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PAPER

“ADJUDICATION - THE CHANGED MODEL”

by

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3 Paper Buildings

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ADJUDICATION - "THE CHANGED MODEL"

It is almost exactly six years ago that "new" adjudication began. It was two years before that when the ICE, CIArb, ACA and others began training for what eventually became the panels of construction adjudicators. I was one of those trainers.

In those early days the emphasis or model was that the adjudicator was brought in to make an independent re-cap of an engineer's decision or an architect's certificate or QS valuation and as between contractor and subcontractor the adjudicator was merely an outside independent QS/architect/engineer/consultant making a quasi certificate (A Decision). So the process or procedure was only as "formal" as the industry expected from any certifier. In other words the adjudicator was an even handed person from construction who was a busy QS/engineer/architect/consultant with a side line of adjudicating as a stranger on other building and civil engineering projects when invited. Quite how this person adjudicated wasn't in point at all. He just got stuck-in! It was refreshing, even exciting.

It wasn't long before someone disagreed with the Adjudicator's Decision; and refused to play ball. Nor was it long before the Other Party asked the Court to enforce the Adjudicator's Decision; after all it is supposed to be a binding decision by the adjudicator. On the face of it enforcement is simply an order of the Court to obey the adjudicator. In reality enforcement is the starting gun, which unleashes all the powers of the state to ensure that people obey what the High Court says it will do. Can you see a snag here?

Enforcement is the converting of an informal certification process of an adjudicator into a Judgment of the High Court. If the informal process (the adjudication) has been conducted in a fashion which is embarrassing to the English legal system, how can Her Majesty's Judges approve that repugnant process? If Parliament is supreme it did not intend through this somewhat low key Act of Parliament (HGCRA 1996) to sweep away the English notions of fair play in a dispute deciding process. Put shortly, if a Judge was asked to enforce unfairness according to the English Law system he would not do so. Parliament didn't invent an unfair dispute management system.

Quite what is "unfair" could be answered plainly. If you need a Judge to support an adjudicator's "due process" the adjudicator has to be seen to be fair in a Judge's eyes. Nobody argued for the Judge to test fairness through the construction industry's eyes but truth to tell none of us in the construction process thought we had to apply a judicial procedure. And, there you have the shift. The Judge is part of adjudication and Parliament meant that to happen via enforcement. It therefore meant the Court to have a roll, but none of this meant that the adjudicator could do his job in an informal way. He is not an ad-hoc junior Judge. It simply means that if he administers or manages the process he must either have the express consent to do it this or that way or he must observe the notions of due process, *which the English Legal system has traditionally operated*. An early upsetting example was in *Discain v. Opecprime*. Here the adjudicator received commentary from one side only. That was too dangerous for the enforcement judge. It was *unfair* process and was set aside: -

"I find it distasteful and I cannot bring myself to enforce an adjudication, which has been arrived at in that way" . . . "he should have made sure that the other party was involved in the discussions . . ."

The message was plain and with respect quite correct. Those of us in at the beginning of this whole idea in truth overlooked the important role of the Judges. We soon realised that when asking ourselves "how" to adjudicate we had to have a system recognisable to and have the nod of the High Court. That would not be difficult.

Adjudication – “The Changed Model”

Another thing soon happened. There was a shift in power from the payer in commerce to a more balanced position. In 1996, Lord Woolf and colleagues had published “*Access to Justice*”. It openly explained that litigation was not working. Some said the same about arbitration. In other words, the man with the money said to-be-owed to another, could sit on his hands and take advantage of the slow expensive court system. But now there was a 28-day device (an experiment) in construction, which could and did decide who would have the money pro-tem. It followed that it was important to “win” this new first round in the dispute business. So industry called for help with its adjudications. Lawyers, consultants and “commercial managers” began more expertly exploring their legal rights under the construction contract. They did that to be on top of things when adjudication came along. The effect sometimes is to make the dispute go away. If not, the emphasis in the adjudication is now not merely revising a certificate or re-valuing the works or re-visiting an engineer’s decision. Instead the adjudication is heaving with evidence, facts, and legal argument, procedural niceties. Moreover there is a real endeavour to use the adjudication to decide the matter for good.

Balfour Beatty v. Lambeth [12 April 2002] H H Judge Lloyd Q.C. :-

“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.”

May I say this: -

The process of adjudication has at its heart speed, economy, arbitral principles. The adjudicator’s task is to: -

- Ascertain the facts and the law;
- Without disproportionate expense;
- Within the constraints of the 28-day process as extended
- Having regard to the contractual rules;
- Having regard to the provisional and binding nature of the Decision

AND

- (a) Act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
- (b) Adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

THE NEW MODEL

- (1) There are differing types of dispute. It seems important to make better attempts to match the dispute with the adjudicator.
“Users” can help here.
- (2) Matching the demands of the dispute with the right adjudicator is important.
Adjudicator Nominating Bodies (“ANB’s”) can help here.

- (3) Given the timescale and procedural demands, the task of adjudicating may be made that much easier and outcome more predictable if the model was limited to deciding (Refereeing) the case put, rather than adding the burden of being the investigator as well.

Adjudicators can help here.

USERS INPUT

Ordinarily the "User" serves a 'Notice of Intention to Adjudicate' and then calls for an ANB to appoint. It would be useful to also provide a précis of the dispute and an indication of the degree of complexity in the Issues. The idea is to indicate to the ANB the qualities required in the adjudicator. 300-400 words ought be enough. An attempt to grade complexity on a scale 1 – 5 (5 being the most complex) would help.

"Users" might also reflect on the desirability of having pre-canvassed their arguments. This is the use of a "Position Statement", which indicates inter-parties arguments well before the adjudication: 'A' puts his views to 'B' and seeks the views of 'B'. There is a resemblance here of Pre-Action Protocol. But the intention is to thoroughly explain 'A' and 'B's points of view to each other without the adjudicator being involved. By the way, this is one way of helping to avoid "new" argument in the subsequent Referral and/or Response.

ADJUDICATING NOMINATING BODIES ("ANB's")

If the "User" has indicated the Nature of the Dispute and degree of complexity, none of that is in point unless the ANB's have examined and graded its panel members. It may well be that now is the time to re-assess the adjudicator panellists. It need not follow that adjudicator's be dismissed, rather they are classified for differing qualities and obtain appropriate certificates.

THE ADJUDICATOR

I have asked myself about 'Standards' for conducting the adjudication qua adjudicator.

Here are some "*Blue Standards*" for due process. They are merely my ideas: -

Blue Standard: Find and apply the applicable "Rules".

- Blue Standard:**
- (a) Act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
 - (b) Adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

Blue Standard: Act with proportionality

Blue Standard: Decide the case *put*.

Blue Standard: Ascertain the law from the submissions *put*.

Ascertain the facts: -

- Allocating burden of proof
- Weighing the evidence adduced
- Using the balance of probabilities
- Without the benefit of exploration by trial.

Adjudication – “The Changed Model”

- Blue Standard:** Remind yourself: -
- You are a summary dispute decider not an advocate;
 - Decide between ‘A’ and ‘B’ on *their* arguments;
 - On their taken positions;
 - On the weight of evidence and burden of proof, and
 - Do so given absent exploration by trial.
- Blue Standard:** Do not (absent express agreement) become a certifier. Instead you are to summarily decide *between ‘A’ and ‘B’s arguments* who is right about a certificate. Decide upon *their* taken position on the weight of evidence and burden of proof given the absent exploration by trial.
- Blue Standard:** Do not (absent express agreement) become a detective. Instead you are a summary dispute decider on what ‘A’ and ‘B’ says about the facts. Decide upon their taken positions on the weight of evidence and burden of proof given the absent exploration by trial.
- Blue Standard:** Do not (absent express agreement) become a forensic scientist. Instead you are a summary dispute decider on what ‘A’ and ‘B’ says about their case. Do not become a programmer or expert witness or witness of opinion. Bring your ordinary construction knowledge and apply it to ‘A’ and ‘B’s case but do not become an expert super-man know all.
- Blue Standard:** Do not (absent express agreement) become a valuer. Instead you are a summary dispute decider on what ‘A’ and ‘B’ says about value. Evaluate *their* taken positions on the weight of evidence and burden of proof given absent exploration by trial.
- Blue Standard:** Do not (absent express agreement) be a mediator. Instead decide the *rights* of ‘A’ and ‘B’ on the cases advanced by ‘A’ and ‘B’.
- Blue Standard:** Do not become a *smart-alec*, a show-off by putting up bright ideas of your own.
- By doing so there is a real possibility that you are helping ‘A’ or ‘B’ at the expense of his opponent.
- By all means ask questions about ‘A’s case or ‘B’s case *but* only so as to understand what ‘A’ or ‘B’ is trying to say. The interfering busybody adjudicator is easily perceived as having lost his independent role. The real worry is that a notion or line of argument or point of law or finding a right or duty, which is then put to the parties is not only dangerous but becomes a life boat for ‘A’ or ‘B’. There is nothing better than clinging to an argument (even milking) advanced by the Decision-Maker himself.
- Knowing the Law or knowing the technical aspects** of the dispute is enormously welcome so that you recognise the elephant when you see it. But you are not asked to deploy that knowledge when ‘A’ or ‘B’ hasn’t. Merely appreciate the information for all it is worth. You are a Referee or an Umpire . . . better not to tell the bowler how to achieve a better result.

“USERS”

You might see that if the adjudicator operates a model whereby he decides between “Team A” and “Team B” he/she is very much dependent on what ‘A’ or ‘B’ has to say via its case. He is not there to investigate *despite* ‘A’ and ‘B’. The adjudicator is there to read/hear with great care every word. It follows that the presentation of the case must be thorough. An adjudicator with limited knowledge of the law who finds himself faced with legal argument will need help from ‘A’ or ‘B’ or both. Be careful and patient in giving that help. The novice to law as adjudicator should be taken to basic principles and slowly signposted to cases and materials, which will help. Coax the adjudicator to obtain help but don’t bank on him doing so. Rather better to give considerable help.

Another area of help is to be circumspect about piling-in umpteen lever arch files. There is a real chance that even if the adjudicator reads-in, not much will sink-in. Better to sign post. When a submission makes a point, refer it to a bundle number or better still copy and paste (if possible) part of a document into the submission.

Remember that the adjudicator is trying to decide the Issues and Sub-issues. Consider pulling issues into a schedule so that each can be seen at a glance and see where argued.

THE BINGHAM ADJUDICATION SCHEDULE				
ITEM No	ISSUES/SUB-ISSUES WITHIN ISSUE Including £ difference	Burden On Claimant? Respondent?	Argued where in Referral’s Bundle?	Argued where in Respondent’s Bundle?

This would be done once the inter-party exchanges are finished.

When compiling a Reply it is very helpful to paste the Reply commentary into the document that is being replied to. So if ‘A’ says in his Referral it happened on a Tuesday, let us see ‘B’s Reply to that below ‘A’s claim.

As for the Referral the whole idea is to refer the whole dispute. Frequently and wrongly ‘A’ refers only to his side of the dispute. The correct approach in the writer’s view is to refer what ‘B’ has also previously said to ‘A’. (You might now see the value and use of the “Position Statement”.)

On occasions the Respondent thinks of arguments not previously advanced and puts them into his Response document. It is tempting for the Referring Party to object, saying that the new arguments/evidence turn the dispute referred into a different dispute. Sometimes that will be true and the new argument or evidence inadmissible. But if that is the case, if it forms a new dispute the remedy for ‘B’ is to serve a ‘Notice of Intention to Adjudicate’ of his own and come with this further dispute. If it is as easy as this, don’t persist with an empty quarrel in the first adjudication trying to get it in. Start another matter instead.

If new argument/evidence in the Response is in fact part and parcel of the first referred dispute, the test for letting it in is fairness. It should come into this dispute because it is relevant and if arrangements are agreed to provide the surprised party time to answer the new material. Time really is the answer. If the party with the new material will not agree to extend time for his opponent to answer it may be quite correct to reject the new material. The test is one of “fair play”. You might begin to see how important it is to be on the alert to answer emerging disputes, so that the answer is at least on the table and is not an ambush answer *in* the adjudication. In short, the adjudication is not the time to find out what the other fellows argument is. The arguing is *over* when the adjudication *begins*.

Adjudication – “The Changed Model”

The arguments are in the sack and the sack tied at the neck and handed to the adjudicator. In truth, new arguments do go into that sack during the adjudication but not if they create an unfair advantage, which causes or may cause substantial injustice.

ANB’s (Adjudicating Nominating Bodies)

One of the most dangerous positions for “Users” is the ANB, which becomes an outside influence on adjudicators. It is unlawful to have adjudicators “*looking over their shoulders*” when conducting and deciding a dispute. My concern is the use made, and effect of, complaints to ANB’s about adjudicators. Judicial decision makers are not there to win friends. Judges, arbitrators, adjudicators and tribunals of all sorts attract criticism about their process or outcome. The common law of England and Article 6 of Human Rights Act forbids the imposition of “outside pressure” on any tribunal. If that is happening or happened the Decision has no effect in law. The reason is that the Decision maker may, only may, trim and tailor his decision to avoid a complaint. There need only be a mere possibility of that.

The real intention behind harbouring complaints is to monitor performance. If that is what happens (and if complaints especially from a loser can be trusted) then no real difficulty arises until the effect of a complaint is analysed. If the effect, might, only might, lead to some disadvantage suffered by the adjudicator then the well-intended idea becomes unlawful and divert the true course of justice. Even if there is a one in one hundred chance of that happening, the pressure must stop. Far better to continually train and continually examine the Decision makers, this is objective assessment and does not offend independence nor impartiality.

ADJUDICATORS

One or two other Blue Standards: -

1. TAKING THE APPOINTMENT

- Am I available?
 - 24/7 task
 - 42 days and more besides
 - Too busy
- Do I have the expertise
 - Familiar
 - Technically
 - Legally
- Is there any conflict?
 - Recuse
 - Bias actual
 - Bias apparent
 - Independence
 - Prejudice
 - Impartial

Discussion: Bias

The test as to bias was stated by Lord Hope in *Porter v. Magill* [2002] 2AC_375 @ paragraph 103: -

“The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”.

That is the test, which an adjudicator is required to apply when deciding whether the adjudicator should recuse himself for bias.

BLUE STANDARD: IF IN DOUBT RECUSE

For a detailed exploration of bias and adjudication, read *Glencot v. Ben Barrett & Son*. Note the cases therein especially *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 CA (Lord Chief Justice, the Master of the Rolls and the Vice-Chancellor) said at pages 471-472 (paragraphs 2-3): -

- “2. In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affections or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.
3. Any judge (for convenience, we shall in this judgment use the term ‘judge’ to embrace every judicial decision-maker, whether judge, lay justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgement given. Such objections and applications based on what, in the case law, is called ‘actual bias’ are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.”

These observations, although directed to impartiality, would apply equally to independence*

AND Lord Prosser in *Starrs v. Ruxton* [2000] JC 208: -

“As regards the actual words ‘independent’ and ‘impartial’, the latter appears to me to be of the essence of the judicial process. I would regard the concept of a partial judge as a contradiction in terms. But I am inclined to see independence – the need for a judge not to be dependent on others – as an additional substantive requirement, rather than simply a means of achieving impartiality or a perception of impartiality. Independence will guarantee not only that the judge is disinterested in relation to the parties and the cause, but also that in fulfilling his judicial function, generally as well as in individual cases, he is and can be seen to be free of links with others (whether in the executive, or indeed in the judiciary, or in outside life) which might, or might be thought to, affect his assessment of the matters entrusted to him. The requirement of independence seems to me to have an importance, which runs even wider than that of impartiality. The two concepts appear to me to be inextricably interlinked, and I do not myself find it useful to try to separate the one from the other (page 232).”

BLUE STANDARD: The Adjudicator must have complete independence. If in doubt recuse.

* Lord Bingham in *Miller v. Procurator Fiscal* [July 2001] Privy Council

UNEQUAL REPRESENTATION

The Adjudicator must always remain independent of the Parties. Helping the unrepresented Party may easily create the impression of bias. The limit of assistance is in the matter of not allowing one party to take advantage of the weaker party.

BLUE STANDARD: Do not make a case for an unrepresented party. Safeguard the party from unfair advantage only.

THRESHOLD JURISDICTION

A Respondent may contend: -

- No right for the Referring Party to adjudicate at all;
- No right for you to be the Adjudicator: -
 - Wrong appointing body;
 - Procedurally improper appointment.

BLUE STANDARD: Treat a Jurisdictional challenge by way of full analysis (Whether binding or not): -

- Consider facts and law;
- Consider own self interest;
- Consider risk of wasted resource by pressing on;
- Consider disadvantage/prejudice suffered by pressing on;
- Consider “balance of convenience” in stopping;
- If in doubt stop.

TAKING POINTS

Beware temptation to “take a point” of your own. Unless there is gross unfairness *avoid* taking a point to assist one party. Retain independence. Remember, if the parties continue with the adjudication without making an objection forthwith it may not raise that objection later before a court unless he shows that at the time he took part or continued to take part in the proceedings he did not know and could not with reasonable diligence have discovered the grounds for objection.

Read Dyson J. in *Project Consulting v. Trustees of the Grey Group* (Case No 7 Adjudication Decisions) and read too Devlin J. in *Westminster v. Eicholz* WLR [1954].

BLUE STANDARD: Do not take points yourself unless a serious injustice might arise.

INTERNAL JURISDICTION

Essentially this is to do with what the Adjudicator is empowered to do. An example is to ask: "What dispute is the Adjudicator seized?"

Carter v, Nuttall [April 2002] H H Judge Bowsher: -

"It was accepted before me that the jurisdiction of an adjudicator derives, at least in a case like the present, from the Notice of Adjudication. Put simply, the adjudicator has jurisdiction to decide a "dispute" which is the subject of a Notice of Adjudication, but he has no jurisdiction to decide something, which is not covered by the relevant Notice of Adjudication. It seems to me that what is or is not the subject of a Notice of Adjudication depends upon proper construction of the relevant notice in accordance with the principles of construction enunciated by Lord Hoffman in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 at pages 912H to 913F."

Sometimes a Respondent will respond with a defence to which the Referring Party will object, saying that all or part is outwith the "dispute" in the Notice of Intention: -

Fastrack

"Thus the "dispute" which may be referred to adjudication is all or part of whatever is in dispute at the moment the Referring party first intimates an adjudication reference. In other words, the "dispute" is whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the Referring Party has chosen to crystallise into an adjudication reference. A vital and necessary question to be answered, when a jurisdictional challenge is mounted, is: what was actually referred? That requires a careful characterisation of the dispute referred to be made. This exercise will not necessarily be determined solely by the wording of the notice of adjudication since this document, like any commercial document having contractual force, must be construed against the background from which it springs and which will be known to both parties."

AND

KNS v. Sindall [17 July 2000] H H J Humphrey Lloyd Q.C.

"As Judge Thornton said in Fastrack, "the "dispute" is whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference." A party to a dispute who identifies the dispute in simple or general terms has to accept that any ground that exists which might justify the action complained of is comprehended within the dispute for which adjudication is sought. It takes the risk that its bluff may be called in an unexpected manner*. The further documents which come into existence following the notice of adjudication (such as "the referral" which is defined in clause 38A.4.1 of DOM/1) do not cut down or, indeed enlarge, the dispute (unless they contain an agreement to do so). The adjudicator is appointed to decide the dispute, which is the subject of the notice and that notice determines his jurisdiction. The adjudicator's jurisdiction does not therefore derive from the further documents, although those documents are likely to help the adjudicator to find out what needs to be decided in order to arrive at a conclusion on the dispute."

In *Griffin v, Midas* [21 July 2000] H H Judge Humphrey Lloyd, Q.C. explains: -

"That means that not only has there to be time to consider the claim or assertion but also, in an appropriate case, time to discuss and to resolve it by agreement, for only if that fails will there be a dispute, as I set out at the beginning of this judgment. Adjudication is not a substitute for

* It must be doubted that the learned Judge was indicating that it was open to the Responding Party to reverse ambush the Referring Party. It is the timescale of 28-days, which precludes "trying-out" brand new substantive issues in the Defence.

Adjudication – “The Changed Model”

discussion and negotiation nor is it to be used to provide the agenda for discussion and negotiation where no dispute had truly existed. The Defendant had obviously not time properly to consider the invoices before 3 May and it had no means of investigating the general claim. It was not in a position at that date to state what its position was. Moreover even if it had had the opportunity of doing so and had done so no dispute would have arisen until the Claimants had responded. A dispute will not exist if the claiming party accepts or has no real answer to a justified criticism of the whole or part of a claim. Only when the stages of discussion or negotiation are at an end may there be a dispute which could be referred to adjudication.”

It is humbly submitted that what is good for the (Claimant) goose is good for the (Respondent) gander. Adjudication is a Decision about the discussions and negotiations which are all done but not resolved and are now before an Adjudicator to adjudicate upon that now closed container (the sack tied at the neck and handed over) and subject only to the adjudicator seeking clarification about facts and matters *already in* the container.

And if the Respondent advances a defence to which the Referring Party cries foul (inadmissible) then the adjudicator has to now decide whether the Defence is new/not previously discussed/ not an addition to the closed agenda. If it is new and substantial then it must be outwith the current adjudication and brought as a new and separate adjudication by the Respondent once crystallised. If on the other hand it is not new at all then the Referral was defective since it only referred the Claimant’s side of the dispute. In this latter circumstance, the Referral was flawed from the outset.

BLUE STANDARD: Interpret the Notice of Adjudication (in the context set by the Referral) to identify the issues.

BLUE STANDARD: The Referral is intended to refer the whole dispute as previously rehearsed. It cannot be an ambush.

BLUE STANDARD: The Response is not a vehicle for a substantive surprise defence. It cannot contain an ambush.

NOTE: *Buxton Building v. Durand School* [March 2004] H H Judge Thornton Q.C. is instructive.

RULES FOR THE ADJUDICATION

BLUE STANDARD: At the outset search for the Rules applicable to the Adjudication: -

- Contractual Express Terms (*e.g.* JCT/ ICE or ANB Rules: *e.g.* TeCSA)
- Implied *i.e.* “The Scheme”

NOTE: It will be the contract, which indicates the Rules for Adjudication. An appointment by any particular ANB does not indicate the Rules of that ANB apply to the Adjudication, absent express agreement.

FINALLY

Keep up with the Cases. Read every Judgment in full, not just my column in Building.

Anthony Bingham

3 Paper Buildings

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