NATURAL JUSTICE

by C.H.Spurin

As the number of forums for public and private dispute resolution proliferates the debate about the Rules of Natural Justice that apply to these various processes heats up. In the private sector expert determinators, binding conciliators, contract administrators such as civil engineers and architects, construction adjudicators, arbitrators and judges all engage in judicial or quasi-judicial decision making. In the public sector again government officials, state adjudicators, tribunals, judges and magistrates, committees, various forms of government appointed inquirers and ombudsmen likewise are required to reach determinations, some of a judicial nature and some which, whilst of public interest may not in fact be judicial. Where a decision is judicial or quasi-judicial it is amenable to scrutiny by the courts, exercising their supervisory role, guided by the principles of Natural Justice. It is increasingly clear that there is no single, definitive set of standards that apply universally to all decision makers. However, Natural Justice does set out some central guiding principles, albeit that the rigour with which they are applied by the courts differs from one decision making process to another and further in the light of the circumstances of each case. Much depends upon the extent, if at all, that the element of natural justice which a party asserts has been breached, has impacted upon the decision and whether or not any injustice has resulted from the asserted breach.

It is an article of faith, dating back to **Dimes v Grand Junction Canal** [1852] 3 HLC 759 that *"justice must not only be done, but must be seen to be done."* The central features of this are that the decision maker must

- have the authority or jurisdiction to make a decision (otherwise the decision will be ultra-vires the devision maker's authority or power),
- be unbiased, having no interest in the outcome, and
- afford the parties the opportunity to hear the case against them, to present their case and consider/challenge any evidence.

The question that arises however, is the degree of rigour that applies to each of these requirements in any given circumstance or to specific forms of decision making. The construction adjudication process has been and continues to be subjected to intense judicial scrutiny. The roll call of reported cases on the process increases on an almost weekly basis. The contrast with the procedures which applied to the Hutton Report appear to be quite striking and illuminating.

At the heart of the matter lies the need for society to feel comfortable with the process and to feel confident that justice has been done. The unsuccessful party to a construction adjudication, whilst naturally displeased with the outcome, must nonetheless be persuaded that the outcome is the result of a fair and open process. Equally, whilst the outcome of individual cases is a private matter for the parties concerned, the industry must also be persuaded that the process is one in which it can invest confidence.

The public inquiry process must equally satisfy the public confidence test. The court of public opinion appears to have been less than satisfied with the Lord Hutton's Report. Compare the guidelines for the application of natural justice to construction adjudication provided by Lord Drummond Young in the recent case of **Costain v Strathclyde**, set out below, with those that applied to the deliberations of his Lordship. Was the appointment of Lord Hutton a truly independent process? Who determined the terms of reference and the rules of engagement, conveniently outside the ambit of the Tribunals and Inquiries Act 1921. Consider the power of the judge to interpret his terms of reference. Was it possible to rule on whether something was "sexed up" without first determining what was allegedly being sexed up? Given the "totality" of evidence presented, even if a forensic examination of each clause of the report in isolation stands up to scrutiny, how balanced were the overall conclusions of the report? In particular, should judicial standards of accuracy be applied to the media? Does the press have to ensure that any discussion or criticism of government action is proven and subjected to exacting editorial scrutiny?

Two separate inquiries have now been instituted, one in the UK the other in the US. Do the terms of reference and the applicable rules of engagement that apply to these inquiries match up to the criteria by which our construction adjudication process is judged? Will the court of public opinion be satisfied this time around ? Only time will tell, but in the meantime, comments on a post card please ……

COSTAIN LIMITED v STRATHCLYDE BUILDERS LIMITED[1]

[20] ***Application of principles of natural justice to adjudication***

The practical application of the principle ***audi alteram partem*** *to adjudication perhaps calls for some comment, in view of the particular features of adjudication ….. In my opinion the following propositions are applicable; they are, however, always subject to the qualification that, as Lord President Clyde points out in* ***Black v John Williams & Co*** *(Wishaw),…, in this area it is impossible to lay down absolute or universal general rules, breach of which by an adjudicator will necessarily make his award invalid. The application of the relevant principles must depend on the circumstances of the individual case.*

1. *The general principle, stated in cases such as* ***Inland Revenue v Barrs****, …, is that each party must be given a fair opportunity to present its case. That is the overriding principle, and everything else is subservient to it.*
2. *Subject to that overriding principle, together with any express provisions in the parties' contract, procedure is entirely under the control of the adjudicator.*
3. *In considering what is fair, it is important to bear in mind that adjudications are conducted according to strict time limits; consequently the time that is given to a party to comment on any particular matter may be severely restricted to ensure that overall time limits are met.*
4. *It is also important, in considering what is fair, to keep in mind that the procedure in adjudication is designed to be simple and informal. The requirement of fairness should not place any grievous burden on either the adjudicator or the parties; all that it will normally require is that each party should be given an opportunity to make comments at any relevant stage of the adjudication process.*
5. *If, as is usual, the party who refers a question to adjudication makes written contentions in support of its case, the other party must be given an opportunity to make similar contentions. Express provision to that effect is made in condition 41A.6.2 of the conditions applicable to the Scottish Building Contract used in the present case. If the contentions of either party contain material that is not touched upon in the contentions of the other party, it may be desirable to ensure that that other party is given an opportunity, however short, to comment on the additional material.*
6. *An adjudicator is normally given power to use his own knowledge and experience in deciding the question in dispute; such a power is conferred by condition 41A.6.5.1 of the present form of contract. If the adjudicator merely applies his own knowledge and experience in assessing the contentions, factual and legal, made by the parties, I do not think that there is any requirement to obtain further comments. 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. As I have indicated, the time scale may be very short.*
7. *An adjudicator may also be given power to require parties to give additional information or to carry out tests, or to carry out such tests himself; such powers are found in condition 41A.6.5.3 and .4 of the present contract. If such powers are exercised, it will normally be appropriate to make any additional information or the results of any tests known to the parties, and call for their comments. Once again, the time given may be very short.*
8. *An adjudicator may be given power to obtain from other persons such information and advice as he considers necessary on technical or legal matters; such a power is found in condition 41A.6.5.7 of the present contract. If such a power is exercised, the position is similar to that outlined in paragraph 6 above. If the information or advice raises any matter that has not been canvassed by the parties in their submissions or otherwise, it will normally be appropriate to make such matter known to the parties and call for their comments.*
9. *In this connection, I do not think that any distinction can be drawn between issues of fact and issues of law. An adjudicator will not usually be a lawyer; thus he must depend for information and advice about the law on other persons, whether the parties or his legal adviser. I cannot see any distinction for present purposes between information and advice about the law obtained in that way and information and advice about questions of fact. …..*

[1] OPINION OF LORD DRUMMOND YOUNG : COURT OF SESSION CA96/03 17 December 2003