**SEMINAR**
**"ADJUDICATION AND CLAIM SETTLEMENT FOR THE CONSTRUCTION INDUSTRY."**

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**under the auspices of**
**The Institution of Surveyors Malaysia (Sarawak Branch)**

# MANAGING FOR BETTER BUILDING

Tony Bingham

One of the most exciting innovations in UK Commerce and Government is known as '**Best Value**'. This abstract term is explained in "The Local Government Act 1999, Part 1":

> "To secure continuous improvement in the way (local authority) functions are exercised having regard to economy, efficiency and effectiveness."

Best Value is seen on two levels . . . as a process and as an outcome. It is an end, and a means to an end. Put another way it is a *framework* in order to create a process for organisations of all types to improve their services on the basis of both cost and quality, and to continuously improve their activities in line with priorities set by the organisation. The *outcome* of Best Value means that performance, and the expectations of users, customers, and 'stakeholders' are now deemed to be as important as price. Indeed Her Majesty's Government has not only encouraged this concept generally but has gone so far as to impose Best Value as a duty on local authorities by Act of Parliament.

> "Councils need to break free from old fashioned practices and attitudes . . . our modernising agenda is seeking nothing less than a radical refocusing of Council's traditional role." *[Modern Local Government: In touch with the People 1998]*

The role of Government at national and local levels in the UK is now committed to being a *"best practice client"*. This endeavour in respect of construction industry activity began 6 years ago. A report commissioned jointly by the Government and industry ["Constructing the Team" by Sir Michael Latham. (HMSO1994)], recommended that Government Departments and the wider public sector

> "*should deliberately set out to use their spending power not only to obtain value for money for a particular project, but also to assist the productivity and competitiveness of the construction industry, and thereby obtain better value for money generally in the longer term.*"

The Government at the same time showed its commitment to this principle in the White Paper "Competitiveness – Helping Business to Win" (HMSO May 1994). It encouraged continuous improvements in productivity as the driving force behind Government action as a client and the formulation of best practice should compliment and contribute to this.

'Constructing the Team', now known as The Latham Report, had a significant effect on UK construction. It not only detected the moment for innovation but echoed Government and private sector enthusiasm for seeking solutions to every day problems. It examined (inter alia):

- The "endless refining" of standard form building contract documents and the impact of Adversarial problems.
- The phasing out of "bespoke" documents and outlawing of unfair clauses.
- The development of "quality registers" for consultants, contractors, sub-contractors.
- Clearer definitions for Project Managers.
- Advice for Partnering arrangements.
- Evaluation of tenders on quality as well as price.
- A Code of Practice for the selection of Subcontractors with fair tendering procedures and teamwork on site.
- Productivity savings and cost reductions.
- A new approach to Dispute Management (called Adjudication).
- Mandatory trust funds for payment to limit the impact of insolvency.
- 'Build' insurance for defects.
- A Development Agency to drive productivity improvements and encourage teamwork.

Sir Michael Latham had spent many years by now as a Member of Parliament. He made plain that reports of this type should not end there. He recommended implementation by Statute. He had seen in his parliamentary experience too many reports simply left on one side; this time he wanted action. He got it. Her Majesty's Government detected the will of the industry in two particular areas. Cash flow in construction is vital; secondly the management of disputes was in need of reform. A Bill was introduced in Parliament in 1995. It became law on 1 May 1998. It is known as **"The Construction Act"**; its correct title is "The Housing Grants Construction & Regeneration Act 1996." The relevant parts are confined to S104 to S117. (Available on www.tonybingham.co.uk/links ) In my respectful view the Act is one of the most significant pieces of legislation in construction history. I go further; it introduces a dispute management process, which dramatically improves upon litigation performance and save huge resources in public money. The UK Courts are relieved of mass expenditure. The new system of Adjudication is cost effective and recommended world-wide. This machinery coupled with the new Payment Provisions has improved UK construction beyond all expectations . . . even the lawyers are delighted, though surprised at its success.

I will tell you more about the detail in a moment. Let me first bring you forward 3 years from 1 May 1998. In other words come right up to today. In the 3 years of the 'Construction Act' we in the UK have had experience of over 3000 adjudications. Of that number 55 decisions of Adjudicators have been examined by the High Court. About 10 of the 55 have struck down or set aside the adjudication. I have told you that because we speak not from anticipation but from experience. If I may go further, in the 3 years as a practising Barrister, my own personal experience has allowed me to represent parties as Claimant or Respondent in adjudication, to be the Adjudicator on numerous occasions, to seek enforcement of the Adjudicator's Decision and to resist enforcement in the High Court, to be legal advisor to Adjudicators, to decide complaints about Adjudicators, to train, examine and interview potential Adjudicators. Finally I have reported 52 of the 55 decisions of the High Court. And now I admit two things, I am still not wholly convinced I know precisely what Adjudication is, secondly, whatever it is the industry is very satisfied.

## WHAT IS IT?

It is easier to say what it is not. It is not Litigation, nor Arbitration, nor Expert Determination, nor Mediation, nor (and this might surprise you) is it a "Legal System". I think it can be explained as:

> **A new layer of dispute management designed for and applicable to the UK Commercial Construction industry. It neither displaces nor replaces Litigation or Arbitration or Negotiation.**

**Instead, it is an option available at the unilateral choice of either party to a construction contract to call for an independent impartial outsider (the Adjudicator) who will in 28-days fairly decide on and pronounce upon the rights of the parties according to their contract. That decision shall be obliged; it is binding until the decision is finally decided in the traditional places.**

## EMPHASIS

- This does not replace the existing dispute resolution system.
- It is a new layer.
- It is an option, which can be ignored; it is not a pre-condition to arbitration/litigation, nor does it prevent parties mediating or reaching a conclusion of their own.
- It does not require both parties to agree. It is triggered by one party as a statutory right. It cannot be deleted from the contract.
- The contract shall contain Adjudication machinery, which complies with the Act. (8 point compliant).
- A default system called "The Scheme" (www.tonybingham.co.uk/links ) applies if the contract is not compliant.
- The procedure merely has to be fair.
- The period of 28-days can be extended by agreement.
- The decision is binding (temporary finality).
- The decision is enforceable in the Courts if disobeyed.

## BASIC POSITION

An Adjudicator can be called for and has "Threshold Jurisdiction" for:

(1) A Dispute, and

(2) A Construction Contract, and

(3) The Dispute is under the Construction Contract.

## TYPICAL ISSUES

1 Has a Variation arisen?
2 Has a Variation arisen and if so what is its value?
3 What is the value of a Variation?
4 Was the Contract varied?
5 Is a particular item a term of the Contract?
6 Was a term breached?
7 What is the loss arising out of a breach?
8 Of competing causes of loss, which one caused the loss?
9 Is the Contract late?
10 Is an extension of time applicable?
11 Is the extension payable/non payable?
12 Is LAD payable?
13 Is the Work defective?
14 Is a Contra payable?
15 Is insurance payable?
16 Have notices been given?
17 Are notices applicable?
18 What is the meaning of a particular term in the Contract?
19 What is the meaning of a particular word in the Contract?
20 Was the Contract properly determined?
21 When did the Contract reach practical completion?
22 When is the "Due" Date?
23 When is the "Final Date for Payment"?
24 What is the value of Work properly done?
25 Is the Contractor proceeding regularly and diligently?
26 Is this item a Provisional sum?
27 When was possession?
28 What is the programme?
29 Is the programme a term of the Contract?
30 Has SMM been complied with?
31 Are these ground conditions unforeseeable?

32 Is this task temporary Works?

## WHO IS THE ADJUDICATOR?

The first vital ingredient is that the Adjudicator is a person who has considerable experience of the Construction industry. Second, but just as important, the Adjudicator must know (at least) the principles of the law of contract and evidence and law of Tortious Negligence. Vital is to remember that the work of the Adjudicator is to Apply the Contract. At the heart of Adjudication is:

**DECIDED FACT + DECIDED LAW = DECISION AS TO RIGHTS.**

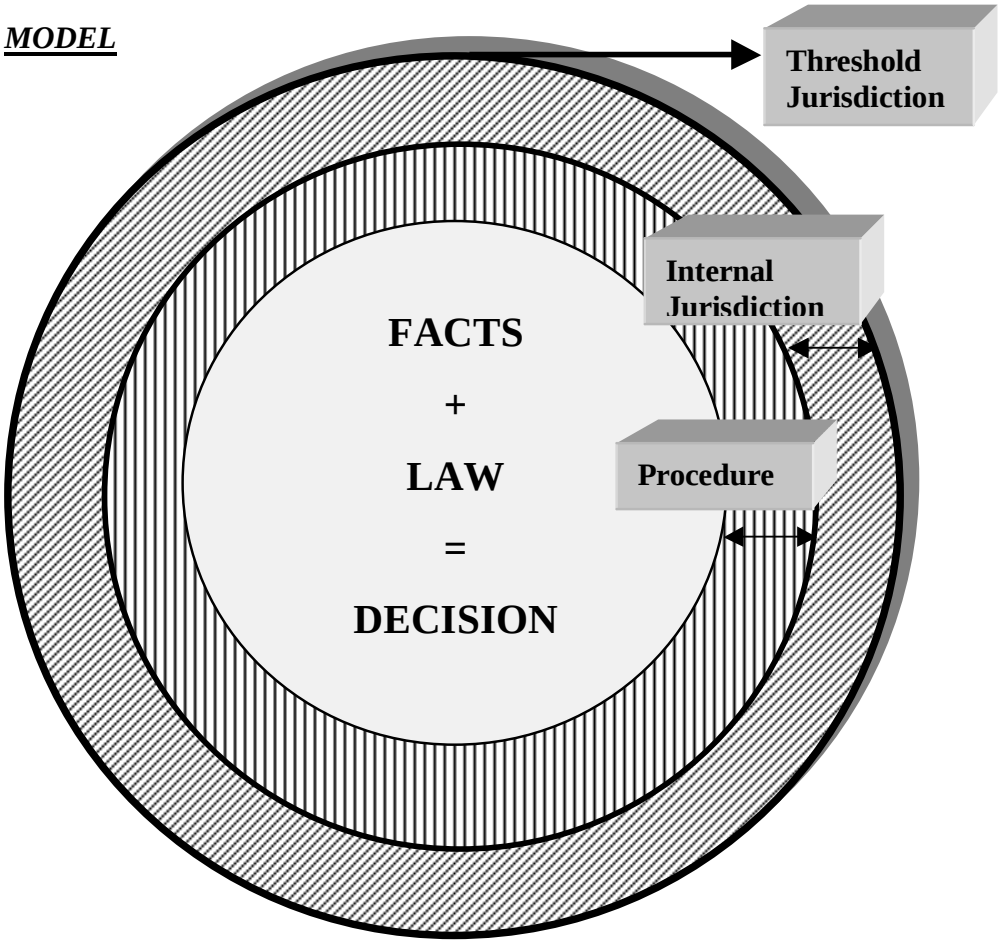
For very large construction projects I have no doubt that the most effective management of disputes is acquired from the pre-selection of a Dispute Resolution Board. These are now in world-wide use. Dispute Resolution Boards containing usually 5 or 6 persons of varying disciplines (engineer/ surveyor/ architect/ constructor/ lawyer/ engineer specialist) visit the project to a pre-arranged cycle to "cast an eye on developments". Then, if a dispute arises, one or more of the Dispute Resolution Board decides the matter using the 28-day machinery of (say) the Construction Act or any variant so agreed.

For smaller contracts on Adjudicator Nominating Body appoints the Adjudicator from a panel or list of qualified people. In the UK last year for example, the Royal Institute of Chartered Surveyors made 1009 appointments from their panel of about 100 Adjudicators.

Crucially the appointee will have no conflict of interest, no actual or apparent bias, will be objective, detached and impartial.

In the UK there are several volunteer Adjudicator Nominating Body's (CIOB, RICS, RIBA, ICE, Academy of Construction Adjudicators (now changed to The Association of Independent Construction Adjudicators – AICA), The Bar, The Solicitors). Some are mentioned in Standard Form Contracts as the appointing body.

***MODEL***




**THRESHOLD JURISDICTION**

I mention this briefly for emphasis. The machinery is only mandatory (if triggered at all) for Commercial Construction Works. The UK deliberately omitted consumer disputes. Construction Works includes however not only those between Employer/ Main Contractor/ Subcontractor but also Professional Consultants disputes. Quarrels about fees are in scope.

**SPECIFIC JURISDICTION**

The party who calls for the Adjudicator is entitled to and should define exactly what question and what remedy is to be examined. Indeed we have learned that the 28-day programme is best suited to discrete items of difference. It is incorrect to bring numerous complex disputes to one 28-day process.

**PROCEDURE**

It is investigative. It is an inquiry by the Adjudicator. We have less emphasis on the traditional adversarial procedure. The Adjudicator may "*take the initiative in establishing the facts and the law.*"

Having received the Referral, and some form of Response:

- **The Adjudicator must be watchful that the Response does not include an unconnected dispute . . . it will be outwith Jurisdiction.**
- **Begin the process of INVESTIGATION of the dispute**.

The Act permits the Adjudicator to take the initiative in investigating the Facts and the Law. He can be as pro-active as he wishes.

- **Sometimes he will hold a hearing**
- **Sometimes he will call for further information.**
- **Sometimes he will call for a site visit.**
- **Sometimes he will call for Legal Advice.**
- **Sometimes he will call for Technical Advice.**

**Be warned.** Notwithstanding the investigative powers of the Adjudicator, it is still up to the parties to "put" their case. The Adjudicator is not there to figure things out *for* the parties. He investigates the parties story that's all.

**EXTENSION OF TIME**

The Adjudicator can agree a further 14 days by agreement with the Referring Party.
Longer time needs Adjudicator *and* both parties agreement.

**THE DECISION OR AWARD**

The Adjudicator, in my view, should be asked to give reasons with his Award. It will focus his mind.

Some Adjudicators are helped by stating a list of issues to be decided. Remember there will be SUBSTANTIVE ISSUES (the ultimate Issue) of which there may be 1, or 2, or 3, or more. The pathway to the ultimate issue is strewn with minor issues too. List them. It helps.

**The Decision is Binding.**

Ask the Adjudicator to deliver it in 'DRAFT' first (to check him for errors).
Indicate that the Decision on monies should be of whatever sums are excluding VAT . . . the parties will deal with VAT on top of the Award as applicable.

The Award will say when monies should flow, unless it is a mere "declaratory" Award, *e.g.* Extension of Time.

**THE JOB IS TO:**

(1) Apply decided FACT to Decided LAW/Rules of the Contract.
(2) FACTS are decided on EVIDENCE.
(3) LAW is the Law of Contract, *i.e.* the Rules in the bargain.

**ENFORCEMENT**

The Award says Parliament is to be obeyed. The UK Courts do just that. Summary Judgment will be given notwithstanding obvious errors of Fact or Law. Only bias or absent Jurisdiction sets a decision aside.

Thereafter, standard litigation/arbitration will decide the same dispute without reference to the Adjudicators decision. It is not an appeal.

**THE SECOND LIMB**

The "Construction Act" explains not only (New) Adjudication but has the second limb of (New) Payment Provisions. They are the Cinderella features of the legislation. Adjudication is an exciting concept, which is mandatory to be in the Contract but only triggered on demand. But the Payment Provisions are wholly mandatory. They must be engaged and must be used on a day to day basis to control cash flow.

The principle is that the payer will use a system of "Notices" for money movements.

(1) "The Green Notice"
(2) "The Amber Notice"
(3) "The Red Notice"

**THE GREEN NOTICE**

This piece of paper must be sent within 5 days of the Interim Valuation date and before the actual due date for the cheque. It will say:

(1) What is payable and how calculated;
(2) The date of payment of the forthcoming cheque.

**THE AMBER NOTICE**

The condition precedent to "withholding" money from amounts otherwise due is the Amber Notice.

To be effective and therefore entitled to withholding, the notice must say:

(1) The reason or reasons for withholding, and
(2) The amounts applicable to each reason.

Served late or incorrectly set out means that the money is not to be withhold.

## THE RED NOTICE

If money is wrongly withheld, the payee is now entitled to postpone his Works. He merely served the 7-day Red Notice.

These new provisions must be expressed in the Contract. If not, the default mechanism of **"The Scheme"** is an implied term. The Scheme contains all the payment machinery for monthly payments and the 3 notices.

## CONCLUSION

I said at the outset that the UK Government and Commerce was looking for "Best Value". We do not see litigation or any other form of long-winded dispute resolution procedures as "Best Value" any longer. The public resource cost in running our Courts is excessive. On the other hand we see disputes in commerce and construction in particular as an ordinary and natural consequence of a dynamic which are fast moving and always, for each project, a different adventure. Building tasks change by the day because clients want to and are invited to change their minds. Hardly is it a surprise when doubts creep in about time and cost consequences. We invented Adjudication to quickly stifle disputes, decide quickly and prevent disputes descending into conflict. Conflict creates bad value. Best of all is the innovation of the visiting Disputes Resolution Board. Its influence on large projects is without doubt and most remarkable calming effect. So much so that the numbers of disputes are remarkably low.

I am confident that Best Value comes from good management. The management of disputes is but an aspect among many. I commend Adjudication and Dispute Resolution Boards to you here.

**Tony Bingham**
**3 Paper Buildings**
**Temple, London**
**EC4Y 7EU**
**England**

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