Fenwick Elliott

# WHAT IF IT ALL GOES WRONG?

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**10 May 2004**

**ADJUDICATION UPDATE SEMINAR**

## Introduction

*Aims*

The aims of this final session are to:

- explain how difficult it is to ignore an Adjudicator or overturn his decision;
- give some guidance on the few occasions when an Adjudicator's decision can be overturned, ignored, circumvented etc;

*An Adjudicator can get the facts and the law wrong…*

1. It may be accepted now but when the Housing Grants, Construction & Regeneration Act 1996 ("Housing Grants Act") first introduced adjudication, many people thought Judges would not uphold decisions of laymen exercising judgment on substantial disputes. This was quickly dispelled when the first case reaching the Courts upheld an Adjudicator's decision – *Macob Civil Engineering v Morrison Construction.* Adjudicators are given a very wide latitude, an Adjudicator: -

   > If he has 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[1]

2. To put it simply an Adjudicator can get the facts and the law wrong and in the majority of cases there is nothing that can be done about it. Decisions where: -

   - the Adjudicator confused gross and net contract sums resulting in a windfall of between £300,000 - £500,000 to the wrong party[2];

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[1] From the well known Court of Appeal decision in *Bouygues (UK) Ltd –v- Dahl – Jensen (UK) Ltd*[1] which approved of this statement original made in *Nikko Hotels (UK) Ltd –v- NEPC* .

[2] *Bouygues* yet again

- the decision was described as confusing and unintelligible[3];

- the Adjudicator at the last minute delayed delivery of his decision 4 days beyond the deadline in order to get paid first;[4]

have all been upheld by the Courts. Indeed in *Bouygues* the Court of Appeal accepted mistakes are *"inherent"* in the adjudication process.[5]

*Arbitration, Litigation, Mediation, Negotiation etc, etc…*

3. It is always open to the parties having received an Adjudicator's decision to litigate via the Courts, or if there is an arbitration clause in the Contract, to commence arbitration. The Pre Action Protocol for Construction Disputes sets down a series of letters, meetings etc that takes months but a party has to go through before commencing litigation in court. The Pre Action Protocol however does not apply to adjudication, a dissatisfied party can go to court as soon he receives the decision.

   However, the problem with this approach is the disgruntled party must *"pay now and argue later".* A disgruntled party may commence arbitration or litigation, but in the interim he will have to pay the sum awarded by the Adjudicator.

4. In theory the disgruntled party can try to mediate the dispute, negotiate a settlement, embark on an expert determination, but in my view these are flights of fantasy. Once the parties have been through an acrimonious adjudication, the last thing on their mind is some form of alternative dispute resolution.

5. The vast majority of adjudications do not result in subsequent litigation or arbitration. The simple truth is with most disputes an Adjudicator's decision is the end of the matter.

**Dealing with problems during the Adjudication**

*Withdrawing*

6. Perversely for some parties the best thing that can happen is a complete catastrophe. If the adjudication goes seriously wrong from an early stage, say because the Referring Party has forgotten to ask the right question[6], the Referring Party can withdraw the adjudication and start again.

   There is an issue as to whether the Referring Party needs the Responding Party's consent to withdraw (I do not think so) and in any event a Referring Party who withdraws will have to pay the Adjudicator's fees.

   I will explain at the end of this talk how a complete disaster can sometimes work to the Referring Party's advantage at the end of the Adjudication process.

[3] *Gillies Ramsay Diamond and Gavin Ramsay and Philip Diamond v PJW Enterprises Limited*
[4] *Ritchie Brothers Ltd v David Philip Ltd* 15 April 2004
[5] *Bouygues* again
[6] , or as is often the case, forgotten to ask to be paid,

*Getting the Adjudicator's assistance*

7. Contrary to urban myth, most Adjudicators are not fools. Experienced Adjudicators are prepared to influence the parties if they perceive an unfair advantage being exploited. The first step should always be to involve the Adjudicator. The Adjudicator can use the ultimate sanction – he can resign. If he takes this drastic step the Referring Party is faced with having to start all over again with a new Adjudicator[7].

   The Adjudicator is (largely) master of his own procedure. Experienced Adjudicators try to coax the parties by pointing out that, if (say) more time is not given to allow a party to respond, then the Adjudicator will have no option but to resign. Most parties are faced with an intransigent but polite Adjudicator eventually gives in and allows further time for the adjudication to run its course. He can decide relevance of the evidence that is put before him and make suggestions as to whether meetings, more time or a response is needed.

8. The parties should be reluctant to upset the Adjudicator who will eventually decide whether or not a substantial sum is payable. In *London & Amsterdam Properties Ltd v Waterman Partnership Ltd* the Referring Party delivered a lengthy submission and witness statement 14 days before the Adjudicator's decision was due, even though the information was available before the adjudication commenced and could have been served with the Referral. The Responding Party, not surprisingly, complained of what the Judge described as a *"clearly deliberate ambush"* and this matter reached the Technology & Construction Court. The Judge made it clear that the Adjudicator had the power to give the Responding Party sufficient time to deal with the submission, or exclude the evidence altogether.

*Starting your own adjudication – Cross Adjudication*

9. A Responding Party may wish to raise a set off or counterclaim in an adjudication because it failed to serve the requisite Withholding Notice. Alternatively the Responding Party may want to bring a claim for defects to (say) put some pressure on the Referring Party. It is always open for the Responding Party to start a new adjudication. What normally happens is that the second adjudication is referred to the same adjudicator nominating body and, not surprisingly, the same Adjudicator is appointed. Whilst the Adjudicator must deal with both adjudications separately in practice the Adjudicator will try to have one consolidated adjudication and one decision, but only with the parties' consent.

   The key here is to act quickly. If both adjudications are then started around the same time with the same Adjudicator, whereby their timetables can run "concurrently", it is more likely the Adjudicator will try to get the parties to agree to deal with both adjudications together. If however the second adjudication commences well after the first, the Adjudicator is bound by the Act to deal with the first adjudication before the second. The timing of a "cross adjudication" is also relevant to enforcement (see below).

[7] ..and the Adjudicator who resigns is unlikely to get paid.

*Slip Rule*

10. Two cases have confirmed that an Adjudicator can correct accidental errors and slips in his decision. In *Bloor v Bowmer Kirkland* the Adjudicator corrected typographical errors in his decision within two and a half hours of it being given. In *Edmund Nuttall v Sevenoaks District Council* the Adjudicator wrote to the parties eight days after producing his decision, pointing out there was an error in his decision but he did not have the power to amend his decision. Basically he admitted he made an error and honestly highlighted this to the parties. In both cases the Court decided that the Adjudicator had implied power to amend accidental slips.

    However this in turn has given rise to a wealth of disgruntled parties pointing out "slips" in Adjudicators' decisions. The power to correct "slips" is often overrated by losing a losing party. My firm has recently been involved in adjudication where the losing party, whom we are not acting for, produced a ten-page note of alleged slips in the Adjudicator's decision. It would have completely reversed its meaning. The Adjudicator declined to make the amendments to his decision.

*CPR Part 8*

11. Nearly 40% of Adjudications are subject to a challenge to their validity ranging from the process for appointing an Adjudicator through to the extent of the issues in dispute[8]. The truth is many Adjudicators expect a challenge to their jurisdiction.

12. It is always open to the Responding Party to make an application to the Court during the course of an adjudication for a declaration confirming the Adjudicator can or cannot act in a particular manner. This procedure is not often used, unless both parties agree, the underlying adjudication will continue as the Adjudicator is bound by the limits set out in the Act.

    What most people do is simply sit and wait for the decision to be enforced.

**After the Decision has been given**

*Natural Justice and Procedural Mistakes*

13. When seeking to challenge an Adjudicator's decision most parties simply wait for enforcement and raise their objections. Most attempts to resist enforcement fail. Whilst an Adjudicator can get the facts and the law wrong the fertile area for overturning an Adjudicator's decision are procedural irregularities, and particularly breaches of natural justice.

14. In an adjudication both parties must have the opportunity of not only presenting their own case, but also answering the case put forward by the other party and dealing with the Adjudicator's views. This of course subject to the strict 28-day time limit imposed on an Adjudicator.

15. A breach of natural justice can occurred when the Adjudicator has received advice or submissions, and not presented them to the parties for comment . For example, in *Costain Ltd v Strathclyde Builders Ltd* the Adjudicator sought legal advice but did not

[8] Glasgow Caledonian Centre Report Number 5 February 2003

invite comment submissions from either party on the advice received. Even though neither party asked to see the advice, it was held the Adjudicator had committed a breach of natural justice by not disclosing the advice and accordingly his decision was a nullity. The fact that neither party had asked to see the advice was irrelevant as *"…everything else is subservient to natural justice".*

16. Failure to strictly follow the appointment procedure can also lead to problems. In *IDE Contracting Ltd v R J Carter Cambridge Ltd* the Scheme governing the adjudication provided that, if **after** a Notice of Adjudication had been issued if the Adjudicator was unable to act, the parties could refer the dispute to an adjudicator nominating body of their choosing. In this case in order to save time a secretary telephoned the Adjudicator named in the Contract to find out if he was available – he was not. However, the phone call was made **before** the Notice to Adjudicate was issued. Because the appointment had not been followed, as the Adjudicator had not been asked whether he was available **after** the Notice to Adjudicate had been served, the decision of the replacement Adjudicator was invalid.

*Reserve your position*

17. Allowing the Adjudicator to proceed without objection can be fatal. If an objection is to be taken at a later date, the aggrieved Party must clearly reserve their position if they continue with the Adjudication. In the *IDE* case the Responding Party made continued with the Adjudication but made it clear the Responding Party reserved their rights. In *Try Construction Limited v Eton House* the Referring Party's failure to object to the appointment of a planning expert going beyond *"the strict confines"* of the Parties' Submission was fatal

*Setting off against the Adjudicator's decision…*

18. Before the Act was even passed by Parliament, some bright sparks were suggesting it was possible to serve a Withholding Notice against an Adjudicator's decision and set off against the sums awarded by the Adjudicator (it had to happen). Although in *Bovis Lendlease Ltd v Triangle Developments Ltd* the Technology & Construction Court decided that the wording of the Contract in question allowed a set off against an Adjudicator's decision. The Court of Appeal in *Levolux v Ferson* for all intents and purposes got paid to the notion of a disgruntled party seeking to set off against the monies awarded by the Adjudicator.

However, with every rule there are exceptions.

*Set off consistent with the Adjudicator's decision*

19. In *David McLean Housing Contractors Ltd v Swansea Housing Associated Ltd* the Responding Paying party paid up following an Adjudicator's decision the full amount awarded by the Adjudicator save for liquidated and ascertained damages which reflected the Adjudicator's award of an extension of time. The Referring Party immediately served an effective Withholding Notice on receipt of the decision deducting liquidated and ascertained damages. Essentially the Referring Party did not get all of the extension of time that he was claiming, and as he fell short, arguably liquidated and ascertained damages were due to the Employer.

The Court held the deduction of liquidated and ascertained damages was consistent with the underlying Adjudicator's decision. As an effective Withholding Notice being given, the Court refused to enforce the balance of the Adjudicator's decision.

*Do the Contract terms allow a set off?*

20. In most cases where the parties have argued the underlying Contract allows the set off against an Adjudicator's decision, they have failed. However in *Shimizu Europe Ltd v LBJ Fabrications Ltd* the Adjudicator decided £47,718.39 plus VAT was to be paid 28 days after LBJ had delivered a VAT invoice as required by the underlying Contract. LBJ sent an invoice to Shimizu after the decision and in reply Shimizu issued a Withholding Notice. It was held that in view of the underlying Contract and the Adjudicator's decision the amount awarded by the Adjudicator was not due to be paid until 28 days after the invoice had been submitted. According, it was therefore possible for Shimizu to issue a Withholding Notice in respect of the set off which arose after the Adjudicator's decision, but before the final date for payment. The Judge in this case accepted that this was a harsh position, but the Act did not prohibit this approach – it was simply an application of the Contract agreed between the parties.

    Not surprisingly there has been a recent rush of amendments to the payments terms of bespoke contracts following this case.

*Insolvency*

21. Some parties try to avoid payment by arguing that they have a substantial counterclaim, and if the monies are paid the Referring Party will go into liquidation with no prospect of the paying party recovering its counterclaim. There are several cases on this point[9] and the Court can sometime be sceptical of a party who has lost an adjudication alleging that it should still not pay. In *Herschel* the Court held that the losing party was always aware of the financial state of the Referring Party and *"[The Losing Party] only has itself to blame if the company selected by it proves not to have been substantial…"*

22. In summary the party who is trying to resist payment will have to :-

    1. produce compelling evidence that the Referring Party cannot pay. (This will normally be to show the Referring Party is on the verge of liquidation);

    2. advance the Counterclaim quickly – this can be done by pursuing its own adjudication[10];

    3. pay the disputed monies into Court, pending resolution of the Counterclaim;

23. When the Referring Party has gone into liquidation paragraph 4.90 of the 1986 Insolvency Rules may apply to provide for a mutual set-off. Here the Losing Party is entitled to set off against the monies awarded by the Adjudicator. Otherwise, the

[9] For example *Hershel v Breen* and *Baldwin Industrial Services v Barr*
[10] In *Guardi v Datum Contracts* the failure by Guardi to serve withholding notices and only serving a claim late on in the enforcement process counted against it.

Losing Party would have no prospect of recovering the Counterclaim from a company in liquidation.

*Misconduct*

24. I am not aware of any case where an Adjudicator has been removed from an adjudication for misconduct during the course of the adjudication itself. It is, however, always open to the parties to complain to the Adjudicator nominating body about the Adjudicator's conduct.

*April 2002 – 2027 Adjudications. Complaints – 40*

*Upheld – 7*

*Year to April 2003 – 2008 Adjudications. Complaints – 18*

*Upheld – 0*[11]

*The best case –A catastrophe*

25. As I mentioned at the beginning of this talk, some adjudications go wrong, the best that can happen is a complete disaster! If you have asked the Adjudicator the wrong question, relied on the wrong payment certificate, forgot to ask to be paid etc. etc. there is nothing to stop you from adjudicating again dealing with the real issues in a fresh adjudication. The Adjudicator's decision is binding, but if you have asked him the wrong question in the first place, it will not bind you when an Adjudicator is eventually asked to deal with the real issue.

**10 May 2004**

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[11] Taken from the Adjudication Reporting Centre at Glasgow Caledonian University Report dated March 2004