must go to Rudi Klein who urged us all to think back to our school days and what our maths teachers drilled into us – show your workings!

Suspension

When asked whether there is likely to be an increase in payees suspending performance of their obligations as a result of the amendments to s.112, the panel agreed that there was likely to be an increase, although there were some differences over the extent of the increase.

Most agreed that the ability to partially suspend obligations and the right to payment of costs and expenses arising out of a suspension will give payees greater confidence to suspend, and this in turn will result in an increase in the number of suspensions. However, some factors which may limit the number of suspensions were mentioned, for example the damage to relationships and the practical consequences of suspending, including potentially having to pay labour to stand idle or delays to the commencement of other projects.

What 'obligations' can be suspended under s112(1)?

One of the panellists considered that a payee might be able to suspend its obligation to insure the works. However, it was stressed that caution must be exercised when suspending obligations required under statute, for example those extending to elevators, gas safety, etc.

Another panellist reminded the meeting that construction professionals need to think about the consequences of any suspension – for example if a construction professional suspends its obligations to undertake inspections over an unpaid fee of, say, £5,000, but this causes £500,000 of delay damages, could this land the construction professional in 'hot water' with its professional body or PI insurer?

In my view, an increase in the number of suspensions might result in a consequential increase in the number of adjudications, for example disputes might arise over the question of whether the payee complied with the notice provisions in the contract, what costs and expenses the payee is entitled to recover and to what extension of time, if any, the payee is entitled.

What costs and expenses might a payee be entitled to recover under s112(3A)?

A very interesting question that the panel addressed was whether s112(3A) would be interpreted narrowly so that a payee is limited to recovering only those costs and expenses directly related to the suspension (e.g. the cost of removing plant from site and returning it) or will it be interpreted widely so that all costs and expenses arising out of the suspension are recoverable (e.g. the costs of a site agent for the entire period of delay).

Some of the panel leaned towards the narrow interpretation, but others anticipated that these provisions would be treated like a traditional loss

and expense claim.

Only time will tell but it will certainly be another fertile ground for disputes.....

Summary

The new payment provisions have received somewhat of a negative press due to their complexity and unfortunate drafting. However, once the questions over the meaning of some of the amendments have been resolved, the amendments will, in my view, be quite effective at maintaining cash flow. Of course, there's every possibility that I'm wrong and I'll be back talking about further revisions in a couple of years time...

Things Irish

James Golden

News from the Northern Ireland Assembly…

As readers will know, the Construction Contracts (Northern Ireland) Order 1997 replicates, to a large extent, the provisions set out in Part II of the Housing Grants Construction and Regeneration Act 1996.

In April 2009 a consultation was carried out by the Department of Personnel and Finance which concluded overwhelmingly that Northern Irish law should remain in step with that in England, Wales and Scotland. This remains the almost certain result and is the position supported by the Northern Ireland Region of the Society.

The Construction Contracts (Amendment) Act (Northern Ireland) 2011 has been published setting out similar changes to those introduced by the Local Democracy Economic Development and Construction Act 2009 and received Royal Assent in February 2011, although no commencement date has yet been set. The latest estimate is that amendments to the 1997 Construction Contracts Order will be effective within the next 12 months.

A public consultation is now to be carried followed by the necessary legislative process. This is imminent.

Update on the Construction Bill in Ireland

The Irish Government has recently completed a Regulatory Impact Assessment of the proposed Construction Contracts Bill which was introduced over a year ago. The RIA was published on 27 September 2011. It can be found at http://per.gov.ie/wp-content/uploads/Regulatory-Impact-Analysis-of-the-Construction-Contract-Bill.pdf
The Bill is now due to be presented to the Dail imminently and will be sponsored by the Government.

The Bill (and the RIA) contain a good many proposals that are very different from those in England, Wales, Scotland (and Northern Ireland). These include a proposal that Public Sector and Private Sector contracts should have a different adjudication regime and that adjudication decisions would be non-binding if a writ or notice of arbitration has been issued. However, much will depend on the amendments actually proposed by the Government.

The Society is engaged in Dublin on a number of fronts. However, our presence is (as yet) far from substantial. The Northern Ireland Region is sponsoring some key stakeholders in the Construction Contracts Bill project to attend the Annual Conference this year and has offered support to those progressing the matter.

If you have any comments or points of interest on this, then please contact me at james@quigggolden.com

Complaints series - Complaint No.11 – professional associations

J R Hartley

One complaint that arises from time to time is an allegation that an adjudicator has a close relationship with one of the party representatives.

We are all aware of the principle that an adjudicator should be impartial at the time of accepting an appointment and remain so during the entire proceedings. Similarly, we will be aware of the need to avoid presumed or unconscious or apparent bias arising from an involvement with a party, including a party representative. The test for apparent bias, in broad terms, is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the adjudicator was biased.

Whether an association between an adjudicator and a party's representative gives rise to an appearance of bias will be fact dependent. It is, nonetheless, helpful to consider some types of associations that might arise and whether they give rise to a conflict.

The fact that an adjudicator is a member of the same professional association and/or society or "club" as a party representative will not ordinarily give rise to an appearance of bias. It follows that where an adjudicator has the same professional qualification or is a member of the same professional group as a party's representative should not give rise to a justifiable complaint. Similarly, the fact that a party representative is known to an adjudicator through previous or current professional engagements should not give rise to a justifiable complaint or require disclosure.

What is perhaps less clear cut is a situation where there is a close family or personal relationships (i.e. an association outside the working environment) with party representatives or members of their firms. It is thought that, at the very least, these types of associations should be disclosed by the adjudicator once they come to the adjudicator's attention. The steps which should then be taken will necessarily depend upon the proximity of that relationship.

- In instances where the individual within the party representative's firm has not been, or is not, involved with the particular matter it may well be acceptable for the adjudicator to proceed with an appointment without obtaining consent from the parties.
- Where the relevant individual is involved with the subject matter, it may be advisable for the adjudicator to decline to proceed unless the parties, in full knowledge of the association, give their consent.

Nicholas Gould's Case Notes Corner

Fenwick Elliott LLP, Case Editor
Co Editor: Charlene Linneman, Fenwick Elliott LLP

Transcripts of these cases, if available, can be downloaded from the Society's website (www.adjudication.org). Simply go to the case summaries.

Witney Town Council v Beam Construction (Cheltenham) Limited

[2011] EWHC 2332 (TCC), 12 September 2011, TCC, Mr Justice Akenhead

Meaning of Dispute – Jurisdiction – Part 8

Beam's Adjudication Notice claimed money and time and that the Council were in repudiatory breach of contract. An Adjudicator was appointed and the Referral Notice served. The Council promptly made it clear it considered that more than one dispute had been referred to adjudication but the Adjudicator emphatically and very promptly made it clear that he did not consider the point a good one. The Council reserved its position.

The Judge held that only a single dispute had been referred to adjudication: this dispute was what was due and owing to Beam. It was important to bear in mind that construction contracts are commercial contracts and parties can be taken to have agreed a sensible interpretation will be given to what the meaning of a dispute is.

The Judge drew the following conclusions at para 38:

(i) A dispute arises generally when and in circumstances in which a claim or assertion is made by one party and expressly or implicitly challenged or not accepted.

(ii) A dispute in existence at one time can in time metamorphose in to something different to that which it was originally.

(iii) A dispute can comprise a single issue or any number of issues within it. However, a dispute between parties does not necessarily comprise everything which is in issue between them at the time that one party initiates adjudication; put another way, everything in issue at that time does not necessarily comprise one dispute, although it may do so.

(iv) What a dispute in any given case is will be a question of fact albeit that the facts may require to be interpreted. Courts should not adopt an over legalistic analysis of what the dispute between the parties is, bearing in mind that almost every construction contract is a commercial transaction and parties can not broadly have contemplated that every issue between the parties would necessarily have to attract a separate reference to adjudication.

(v) The Notice of Adjudication and the Referral Notice are not necessarily determinative of what the true dispute is or as to whether there is more than one dispute. One looks at them but also at the background facts.

(vi) Where on a proper analysis, there are two separate and distinct disputes, only one can be referred to one adjudicator unless the parties agree otherwise. An adjudicator who has two disputes referred to him or her does not have jurisdiction to deal with the two disputes.

(vii) Whether there are one or more disputes again involves a consideration of the facts. It may well be that, if there is a clear link between two or more arguably separate claims or assertions, that may well point to there being one dispute. A useful if not invariable rule of thumb is that, if disputed claim No 1 can not be decided without deciding all or parts of disputed claim No 2, that establishes such a clear link and points to there being only one dispute."

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Carillion Utility Services Limited v SP Power Systems Limited

[2011] CSOH 139, 18 August 2011, Outer House, Court of Session, Lord Hodge

Natural Justice – Use of Own Knowledge - Severance

Carillion and SP Power entered into a framework agreement for Carillion to carry out excavation, backfilling and reinstatement works relating to electricity cables. A dispute arose which Carillion successfully referred to adjudication.

At enforcement, SP Power argued:

1 *The Adjudicator had breached the rules of natural justice in the method he adopted to quantify Carillion's claim: the Adjudicator had not adopted the method of quantification that Carillion had put forward but used his own experience of what would constitute reasonable commercial rates and made an assumption regarding additional equipment. The Adjudicator had not given the parties an opportunity to consider and comment on his proposed methodology and the material on which it was based;*

2 *If the Court agreed the Adjudicator had breached the rules of natural justice, the Court should sever the offending part of the decision which related to the uplift of the rates.*

The Judge found that the Adjudicator did not breach of the rules of natural justice when he formed a view regarding the amount of equipment required. The Adjudicator had considered material provided by Carillion and applied his own knowledge and experience to assess Carillion's claim. However, the Adjudicator did breach the rules of natural justice when applying the commercial rates which, on the basis of his experience, he considered reasonable, but about which there did not appear to have been any evidence. This calculation was a material, and not peripheral or insignificant, part of his decision. By failing to give the parties notice of his proposed commercial rate and the way in which he proposed to apply it in reaching his conclusion, the Adjudicator breached the rules of natural justice.

The decision was not severable. The Judge did not consider it was necessary to decide on the competency of the severance of a part of a single dispute as he formed the view that a partial enforcement of the Adjudicator's decision "would be likely to create complexities which are better avoided."

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PHD Modular Access Services Limited v Seele GmbH

[2011] EWHC 2210 (TCC), 8 August 2011, TCC, Mr Justice Akenhead

Pre-Action Disclosure

Seele employed PHD to carry out scaffolding works necessary for Seele's work in connection with the installation of the main concourse roof at King's Cross Station. The parties fell into dispute and there were seven adjudications, each started by PHD.

PHD then brought a court application seeking categories of documents in very wide classes. PHD's director gave evidence that PHD were contemplating commencing a number of further adjudications and court proceedings.

The Judge held that it was an inappropriate case to order pre-action disclosure. The Judge gave the following guidance:

"23. It is important that parties who are adjudicating, who have adjudicated or who are thinking about adjudicating do not see CPR Part 31.16 as some sort of procedural support and a tactical weapon for the purposes of adjudication. This is partly because it is only available when court proceedings are anticipated and partly because the Court should not interfere with the parties' contractual relationship where the contract itself does not as such give either party a right to documentation. The Court should be cautious about granting pre-claim disclosure where the parties are actively pursuing for better or for worse the contractual or statutory adjudication route unless it is clear that notwithstanding this proceedings are anticipated."

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Cain Electrical Limited v Richard Cox t/a Pennine Control Systems

24 May 2011, TCC (Bristol District Registry), HHJ Havelock-Allan QC

S107 – Contract in writing – Jurisdiction

Cain successfully brought an adjudication against Pennine in relation to two outstanding invoices (Invoices 3 and 4) for work done. Pennine paid the amount awarded by the Adjudicator for Invoice 3 without any admission of liability. The enforcement proceedings therefore only concerned Invoice 4.

Pennine argued that the Adjudicator lacked jurisdiction as the contract was not in writing such as to satisfy the requirements of s107. The Notice of Adjudication stated that the written terms of the contract were in Pennine's purchase order and in an exchange of emails between the parties on the same date as the purchase order. In its Response, Pennine objected to the Adjudicator's jurisdiction on the basis that Cain was purporting to rely on certain matters in its Response (and supporting witness statement) having been the subject of an oral agreement that was not reflected in the written terms of the contract. In its Particulars of Claim, Cain alleged that the contract was made by an exchange in writing and therefore fell within s107(2)(b).

The Judge held that there was no triable issue and Cain was entitled to summary judgment. The only material in support of a triable issue was that contained in the Referral Notice and its supporting witness statement attached to it. Cain now disowned both documents insofar as they suggest any terms were orally agreed. Pennine had always denied that any terms were ever agreed that were not put in writing. Therefore there was no real prospect of Pennine establishing at the trial of the claim that the Adjudicator did not have jurisdiction, even though the reason why he had jurisdiction had only become clear from the Particulars of Claim.

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AJ Brenton t/a Manton Electrical Components v Jack Palmer

19 January 2001, TCC, HHJ Havery QC

Party to contract – Jurisdiction – Error of Fact

Brenton applied for summary judgment to enforce an Adjudicator's decision. Palmer argued that the Adjudicator did not have jurisdiction to make his decision as the true party to the contract was not Palmer himself but his company, Lords of Princetown Limited. The Judge decided that, as the Adjudicator made the finding that Mr Palmer was a party to the contract, and referring to The Project Consultancy Group v The Trustees of the Gray Trust and Macob v Morrison, this was a decision that the Adjudicator was empowered to make under the Act. If the Adjudicator had made an error in coming to that decision, it was an error of fact that was within his jurisdiction to determine. As such, the decision was enforced.

Grovedeck Ltd v Capital Demolition Ltd

24 February 2000, TCC, HHJ Bowsher QC

Contract in writing – Oral contract – Multiple disputes – s107

Grovedeck carried out demolition work for Capital pursuant to oral contracts. Disputes arose which Grovedeck referred to adjudication. Capital argued that the Adjudicator acted without jurisdiction since there was no contract in writing and that the Act did not apply.

Grovedeck relied on the exchange of written submissions in the adjudication itself and that there had been no denial that there were oral agreements in the two projects and this was enough to give the adjudicator jurisdiction.

The two main issues to be decided were:

1 Did the Act apply to oral contracts; and

2 Could more than one dispute can be referred to adjudication and, in particular, disputes under more than one contract.

On the first issue, the Judge held that disputes as to terms, express and implied, of oral contracts were not readily susceptible to resolution by adjudication. Therefore Parliament had no intention for submissions made by a party to an unauthorised adjudication to give the supposed Adjudicator a jurisdiction which he did not have. He also noted that an Adjudicator can go no further than enquire into his own jurisdiction, but can not decide it.

Having already decided the contract did not comply with s107(5), the Judge agreed with Judge Thornton in Fastrack Construction v Morrison Construction that only one dispute could be referred at any one time under the Scheme. However, there was no such restriction in relation to the Act, unless the parties agreed otherwise. His Honour stated: "I see no reason why a construction contract in writing which sufficiently complied with section 108 of the Act as to avoid the application of the Scheme should not provide for the referral of more than one dispute or more than one contract without the consent of the other party".

Woods Hardwick Ltd v Chiltern Air Conditioning Ltd

2 October 2000, TCC, HHJ Thornton QC

Natural Justice – Bias – Separate communications with the parties – Neutrality of Adjudicator – Withholding notice – s111

Woods successfully referred a dispute regarding its entitlement to fees to adjudication. The contract was based upon an exchange of letters and contained no provisions for adjudication therefore the Scheme applied. At enforcement, Chiltern argued that the Adjudicator's decision was a nullity as the Adjudicator had failed to conduct the adjudication impartially and in compliance with the rules of natural justice. In particular:

1 The Adjudicator had prevented Chiltern from fairly presenting its case at the meetings;

2 The Adjudicator had taken evidence from Woods and from third parties which he failed, subsequently, to afford Chiltern the opportunity to comment upon; and

3 The Adjudicator had provided a detailed witness statement to Woods for use in the enforcement proceedings which contained partisan views adverse to Chiltern.

The Judge dismissed the application. He commented that, although Chiltern had not served a withholding notice, the sums claimed by Woods had not been the subject of any third party assessment or certificate, so that any abatement properly relied upon by Chiltern did not require a s111 notice. The Judge held:

1 In order to make a valid and enforceable decision, an Adjudicator must act in conformity with the rules of the Scheme which imposed an obligation on the Adjudicator to act impartially;

2 The Adjudicator had to ensure that the procedure which he adopted allowed Chiltern a fair opportunity to make its case;

3 The Adjudicator was in breach of the Scheme for failing to make available to both parties information that he obtained from Woods and the third party;

4 Whilst there was no rule which prevented an Adjudicator's witness statement being submitted in a related court action, an Adjudicator should ensure that his evidence is confined to a neutral factual account; in this case, the Adjudicator's statement exceeded the requirement of neutrality;

5 The statutory requirement to act impartially required the Adjudicator to act in a way that did not lead to a perception (judged objectively) of partiality by one party. In this case, the Adjudicator's conduct could easily be perceived as partial.

Elanay Contracts Ltd v The Vestry

30 August 2000, TCC, HHJ Harvey QC

Article 6 - Human Rights – Fair Hearing

Elanay commenced enforcement proceedings. Vestry raised certain arguments in their defence, including an argument based upon Article 6 of The European Convention on Human Rights to the effect that Vestry was not afforded a reasonable opportunity to present its case. At the time of the adjudication, Vestry's principal person involved in the relevant events spent most of the 28 days in hospital, visiting his dying mother. In addition, there was late delivery of documents by Elanay.

The Judge held that Article 6 did not apply to the Adjudicator's award or to proceedings before an Adjudicator because they did not involve a final determination. That is because all Adjudicator's decisions pursuant to the Act are subject to final determination by arbitration, litigation or agreement between the parties. Accordingly, Elanay was granted summary judgment.

Griffin (t/a K&D Contractors) v Midas Homes Ltd

21 July 2000, TCC, HHJ LLoyd QC

Notice of Adjudication – Jurisdiction

Griffin's Notice of Adjudication referred to previous invoices and letters only. Midas objected that the Adjudicator did not have jurisdiction as the Notice did not conform with the provisions of the Scheme. At enforcement, the Judge had to decide, with respect to s1(3) of the Scheme, whether the dispute referred had been described precisely.

The Judge held that although it is possible to give a Notice of Adjudication by reference to other correspondence, a party must ensure this correspondence is sufficiently clear and records the dispute with precision. He considered it crucial for the party receiving notice, and the adjudicator, to answer two key questions: "what is the brief description of the dispute and what the nature of the redress which is sought?"

In this case, only one dispute out of a series had been suitably defined in the Notice. Accordingly, the Adjudicator only had jurisdiction to deal with this dispute i.e. two outstanding invoices. He did not have jurisdiction to deal with all the invoices and general claims that were not identified in the Notice.

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John Mowlem Construction Plc v Hydra-Tight Ltd

6 June 2000, TCC, HHJ Richard Havery Q.C

Declaration – Jurisdiction – Appointment of Adjudicator - Injunction

The parties' NEC subcontract provided for a dispute to be referred to adjudication only after attempts had been made for at least four weeks to resolve the dispute under a "Notice of Dissatisfaction", and for the Adjudicator to be nominated by John Mowlem from its list of approved Adjudicators from Atkin Chambers. A dispute arose and Hydra-Tight first requested RICS appoint an Adjudicator and then the ICE. John Mowlem objected and brought an application arguing that the subcontract procedure had not been followed.

The Judge found that John Mowlem had the right to include a provision in its standard form of contract for the appointment of an Adjudicator from their chosen list. This was not bias, as Hydra-Tight would have a chance to object to any appointment on the basis of any conflict of interest. The list was identifiable as it could easily be construed as members of Atkin Chambers.

The Judge noted that the Notice of Dissatisfaction provision was contrary to s108 requirement for adjudication to be referred "at any time". This meant the subcontract did not provide a timetable for securing of the appointment of an Adjudicator and referral of a dispute to him within 7 days. As such, as the contractual adjudication provisions were non-compliant with the Act, Part 1 of the Scheme in its entirely applied. A declaration was granted that the Adjudicator did not have jurisdiction as well as an injunction restraining Hydra-Tight for taking any step in the adjudication or to seek to enforce or implement any decision of the Adjudicator without Mowlem's agreement.

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Edmund Nuttall Ltd v Sevenoaks District Council

14 April 2000, TCC, HHJ Dyson

Slip rule - Implied term

The Adjudicator made a mistake in part of his decision, awarding Edmund Nuttall a sum in respect of loss and expense (as a result of delay and disruption) which had already been paid on account. The Adjudicator immediately accepted an error had been made and took steps to correct it but added that he did not believe he had jurisdiction to amend his decision. Notwithstanding this, Edmund Nuttall brought enforcement proceedings for the full amount. The issues were:

1 Whether the Adjudicator had jurisdiction to correct a mistake in his decision; and

2 Whether there was an implied term allowing the deduction of liquidated damages from an order of the Adjudicator for payment.

On the first issue, the Judge considered the "slip rule" as decided in Bloor v Bowmer & Kirkland which "putting the matter at its lowest, it is at least arguable that it [the Bloor decision] is right". A key consideration when determining an Adjudicator's power to correct a decision is whether the correction is to be made within a reasonable time of giving the decision and that neither party could sensibly argue to the contrary.

On the second issue, the Judge held that the contract operated sufficiently without such a term. He was very wary about implying a term as to the circumstances in which liquidated damages may be deducted from a sum due to the contractor, when the contract contained detailed express provisions which dealt precisely with the issue.

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Bloor Construction (UK) Ltd v Bowmer and Kirkland (London) Ltd

5 April 2000, TCC, HHJ Toulmin CMG QC

Slip Rule – Amendment to decision - Mistake

The Adjudicator sent out his decision by fax at 3.32pm on the date for his decision. Bowmer pointed out to the Adjudicator that he had failed to take into account payments on account made by Bowmer. The Adjudicator agreed that an error had been made and issued a corrected decision at 5.53pm on the same day.

Bloor argued that once the Adjudicator has communicated his decision to the parties, his duty was at an end and he had no power to correct any errors, except perhaps clerical errors.

The Judge held that, in the absence of a specific agreement by the parties to the contrary, a term is to be implied into the construction contract for the Adjudicator to have power to correct an error arising from an accidental slip, or omission or to clarify or remove any ambiguity in the decision which he has reached, provided this is done within a reasonable time and without prejudicing the other party. Furthermore, the Adjudicator must give the parties a reasonable opportunity to make any representations. As such, the corrected decision was a valid statement of the position as between the parties.

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Herschel Engineering Ltd v Breen Properties Ltd

14 April 2000, TCC, HHJ Dyson

Ongoing court proceedings – Adjudication – Stay of execution – Claimant's financial position – s108

Herschel obtained judgment in respect of their claim for unpaid invoices in the County Court. Judgment was then set aside and Breen given unconditional leave to defend. Prior to their serving a Notice of Appeal, Herschel referred the dispute as to non-payment of invoices to adjudication.

The Judge found that the decision of the Adjudicator was not final and therefore the dispute could be referred to adjudication, although there were ongoing court proceedings. Therefore the Adjudicator's decision could not give rise to any estoppel. The Parliament decided that a reference to adjudication could be made at "any time" and these words should be given their plain and natural meaning.

In relation to Breen's argument that Hershel had waived/repudiated the clause providing for dispute resolution, the Judge stated a party must choose whether to refer a dispute as per the contractual obligation or commit a breach of contract and refer the dispute to adjudication. There is no question that "they are not mutually exclusive routes to dispute resolution".

The Judge declined to grant a stay of execution pending final determination of the County Court proceedings. There was no real prejudice to Breen being required to pay immediately and there was no reason to keep Herschel out of its money any longer. There was no evidence that Herschel would be unable to repay Breen if it lost in the County Court proceedings.

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Absolute Rentals Limited v Gencor Enterprises Limited

16 February 2000, TCC, HHJ David Wilcox

Stay of proceedings - Arbitration

Gencor carried out various building works for Gencor pursuant to a 1980 JCT Minor Works contract. The contract contained an arbitration clause but no adjudication provisions. A dispute arose between the parties which Absolute referred to adjudication. The Adjudicator found in favour of Absolute who sought to enforce the Adjudicator's decision. Gencor cross applied for enforcement proceedings to be stayed under the Arbitration Act 1996.

The Judge enforced the decision. The Adjudicator's decision was entirely without prejudice to the final merits and determination by the Arbitrator. Although Gencor had served statements late questioning Absolute's financial viability, the Judge also declined to order a stay because of Absolute's financial position as to do so would frustrate the Scheme.

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Macob Civil Engineering v Morrison Construction Limited

[1999] EWHC 254, 12 February 1999, TCC, Mr Justice Dyson

Enforcement – natural justice – procedural error - stay

Macob applied to enforce an Adjudicator's decision. Morrison contended that the decision was in breach of the rules of natural justice and served an arbitration notice. Morrison applied for a stay under s59 of the Arbitration Act 1996 on the basis that the dispute had to be determined by arbitration before the court could enforce the decision.

The Judge confirmed that the decision of an Adjudicator was enforceable summarily regardless of any procedural irregularity, error or breach of natural justice. The Judge adopted a purposive approach to the construction of the word "decision", refusing to accept that the word should be qualified. As such, a decision whose validity was challenged was still a decision within the meaning of the Act. Therefore the decision was enforceable and binding until the challenge was finally determined. Further, the Court had power under Section 42 of the Arbitration Act 1966 to enforce the decision of the Adjudicator. As judgment was not requested, the Judge declared that the amounts were properly owing.

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Bridgeway Construction Ltd v Tolent Construction Ltd

11 April 2000, TCC, HHJ Mackay

Tolent Clause – Costs

The parties' subcontract incorporated the CIC Model Adjudication Procedure, but with an amendment that the party serving the notice of adjudication was to bear all the costs and expenses incurred by both parties in relation to the adjudication, including but not limited to all legal and expert fees.

Bridgeway sought a declaration that the amendments were void on the ground that they had the effect of inhibiting the parties from pursuing their remedies under the Act. Tolent argued that the clauses were not void and unfair as they applied to both parties and were part of a procedure which adopted the Act. The clauses referred to the matter of costs, an issue on which the Act was silent.

HHJ Mackay upheld the contract terms. The amendments were alterations to a CIC Model Procedure and not to any Act of Parliament. There was nothing to prevent parties from making their own contractual arrangements as to who was to bear the costs of any adjudication notwithstanding the outcome of the adjudication. They were not unfair as they applied to both parties. Bridgeway had argued matters before the Adjudicator on the principle as to who should pay and who should not pay, so they were bound by the adjudication. The parties had given the Adjudicator the right to determine such issues and they were bound by his determination.

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