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PAPER

"*Decision Making – Can it be Judicial?* "

by Daniel Atkinson

Daniel Atkinson Limited

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Judicial?

1. The term "Judicial" has several meanings, including

   "*decreed by or proceeding from a court of justice*"

   and

   "*established by or founded upon law or official or accepted rules*"

   and

   "*characterized by careful evaluation and judgment*".

2. The decision of an Adjudicator is not the decision of a judge in Court of Justice and therefore in that narrow sense is not a judicial decision.

3. The Housing Grants, Construction and Regeneration Act 1996 does not expressly state that an Adjudicator shall decide the dispute referred by careful evaluation and judgment and based upon the applicable law. Nonetheless, it is difficult to avoid the conclusion that a "judicial" decision in that wider sense was clearly intended:

   3.1 Section 108(e) of the Act requires contracts to impose a duty on the Adjudicator to act impartially. The meaning of the term "impartially" has been fleshed out in a number of cases[1] to mean not only that there should be no apparent bias, but also that the Adjudicator should act fairly and conduct proceedings to comply as far as the timetable allows with natural justice.

   3.2 Section 108(f) of the Act requires contracts to enable the adjudicator to take the initiative in ascertaining the facts and the law. There is little point in such a requirement unless establishing and applying the law to the facts is required to be an inherent part of the decision process.

4 The Scheme for Construction Contracts (England and Wales) Regulations 1998 provides further guidance on the intention of Parliament. The Scheme confirms that the decision making process is required to be judicial in the wider meaning of that term:

   4.1 Paragraph 4 of the Scheme requires that a person requested or selected to act as an adjudicator is not to be an employee of one of the parties to the dispute and shall declare any interest, financial or otherwise, in any matter relating to the dispute.

   4.2 Paragraph 12(a) of the Scheme requires the Adjudicator to act impartially in carrying out his duties. The Adjudicator is required to act in accordance with any relevant terms of the contract and reach his decision in accordance with the applicable law in relation to the contract.

   4.3 Paragraph 13 of the Scheme allows the Adjudicator to take the initiative in ascertaining the facts and the law "*necessary to determine the dispute*". Paragraph 13 provides a list of powers that the Adjudicator may use.

   4.4 Paragraph 15 (b) allows the Adjudicator to "*draw such inferences ….. as circumstances may, in the adjudicator's opinion, be justified*" from a failure to comply with any request, direction or timetable of the Adjudicator made in accordance with his powers or any failure to produce any document or written statement requested by the Adjudicator.

   4.5 Paragraph 15(c) of the Scheme allows the Adjudicator to make a decision on the information before him "*attaching such weight as he thinks fit to any evidence submitted to him outside any period he may have requested or directed*".

   4.6 Paragraph 17 of the Scheme requires the Adjudicator to consider any relevant information submitted to him by any of the parties.

[1] **Discain Project Services v Opecprime Limited (No 1)** [2000] BLR 402 is one of the first cases.

5 Recent cases show that judges will not enforce a decision if some aspect of the adjudication proceedings is repugnant to them. This is the ultimate test of an adjudicator's decision and whether it can be considered judicial (adopting the wider meaning). Three aspects of adjudication proceedings are considered below in the context of recent cases, namely:

5.1 Appointment

5.2 Conduct of proceedings

5.3 Deciding the Issues

6 Before doing so, it is relevant to reflect on the how adjudication has matured into a sophisticated means of dispute resolution, despite its essential provisional status in law[2].

7 Adjudication has been adopted by the construction industry as an intervening provisional stage in the dispute resolution process, even when the contract had ended. Adjudicators now decide very complex disputes, involving substantial sums, often years after the relevant events.

8 The timetable for adjudication prevents the development of the full case during the adjudication process itself. As a result particularly in complex cases, the Referral may be voluminous including witness statements, expert opinions and extensive documentary evidence. Legal costs can be considerable.

9 In recent adjudications in which the writer was involved the parties were represented by Counsel on both sides, one day hearings were held with full transcript with cross examination of witnesses and experts and the initial 28 day period was extended in one case to 3 months.

10 It is perhaps because of this development, that the Courts have insisted that adjudicators act judicially.

The Appointment

11 The Parties must carefully select the adjudicator since the adjudication will have been a waste of money if the Court does not enforce the decision. Even in the tight timeframe of adjudication, the parties may spend considerable sums. A wrong selection, possibly to obtain a tactical advantage, may prove costly in the end.

12 The prospective adjudicator must carefully consider if he should accept an appointment. At present, as far as I am aware, only the Institution of Civil Engineers requires their adjudicators to comply with a code of conduct that addresses such matters. In making a decision whether to accept appointment, the prospective adjudicator must carefully consider whether:

12.1 he has the competence and the capability to deal with the issues referred to him;

12.2 he has the time to conduct the adjudication;

12.3 there are any conflicts of interest with the parties or their representatives;

12.4 the prospective adjudicator has a financial or other interest in the issues to be decided;

12.5 there are any circumstances which may give the impression of bias.

13 Two recent cases show the circumstances that adjudicators will wish to avoid by refusing an appointment.

Case 1: Pring & St. Hill Ltd –v- C.J. Hafner (2002)

14 The first case ***Pring & St. Hill Ltd –v- C.J. Hafner*** *(2002)* decided by Judge Humphrey Lloyd demonstrates the problems faced by adjudicators when acting in multiple adjudication with different parties, whether sequential or in parallel. The essential facts and the involvement of the Adjudicator were as follows:

[2] If the dispute is referred to arbitration or litigation following adjudication, it is decided anew and the whole process needs to be repeated. There is provision in the Housing Grants Construction and Regeneration Act 1996 at Section 108(3) for the parties to agree to accept the decision of the adjudicator as finally determining the dispute, but this is rarely adopted in practice. Nonetheless, largely by inaction, many adjudicator's decisions are the last word on the dispute and no further steps are taken either to court or to arbitration.

14.1 The Adjudicator had acted in two previous adjudications between Sir Robert McAlpine Ltd and Pring subcontracted to install glazing in a new building. A large portion of the panes of glass were damaged and McAlpine had to replace them. There were four firms, including Pring, who might have caused or contributed to the damage.

14.2 Pring commenced two adjudications against its sub-sub-contractors, Hafner and Howell, in order to pass on the costs for repair to glazing awarded in the previous Adjudication with McAlpine.

14.3 The same Adjudicator in the McAlpine adjudications was appointed in the Hafner and Howell adjudications, which proceeded concurrently.

15 The situation created by the Adjudicator accepting the appointments, was that the Adjudicator had available a great deal of relevant information by different parties. Not all of that information was available to each of the parties. That situation presented significant obstacles to a judicial and enforceable decision on a number of different grounds.

16 The circumstances met the test of apparent bias (Ground 1) and on that basis the Adjudicator's decision was not enforced:

16.1 The Adjudicator's involvement in the previous adjudication may create a very real risk that the Adjudicator would carry forward his judgments and opinions previously reached.

16.2 The Adjudicator might be pre-disposed to a particular view of the evidence, in this case the evaluation of costs which Pring wished to pass on. He might conclude that the sum was the correct measure of McAlpine's damages recoverable from Pring.

16.3 The Adjudicator had not reconsidered his previous evaluation.

17 The circumstances were also a breach of the principles of natural justice as they applied to adjudication (Ground 2) and on that basis the decision was unenforceable:

17.1 The adjudicator had not made available for scrutiny by Hafner the basis for his earlier factual conclusions in the adjudication between McAlpine and Pring.

17.2 Reasons of confidentiality the adjudicator may not have allowed the Adjudicator to make available information.

17.3 In the circumstances, Hafner was deprived of the opportunity to challenge the correctness or relevance of the earlier decision.

17.4 Hafner was not given the opportunity to know the legal and factual roots of the case it had to meet.

18 The circumstances showed that the Adjudicator had not obtained consent for concurrent proceedings as required by Paragraph 18(2) of the Scheme which applied (Ground 3), and on that basis the decision was unenforceable through lack of jurisdiction:

18.1 Judge Humphrey Lloyd recognised that there would be circumstances where it would be valuable for the parties to have the same adjudicator in parallel adjudication to make best use of his knowledge, time and effort.

18.2 Judge Lloyd also recognised that a party would wish to know that it could protect its interests by having information in the parallel adjudication made available to it. A party might also wish to protect its interests by ensuring privacy and confidentiality, which would be jeopardised by parallel proceedings.

18.3 The party itself was best placed to reach a decision about its own interests and these conflicting considerations.

18.4 Hafner had refused to give consent to concurrent proceedings, but the adjudicator proceeded nonetheless with the adjudication.

18.5 Without consent, the adjudicator had no jurisdiction.

Case 2: Amec Capital Projects Ltd v Whitefriars City Estates Ltd [2004]

19 The second case ***Amec Capital Projects Limited v Whitefriars City Estates Limited*** *[2004]* decided by Judge Toulmin further develops the principle of overall apparent bias in adjudication. It emphasises the need for prospective adjudicators to carefully consider their previous involvement with the parties and the issues, at the time of appointment. The essential facts and the involvement of the Adjudicator were as follows:

19.1 There had been two adjudications on the same issues, with the same parties.

19.2 The adjudicator made his decision in the first adjudication in favour of Amec. He ordered Whitefriars to pay Amec the sum of £597,371.78. The Court declined to enforce the first decision on the basis that the adjudicator was not the designated adjudicator under the contract and therefore he did not have jurisdiction[3].

19.3 Amec started the second adjudication on the same issue and requested the appointing body to appoint the same adjudicator, which they did.

19.4 The Adjudicator accepted the appointment on the second adjudication.

20 The situation of the Adjudicator accepting the second appointment created potential difficulties for the Adjudicator attempting to consider afresh those matters that he had already decided. It was often not possible at the outset to foresee problems and the difficulties might only become apparent in the course of the second adjudication. As observed by Judge Toulmin it was very often better when the same or similar issues needed to be considered afresh that a different adjudicator should consider them.

21 Judge Toulmin applied to adjudication, the test for overall bias stated by the House of Lords in ***Porter v Magill*** *[2002]* for judicial proceedings. It is an objective test. It is enough that a fair minded observer who knew the facts would have considered that there was a real possibility that the adjudicator was biased.

22 It was not enough, on its own, that an adjudicator is re-appointed to decide a dispute on the same or similar facts between the same parties. In this case there were three crucial factors that together led Judge Toulmin to the conclusion that there was a real possibility of bias and that prevented enforcement of the decision.

22.1 The adjudicator had obtained legal advice in the first adjudication, which he did not disclose to the parties. He did not obtain legal advice on this point in the second adjudication. There was a real risk that the adjudicator carried forward into the second adjudication the legal advice in relation to one of the issues and that it influenced the judgments which he formed. This was not only a breach of natural justice but also one of the factors that supported a finding of overall bias.

22.2 The telephone conversation between the adjudicator and Amec leading to his appointment in the second adjudication, went beyond the original enquiry as to where to send the papers. Amec discussed the judgment in relation to enforcement of the first decision. Amec told the adjudicator that since the matter was now open again it was referring the matter back to the adjudicator. The conversation in these circumstances was unwise, although on its own it might not have warranted a conclusion of a real possibility of bias. Added to other factors, the conversation carried the risk that a fair minded and informed person might have concluded it might have led the adjudicator to the biased conclusion that he could simply reach the same conclusion as in the first adjudication.

22.3 The advice obtained by the adjudicator in deciding whether he had jurisdiction in the second adjudication was disclosed to the parties but only after he had decided that matter. Whitefriars therefore had no opportunity to comment on the advice before the adjudicator made his

[3] Whitefriars raised that issue before Judge Toulmin in relation to the appointment in the second adjudication, but on the additional facts presented, he decided for Amec on this point.

decision. It might be considered that since the issue of jurisdiction was not directly concerned with the substantive case, that this would not be a factor in relation to bias. That is not so. Judge Toulmin was not prepared to enforce a decision reached in this way.

23 The third factor emphasises how important it is that adjudicators act judicially on all matters related to the adjudication.

Conclusions

24 The conclusions that may be drawn are:

24.1 If adjudication is not to be a waste of money, the Parties, appointing bodies and adjudicators must carefully consider whether the circumstance of appointment properly reflect the judicial nature of the appointment.

24.2 The ultimate safeguard is the adjudicators themselves and robustness to refuse appointments.

24.3 The pressure of the adjudication timetable will not excuse an adjudicator from the requirement to comply with judicial standards of conduct.

24.4 The remedy will usually be in the hands of the adjudicator – he can refuse an appointment if he does not consider he can carry out his duty properly or if he cannot ensure the due process of adjudication.

Conduct of Proceedings

25 The Courts have encouraged the expansion of adjudication by developing a jurisprudence that recognises the short timetable. Concepts of fairness of the proceedings, natural justice, bias and impartiality tailored to the short timetable, have been developed. It is clear that adjudication is a legal process and the adjudicator must act judicially in managing the process.

26 In the very first decision on this new process in ***Macob Civil Engineering -v- Morrison Construction*** *(1999)* Mr Justice Dyson (as he then was) recognised that the timetable for adjudication is very tight. He stated that so far as procedure is concerned, the adjudicator is given a fairly free hand. He may, therefore, conduct an entirely inquisitorial process, or he may invite representations from the parties. Crucially Dyson recognised that Parliament intended that adjudication should be conducted in a manner

"*which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept*".

Those words provided the launch pad for the Adjudication process.

27 The reasons for challenging an Adjudicator's decision are now well settled and provide adjudicators with the standard of conduct required of them.

28 I suggest that an adjudicator must conduct the adjudication proceedings with the aim of securing sufficient information and understanding about the case to allow him to do substantial justice between the Parties by his decision[4].

29 There are a number of techniques the adjudicator can used to manage the case and the investigation, either separately or in combination to further that aim. He can for instance:

29.1 rely solely on the submissions made to him and decide without investigation beyond the submissions – this would be unusual,

29.2 issue Preliminary Findings of Fact and Views and invite comment before making his final decision – useful to draw together the arguments and comments,

29.3 identify the issues early in the process and direct the Parties to make submissions on each of the issues including identifying evidence or caselaw – the most usual course,

[4] I examine how the Adjudicator should proceed if that aim is not achieved in the next section "Deciding the Issues".

29.4 direct the re-presentation of evidence by the Parties in a manner that allows easy analysis and comparison, such as in electronic schedule form – useful in large quantum cases,

29.5 obtain the agreement of the parties to the appointment of legal advisers and technical assessors to speed up the process – unusual except in highly technical cases,

29.6 arrange meetings or hearings to have matters explained or hear witnesses or experts - more usual than not.

30 Adjudications involving complex issues and extensive evidence will require a particular approach. The case ***London & Amsterdam Properties Limited –v- Waterman Partnership Limited*** *[2003]* decided by Judge David Wilcox shows that particularly in those situations adjudicators must ensure that the rules of natural justice are observed if necessary by active intervention by the adjudicator. The essential facts were as follows:

30.1 LAP appointed Waterman as its Structural and Civil Engineers and Traffic Consultants and disputes arose.

30.2 The dispute was referred to adjudication and LAP served its Referral. A timetable was agreed. Waterman was to serve its response and LAP its reply.

30.3 When LAP served its reply, it contained a supplemental statement by a witness which included considerable evidence on quantum. The evidence was available at the time of the referral notice but had not been served. It was not made available to Waterman before.

30.4 Waterman requested an extension of time to deal with new evidence. Waterman asked that the adjudication decision should be put back to allow Waterman to obtain the assistance of its professional advisor who was not immediately available.

30.5 Instead of sensibly agreeing to an extension, LAP insisted on a strict adherence to the existing timetable.

31 Waterman objected to the additional evidence on the basis that it had been available to LAP at the time of the referral and that they had then chosen not to rely upon it. Waterman argued that the information had been requested long ago and there was not adequate time to deal with it by way of expert analysis.

32 The Adjudicator gave his decision and ordered Waterman to pay LAP £708,796.95 including interest. It was clear from the Adjudicator's decision that part of his reasoning depended upon the additional material belatedly produced in the final stages of the adjudication. This was the very evidence about which Waterman complained.

33 Judge Wilcox found that the additional evidence was introduced very late in the adjudication process, so that it could not have been taken account of in Waterman's response. It was not made available until after Waterman's response when their quantum expert drew attention to the lack of substantiation. There clearly was an evidential ambush. The decision to withhold the quantum evidence requested in 2002 was clearly deliberate. The decision to serve the considerable body of detailed evidence at the time of the referral was deliberate. Judge Wilcox generously observed that the omission to serve the necessary additional evidence may have been merely oversight or neglect.

34 Judge Wilcox held however that an evidential ambush, however unattractive, did not necessarily amount to procedural unfairness. It depended upon the case. It could be an important part of the context in which the Adjudicator is required to operate and in which his conduct may fall to be judged in the light of the fundamental requirement of impartiality.

35 In this case, Judge Wilcox decided that Waterman had demonstrated a substantial live and triable issue as to the Adjudicator's jurisdiction to make the decision, based upon the Adjudicator's failure to act impartially. He refused summary judgment:

35.1 Judge Wilcox held that in accordance with the rules of natural justice, the Adjudicator should either have excluded the supplemental witness statement, or should have given Waterman a reasonable opportunity of dealing with it.

35.2 Under the applicable adjudication rules the Adjudicator was preventing from extending time because LAP declined to agree to the necessary extension of time. The Adjudicator should therefore have excluded the evidence. He ought to have complied with the requirement of natural justice but did not do so.

35.3 In fact the Adjudicator avoided a decision as to whether or not the evidence should be admitted and then based his decision upon the additional evidence without giving Waterman a proper opportunity to deal with it. Judge Wilcox held that this amounted to a substantial and relevant breach of natural justice.

36 The decision emphasises the need for Adjudicators to manage the adjudication process so as to ensure fairness and impartiality. This may prove difficult but is an essential part of an adjudicator's judicial duty to the parties and the process.

37 Adjudicators are chosen because of their knowledge of the construction industry and their knowledge of adjudication and construction law. If the adjudicator merely applies his own knowledge and experience in assessing the contentions, factual and legal, made by the parties, there will be no requirement to obtain further comment from the parties. If, however, the adjudicator uses his own knowledge and experience in such a way as to advance and apply propositions of fact or law that have not been canvassed by the parties, it will normally be appropriate to make those propositions known to the parties and call for their comments[5].

Deciding the Issues

38 There has been little useful guidance from the Courts on how an adjudicator should decide matters referred to him. The decision in ***Bouygues v Dahl-Jensen*** *[2000] BLR 522* appears to suggest that an adjudicator has great latitude:

"*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.*"

39 The question whether an adjudicator should make a decision in particularly complex cases was raised by Judge Wilcox in ***London & Amsterdam Properties Limited v Waterman Partnership Limited*** *[2003]*.

39.1 Judge Wilcox warned that there may be limits to the types of cases that could be decided by the process of adjudication. He gave as an example a complex dispute, involving the evaluation of the activities of a number of parties over a long period of time, involving issues of professional negligence and where the project was substantially complete.

39.2 He then expressed the view that even where an adjudicator is prepared to firmly and impartially exercise the powers given to him to investigate, control and manage the dispute, there may well be cases which because of their complexity and/or the conduct of the Claimant are not susceptible of being adjudicated fairly and thus impartially.

"*The scheme does not envisage that there should be a provisional resolution of a dispute by an adjudicator at all costs.*

This would be far greater an injustice and mischief than that which the HGCR Act was enacted to remedy."

40 It appears that Judge Wilcox was concerned whether in all cases an adjudicator could do substantial justice between the Parties.

41 It is a novel view that somehow adjudication should be restricted to only certain types of disputes. There is no such restriction on the Housing Grants Construction Regeneration Act 1996.

42 It is a remarkable suggestion that in some cases, an adjudicator who has accepted the appointment to decide matters referred to him, should not do so. An adjudicator is bound to determine the dispute referred to him, provided it falls within his jurisdiction. Any decision made by an adjudicator otherwise, would be no decision at all.

[5] Opinion of Lord Drummond Young in ***Costain Limited v Strathclyde Builders Limited*** *[December 2003] Outer Court of Session*

43 In the Scottish decision **Ballast plc v The Burrell Company Limited [2001]** Lord Reed was required to deal with such a decision. The adjudicator had apparently formed the view that because the parties had departed from the terms of the pre-printed contract that he was unable to determine the matter referred to him. Lord Reed described the character of the adjudicator's decision as "*ephemeral and subordinate"* and that it *"should be an expeditious procedure rooted in common sense*". He decided that the adjudicator was bound to determine the dispute referred to him, provided it fell within his jurisdiction. By refusing to decide, the Adjudicator had failed to exercise his jurisdiction to determine the dispute. His decision was therefore a nullity.

44 Lord Reed's characterisation of the adjudicator's decision and the decision in *Bouygues* suggests that (at least at present) the Courts are reluctant to review the details of adjudicator's decisions and the process of reasoning adopted[6]. This does not mean that the final stage of the adjudication decision-making process is not required to be judicial in the wider sense.

45 The process of judicial reasoning is complex. A simple description in construction cases is that a judge answers a question by reference to necessary facts. Each party will have competing propositions for the answer to the question, each supported by some facts. Examples of such questions and propositions are:

45.1 Was the completion of the works delayed by late design by the Employer?

45.1.01 The Employer did not complete the design by July 2003 but only by October 2003 and thereby caused delay to completion of the works.

45.1.02 The Employer completed the design in October 2003, but the design was not late and even if the design was completed earlier the works would still have been delayed by matters the responsibility of the Contractor.

45.2 Was the work an instructed variation under the Contract?

45.2.01 The Architect instructed a change to the works in July 2003 which is a change to the specification and is a variation to the contract.

45.2.02 The work was not a change to the specification. The Architect did not give an instruction. In any event there was no instruction in writing which is a requirement for the instruction to give rise to a variation under the Contract.

46 Propositions will usually involve the reconstruction of past events that cannot be proved with absolute certainty[7]. Each party will have a different version, explanation or hypothesis of the past events, each supported by allegations of facts. The alleged facts must be proved by evidence. The methods and mode of proof are many and varied.

47 Essentially the judge must decide which hypothesis is more probable than the other. The judge must decide which facts are proved and whether or not the proven facts support the hypothesis. Even when the judge prefers the hypothesis of the Claimant, that is not enough to win the case if the threshold of proof has not been reached.

48 In the House of Lords ***Rhesa Shipping Co SA v Edmunds and Another (The Popi M)*** *[1985] 2 All ER 712* the issue was whether the shipowners were entitled to claim under an insurance policy for the total loss of a ship. The shipowners commenced the action against the underwriters. The competing propositions were:

48.1 Shipowner: The loss of the ship was caused by collision with a submerged submarine.

48.2 Underwriters: The loss of the ship was the prolonged wear and tear of the ship's hull over many years, resulting in the shell-plating opening up under the ordinary action of wind and waves without collision with an external object.

6 The Court will examine the adjudicator's decision only to the extent necessary to ensure it has been made within jurisdiction.

7 There may be self evident presumptions that may be accepted but even these are rebuttable.

49 The judge at first instance ruled out the underwriter's proposition and considered that the shipowner's explanation of a submerged submarine extremely improbable. Nonetheless he decided that the shipowner's explanation on the balance of probabilities was the cause of loss.

50 Lord Brandon stated the approaches to be taken in deciding an issue:

50.1 A defendant could suggest and seek to prove some other cause of loss, but there was no obligation to do so. Even if they choose to do so, there is no obligation on them to prove, even on the balance of probabilities, the truth of their alternative case.

50.2 The legal concept of proof of a case on a balance of probabilities must be applied with common sense. A finding that an event is more likely to have occurred than not, does not accord with common sense if a judge also finds that the occurrence of an event is extremely improbable,

50.3 It is always open to a court, even after prolonged inquiry, to conclude at the end of the day that the cause of loss, even on the balance of probabilities, remains in doubt with the consequence that the claimant has failed to discharge the burden of proof which lay on them.

50.4 The judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. No judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases however in which owing to the unsatisfactory state of the evidence, deciding on the burden of proof is the only **just** course for him to take.

It was held that the judge at first instance had adopted an erroneous approach by regarding himself as compelled to choose between two theories, both of which he regarded as extremely improbable, or one of which he regarded as extremely improbable and the other of which he regarded as virtually impossible. In these circumstances the Judge should have found that the true cause of loss was in doubt and that the shipowners had failed to discharge the burden of proof.

51 The above decision shows that the judicial process is not intended primarily to obtain the best available approximation to past events. If that was the purpose, then all evidence would be admissible without restriction and judicial reasoning would simply involve giving weight to each item of evidence on a logical enquiry. Instead, the law of evidence prevents some evidence being admissible for a variety of reasons. The existence of the burden of proof and the law of evidence shows that the primary purpose of judicial enquiry is to administer justice between the parties. The approximation of past events is subordinate to that purpose. That explains why the conduct of the parties themselves may prevent evidence being admissible.

52 The decided cases, the Act and the Scheme show that the above judicial process is expected of adjudicators, deciding on the basis of evidence. Paragraph 15 of the Scheme does suggest that the adjudicator is entitled to decide what weight is to be given to evidence, depending on the conduct of the parties. There appears to be only one overriding rule of exclusion of evidence in adjudication. The Courts have repeatedly declined to enforce an adjudicator's decision because it was based on evidence on which the losing party has not had the opportunity to make submissions.

53 The decision in ***London & Amsterdam*** above suggests that an adjudicator is entitled to exclude evidence in circumstances which would make the process unfair, when a party would not have the opportunity to make submissions.

54 Excluding evidence which leads the adjudicator not to consider all the issues referred to him may be unfair and make the decision unenforceable. In ***Buxton Building Contractors Ltd v Governors of Durand Primary School*** *[March 2004]* Judge Thornton QC held that it was for the adjudicator to identify fully all the issues that had arisen that he had to decide and then to decide them, particularly where one of the parties was not legally represented. The judgment by Judge Thornton questions the boundaries of the Court of Appeal judgment in *Bouygues*.

55 In ***Buxton*** the issue was the release of the last tranche of retention which required a Final Certificate from the Supervising Officer under the JCT IFC 98 form. The certificate issued was stated to be an Interim Certificate even though issued after Practical Completion. The School had remedied outstanding defects and sought payment in damages as a cross-claim. The adjudicator decided that the School had not issued a withholding notice. As a consequence the adjudicator:

55.1 did not consider at all the nature, content, validity or quantification of the School's cross-claim;

55.2 did not investigate the material provided to him by the School;

55.3 did not decide whether the School's cross-claim had in fact been taken into account by the Supervising Officer when certifying but made an erroneous assumption that it had been;

55.4 did not consider whether the certificate was issued with contractual validity and instead wrongly assumed that the certificate was one that was duly authorised by the contract conditions and that its payment was provided for by those conditions;

55.5 did not take into account or consider the validity of the correspondence from the School which amounted, or arguably amounted, to a valid withholding notice that had been served timeously.

56 Judge Thornton held that the adjudicator had erroneously concluded that the sum certified represented part of the value of the work which had not previously been certified. The adjudicator did not consider at all the possibility that the sum was partial release of retention that had been previously certified and then validly retained. Crucially this meant that the adjudicator did not consider one of the School's principal arguments namely that one of the purposes of the retention fund was to provide a fund to reimburse the School for the kind of loss that made up its cross-claim. The cross-claim should have been set against the retention release in question.

57 Judge Thornton held that the adjudicator's decision was unenforceable on the following grounds:

57.1 failure of the statutory duty to decide the entirety of the dispute as required by Section 108(2)(c) of the Act;

57.2 serious irregularities in the adjudication procedure by not conforming to paragraphs 17 and 20 of the Scheme (which applied) which require the adjudicator to consider all relevant information submitted to him by any of the parties to the dispute and to decide all matters in dispute. The adjudicator had not considered or decided upon the contents of the submissions, documents and issues referred to him by the School;

57.3 arriving at a decision which was intrinsically unfair by failing to consider or decide core issues that were and remained in dispute and was arrived at following a failure to take into account relevant material and information that had previously been placed before the adjudicator.

58 I suggest that the adjudicator's decision must be based on the evidence and argument presented. The decision is to be made is on the merits of the case as presented and not the best approximation of events. The adjudicator:

58.1 cannot assume that a party's case could be "improved" if more time was available. He cannot decide that something must be due, even if it has not been shown to be due.

58.2 cannot arbitrarily "split the difference". There must be some logic to his decision.

58.3 can decide on the basis of which party's proposition he prefers provided that if it is the Referring Party's proposition that it accords with common sense as having occurred on the balance of probabilities.

58.4 cannot refuse to decide because of the possible consequences of the decision.

59 Ultimately, if the adjudicator fails to understand or be convinced of the case in the time available and he is not allowed the additional time he requires, then he must decide against the referring party and refuse the remedy sought. That failure may be due either to the inadequacy of the case as presented, or to the inadequacy of the time required to consider the case.

Can Adjudicator's Decision Making be Judicial?

60 In conclusion, adjudicator's decision-making is required to be judicial in the wider sense and can be if the primary purpose of adjudication is recognized:

60.1 The adjudicator can act judicially in accepting his appointment and in the conduct of proceedings.

60.2 The primary purpose of adjudication is to administer justice (albeit rough justice) between the parties, and the approximation of past events is subordinate to that purpose. The adjudicator can act judicially to achieve that objective, applying common sense.

60.3 The adjudicator must conduct the adjudication proceedings with the aim of securing sufficient information and understanding about the case to allow him to do substantial justice between the Parties by his decision.

60.4 The decision is to be made is on the merits of the case as presented.

60.5 The adjudicator must consider all relevant information submitted to him by any of the parties to the dispute and to decide all matters in dispute.

60.6 The adjudicator must take into account the conduct of the parties in responding to his requests for evidence, and exclude evidence if the process or timetable does not allow a party the opportunity to make submissions on it.

60.7 The adjudicator must decide against the referring party and refuse the remedy sought, if the adjudicator fails to understand or be convinced of the case.