Chapter 1
What is Adjudication?

General introduction

Terminology

Before we start to look at adjudication in detail it is worth laying down a few ground rules.

Throughout this book, where the words 'the Act' are used they refer to the Housing Grants, Construction and Regeneration Act 1996. Where we refer to other legislation we name the Act concerned by its full title. In order to avoid confusion, for example where there is reference to the Act in close proximity to other legislation, we add the abbreviation HGCRA.

There is secondary legislation derived from the Act. In England and Wales this is the Scheme for Construction Contracts (England and Wales) Regulations 1998, which provides the default position where a construction contract does not comply with the requirements of the Act. We refer to this throughout as 'the Scheme'. Scotland and Northern Ireland have provisions with different titles but these are essentially the same in concept, albeit certain amendments have been made in them. There is also an Exclusion Order, the Construction Contracts (England and Wales) Exclusion Order 1998. This excludes certain types of contract from the definition of construction contracts in the Act.

The parties who wish to use adjudication can be described in a number of ways. The party who starts the process can be described as the 'referring party', 'applicant' (applying for adjudication) or by the title they are given in the contract, such as employer, contractor or sub-contractor. The other party is the 'responding party', the 'respondent', the 'other party' or again the title by which they are referred to in the contract. It would not be correct to use terms such as 'plaintiff' and 'defendant' as these belong to the field of litigation. The terms 'claimant' and 'respondent' are used in arbitration and could be used in adjudication. In practice this arbitral terminology is rarely used. We believe that the simplest and least confusing method of identifying the parties is to use their actual names or an abbreviated form of their names in the body of the decision. This avoids error when directing who shall pay what to whom, or in directing who shall do what for whom.

One aspect that often causes confusion is the nomenclature used when describing the final written product of the adjudication process. It is easy to call it an 'award' but we are of the view that this is not appropriate. The term 'award' is appropriate to arbitration, as is 'judgment' to litigation. Throughout this book we describe the final written product as 'the decision'. We note that neither the Act nor the Scheme use the word 'award'; reference is always to 'decision'.

Why is it that in the courts there is often a reference in enforcement proceedings to the adjudicator's award and not to the decision? What the legislation clearly describes is a decision. That is what the adjudicator does, simply decide. When the matter goes to enforcement, however, the element of the decision which is enforced is the amount or part of

the decision which awards something, hence the use by the courts of the term 'award' in the context of enforcement.

We have to prepare the reader for an element of confusion here. It is the house style of our publishers to avoid the use of capital letters in describing things such as a document that is entitled a decision or a person such as an adjudicator. Thus we have no easy way of differentiating between the individual decisions that the adjudicator makes on the several issues contained within the decision document, and that document itself.

Before 1 May 1998

Adjudication had been an option in a number of standard contracts in the construction industry for many years. It had been generally limited in its scope. The extent to which these provisions had been used is unknown. It was the authors' experience that in the period leading up to the introduction of the statutory right to adjudication, with the higher profile of adjudication generally, those adjudication provisions that did exist were used rather more frequently. There had certainly been an increase, particularly in the civil engineering field, in the number of contracts with provisions for the setting up of dispute review boards where adjudication-type arrangements had come to the fore. This trend accelerated as a result of the publication of the Latham report *Constructing the Team*, culminating in the legislation entitled the Housing Grants, Construction and Regeneration Act 1996.

The first introduction into a standard construction contract of any form of adjudication was in 1976 when the 'Green Form' of Nominated Sub-Contract was amended to include an adjudication procedure. A similar amendment was made to the 'Blue Form' of domestic subcontract. These forms, of course, applied to sub-contracts under the 1963 edition of the Joint Contracts Tribunal (JCT) Contract (previously known as the RIBA form). This inclusion of the adjudication process related to the introduction of elaborate provisions regulating the rights of main contractors to set off costs against monies otherwise due to their subcontractors.

This amendment emanated from the decision by the House of Lords in *Gilbert Ash* v. *Modern Engineering*[1]. This decision reversed the Court of Appeal decision in *Dawnays* v. *Minter*[2], which decided that monies certified under the Green Form represented a special type of debt to which the normal rules of set-off did not apply. *Gilbert Ash* decided that an employer is entitled to exercise the normal rights of set-off that arise by operation of law unless the contract excludes those rights.

The sub-contractors identified that unless a main contractor's rights of set-off were controlled by changes in the sub-contract terms there was great opportunity for abuse. This led to the 1976 amendments to the Green and Blue Forms of subcontract. When the JCT Forms were revised in 1980 the Green and Blue Forms disappeared and the NSC/4 and DOM/1 replaced them with the set-off adjudication provisions included. The JCT Forms are now in their 1998 editions and are undergoing further revision. Both main and subcontract forms now reflect the requirements of the Act.

During the 1980s the policymakers, in an endeavour to avoid the delays and costs that occur in the more traditional forms of formal dispute resolution, started to look at a wider application of adjudication as a means of obtaining resolution of disputes in a summary fashion.

[1] *Gilbert Ash (Northern) Limited* v. *Modern Engineering (Bristol) Limited* [1974] AC 689.
[2] *Dawnays* v. *Minter* [1971] 1 WLR 1205; 1 BLR 16.

In addition to matters relating to set-off, adjudication clauses were developed in other contracts to resolve a far wider range of disputes. Three of these contracts are noted here.

The Association of Consultant Architects' form of contract was originally produced in 1982. A second edition, known as ACA2, published in 1984, included three alternative dispute resolution procedures: adjudication by a named adjudicator, arbitration or litigation. The adjudication provisions were limited to a specific list of disputes and the adjudicator was allowed five days to give his decision. The British Property Federation version of this contract included a mandatory requirement for adjudication.

The JCT 1981 With Contractor's Design Contract had supplementary provisions, including adjudication, added in 1988. These were optional inclusions and the adjudication provisions were not all encompassing, being restricted to certain categories of dispute.

The Institution of Civil Engineers (ICE) New Engineering Contract (NEC), First Edition, introduced in 1993, the precursor to the Engineering and Construction Contract, included adjudication as a front line dispute resolution system and was the first contract to require the application of adjudication to all disputes that arose. Apart from the NEC, the ICE did not include adjudication in any of its other contracts. It did have an optional system of conciliation, which was first introduced into its Minor Works Contract in 1988, followed subsequently by the ICE Sixth Edition in 1991, and then the ICE Design and Construct Conditions in 1992. Conciliation in these forms of contract was a two-stage procedure; the first was a discussion between the parties and the conciliator with the aim of reaching a settlement of the dispute. If that was successful there was no second stage. If, however, a settlement was not reached, the conciliator made a 'recommendation' as to how in his opinion the dispute should be settled. This recommendation was similar to an adjudicator's decision in that it was final and binding unless referred to arbitration or litigation. The ICE produced a formal Conciliation Procedure in 1994 and this procedure still forms a part of the dispute resolution regime in current ICE contracts, even after their amendment to comply with the Act.

None of the adjudication clauses mentioned above complied with the Act and as a result all were discarded in favour of compliant clauses in 1998.

After 1 May 1998 New adjudication – 'Sea change' or Hurricane?

The Act became operative on 1 May 1998 in England, Wales and Scotland (1 June 1998 for Northern Ireland). Any construction contract formed after that date had to have the new right to adjudication incorporated in the contract in a form which satisfied the requirements of section 108 of the Act or it would be incorporated by default with the provisions of the Scheme.

Prior to this date there was great scepticism in the trade press, particularly by many of the lawyers, coupled with the poor drafting of Part II of the Act and lack of any provision in the legislation for enforcement, that new construction adjudication would ever work. There were also those who thought that it would have only deterrent value and would rarely be used in practice.

A major last minute publication[3] sought to discredit the whole of the legislation and the system for adjudication itself, but only on the basis that it should not be a statutory right.

[3] John Uff, QC *et al.*, *Construction Contract Reform: A Plea for Sanity*. Centre for Construction Law and Management, London, 1997.

The sceptics nevertheless remained supportive of voluntary contractual adjudication schemes.

There had been extensive training for new adjudicators prior to 1 May 1998 and a number of professional institutions and trade bodies had formed panels of adjudicators and set themselves up as adjudicator nominating bodies ready for the industry's uptake of new adjudication. At the eleventh hour the government's listing of approved adjudicator nominating bodies in the Scheme was abandoned. This move was disappointing at the time for those who had taken the trouble to 'qualify' as approved bodies, but the logic of not publishing an approved list was impeccable. This was because it would restrict any new organisation qualifying as an adjudicator nominating body without a change each time to the secondary legislation.

The initial uptake of adjudication was slow. This is not surprising as the legislation only operated on contracts formed after 1 May 1998. A party wishing to exercise its right to adjudication had to both get into contract and get into dispute after 1 May 1998. As many construction practitioners know, it is probably easier in the construction industry to find oneself in dispute than in contract.

However the sea change, if one was needed, came from the courts. The question of enforceability of an adjudicator's decision was put beyond doubt in the case of *Macob Civil Engineering* v. *Morrison*[4]. This case established beyond doubt that adjudicators' decisions would be enforced, thus removing one of the major scepticisms in the system of new adjudication. This confirmed the authors' views expressed in the first edition of this book.

Whether this first judgment of itself led to a rapid increase in numbers of adjudications or whether they were already on the increase is unknown. Figures from a survey by the Construction Industry Council (CIC)[5] give one of the more accurate appraisals of the growth of the numbers of adjudications.

Review and consultation

When the Act was under development, Government made an undertaking that a review of how the legislation was working would take place within two years of the operative date for adjudication. In the relatively short period since the birth of new adjudication, not only has a substantial review taken place of the legislation in particular but also of other aspects of adjudication. Other than generating a lot of comment, this review had no effect in that nothing was done about amending either the primary or secondary legislation. A further review is being undertaken under the auspices of the Construction Industry Council, which is rather surprising given the absence of any change as a result of the two-year review.

The first review was undertaken by wide-scale consultation with industry and users of adjudication. It is the authors' experience that, regrettably, such reviews rarely attract grass roots feedback and are usually fuelled by non-practitioners and those with vested interest but no practical experience of the matter in debate.

The CIC, through the newly formed Construction Umbrella Bodies (CUB) Adjudication Task Group, which analysed the response from industry, sought to redress this defect in the consultation process by including practitioners in order to provide a balanced view.

Very little has come from the consultation process. Minor amendments have been

[4] *Macob Civil Engineering Ltd* v. *Morrison Construction Ltd* [1999] BLR 93.

[5] *Adjudication – The First Forty Months*. A Report on Adjudication under the Construction Act. Construction Industry Council, 2002.

proposed to the Scheme, which would only affect the legislation in England[6]. Scotland and Wales can now make their own legislation following changes brought about through devolution.

The message seems clear: 'it ain't broke so don't try to fix it'. There is nothing in the proposals that is likely to involve new regulation or amendment to the Scheme for Construction Contracts (England and Wales) Regulations 1998 and it is likely, rightly in the authors' view, that the Scheme will remain unchanged.

There has been some case law concerning whether or not adjudicators should have the power to award party to party costs. The industry view on this is divided and there are strong views in both camps. Any real problem with the legislation will need amendment to primary legislation rather than secondary legislation.

In the authors' view this particular aspect of adjudicators' decisions is unimportant. We can see no reason why consenting parties should not have an adjudicator deal with costs and there is nothing to prevent such agreement.

There is, however, a less attractive scenario on costs which is of considerable concern to those representing sub-contractors and which does require the assistance of amended primary legislation. This arises in the case of *Bridgeway* v. *Tolent*[7]. This case concerned an adjudication commenced by a sub-contractor against a main contractor under an amended CIC Model Adjudication Procedure. The amendment in question incorporated provisions that the party who issued the Notice of Adjudication would be responsible for both parties' costs in the adjudication. These costs were to include the adjudicator's fees and expenses and any legal and experts' costs. The court held that this term of the contract was not void. It did not breach the Act in any way and did not provide a 'device' that prevented an aggrieved party going to adjudication at any time.

It is unfortunate that Parliament did not deal with this aspect at the time primary legislation was introduced. It is a simple matter both to maintain the parties' right to agree that an adjudicator can deal with costs, and to ban any agreement prior to the dispute occurring that one side should bear all the costs in any event. This could be achieved by adopting section 60 of the Arbitration Act 1996. This would make void all pre-agreements on costs prior to the occurrence of any dispute and would redress any imbalance in bargaining position at the time the contract is made. Unfortunately at the time of writing the Parliamentary time for such an amendment is unlikely to be made available in the immediate future.

Training and quality of adjudicators

Another issue that was raised in the consultation process was the quality of adjudicators. It was thought that the initial training may have been inadequate or that the quality of performance of some of the adjudicators was inadequate. The authors themselves had then, and still have, a concern that the three-day course originally set up as a 'conversion course' for those already trained as an arbitrator, has been adopted as the standard for training those aspiring to be adjudicators without any background as arbitrator.

A study was carried out by the CIC to establish a common theme and minimum criteria for training adjudicators. Subsequent to this study the RICS independently decided to examine the quality of its adjudicator panel and have appraised continuing professional

[6] The Scheme for Construction Contracts (Amendment) (England) 2001.
[7] *Bridgeway Construction Ltd* v. *Tolent Construction Ltd* (11 April 2000).

development (CPD) and provided updated training courses. This is part of an ongoing programme to enhance the quality of adjudicators available to the construction industry.

Other institutions that provide adjudicator panels and act as adjudicator nominating bodies are also reviewing their training and CPD for their panellists.

One proposal that indicates that adjudication has 'arrived' is the commencement of preliminary investigations into setting up a diploma course in adjudication. Such a course would obviously take some time to develop but once it is in place it should go a long way to address any problems in respect of training.

Advice

The final area that the consultation process examined was that of advice. The initial thinking was that there should be advisory documents for adjudicators. The RICS had already taken the initiative and published guidance for its adjudicators[8].

The CUB Adjudication Task Group has also published a similar guidance document[9]. This does not address one of the major problems identified by practising adjudicators: the difficulty that some parties have in putting together a case for adjudication without using the services of expensive advisers. This resulted in the production by the CIC of the *Users Guide to Adjudication* in April 2003.

The rest of the world

The UK legislation has stimulated interest in adjudication across the rest of the world. There is the Building and Construction Industry Security of Payment Act 1999 No. 46 in New South Wales in Australia and the Construction Contracts Act in New Zealand which came into force in 2003. There is also considerable interest elsewhere in Europe as well as in China and the West Indies.

The authorities in Australia and New Zealand took considerable interest in the HGCRA and its application to payment and disputes in the UK. Their legislation does not follow the UK pattern entirely and in some ways their approach is much tougher.

Public or private law?

There is a debate as to whether or not adjudication is governed by private or public law. An excellent paper by Anthony Speaight QC[10] explored this concept on the then case law on enforcement.

The importance of the point is simply that when it comes to enforcement, if adjudicators' decisions fall within the remit of public law they would be subject to judicial review and therefore a wider investigation than has presently been the case at enforcement. The English courts have been very supportive of adjudication from the outset. The basic premise has been that adjudicators' decisions are enforceable unless they fall into limited exceptional circumstances. These limited circumstances are considered later in this book.

---

[8] *Surveyors Acting as Adjudicators in the Construction Industry*. RICS guidance note.
[9] *Guidance for Adjudicators*. Construction Umbrella Bodies Adjudication Task Group, July 2002.
[10] *The Construction Act – Time for Review*, Chapter 8. King's College London, November 2000.

Without entering the debate on what constitutes public law, the regime for enforcement of adjudicators' decisions in England and Wales has essentially followed the law developed in expert determination where matters such as mistakes in law and fact are considered subordinate to the process itself, and therefore ignored. What remains important is whether the right question has been answered and, as now clarified by the courts, whether the procedure has been fair and the adjudicator has acted within his jurisdiction.

Mr Speaight's paper suggests that if there is a public law angle this would only apply where the construction contract is non-compliant and therefore the Scheme applies by default. Any Scheme adjudication would therefore be subject to judicial review. If adjudicators' decisions are subject to judicial review the merits would be examined more closely than is presently the case at enforcement.

The three broad grounds of judicial review are still probably those stated by Lord Diplock in the GCHQ case[11]:

> '(1) Illegality: the decision maker must understand correctly the law that regulates the decision-making and must give effect to it.
> (2) Irrationality: the test which is frequently referred to as ''Wednesbury[12] unreasonableness'', that is a decision which is so outrageous in its defiance of logic or accepted standards that no sensible person could have arrived at it.
> (3) Procedural impropriety: this is a failure to observe basic rules of natural justice or a failure to act with procedural fairness.'

Under these grounds remedies would be available in public law for an aggrieved party where there would be no remedy available in private law.

There are no cases in English law where judicial review has been used to resist enforcement of an adjudicator's decision. It is doubtful from any of the current cases that a challenge will be successful by judicial review.

The position is different in Scotland:

> 'One difference between Scots and English law (in procedure at least), however, is (as I have already mentioned) that judicial review is not confined under Scots law to issues of public law, but extends to powers conferred by a contract upon a third party to determine the rights of the parties to the contract *inter se*. In particular, judicial review under Scots law extends to arbitration and is not uncommon in the context of arbitration under building and engineering contracts.'[13]

Adjudication defined

Dictionaries provide a number of definitions of the verb 'adjudicate'. For example, the Oxford English Dictionary includes '(Of a judge or court) decide upon (claim etc.)' and 'sit in judgment and pronounce sentence'. The word has its roots in the Latin *adjudicare*, to award to (judicially): *ad* (= to) + *judicare* (= to be a judge, from *judex*, a judge).

These definitions show that adjudication is something that judges and arbitrators do every day. It is an action that they carry out as part of their overall function as judge or arbitrator. It is in principle no more than making a decision. In these days of the court Civil Procedure Rules and case management by judges and the active management of the arbitration by arbitrators, the making of a decision, or the adjudication element of their task, is only a part

[11] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374 HL.
[12] *Associated Provincial Picture Houses* v. *Wednesbury Corporation* [1949] 1 KB 223 CA.
[13] *Ballast PLC* v. *The Burrell Company (Construction Management) Ltd* (21 June 2001) Outer House, Court of Session.

of their function. The remainder of their task can be described as 'arbitrating' or, in the case of a judge, 'case managing'.

Parliament sought to define adjudication in a proposed amendment to the then Housing Grants, Construction and Regeneration Bill. The definition was: 'For this purpose ''adjudication'' means a summary non-judicial dispute resolution process that leads to a decision by an independent person that is, unless otherwise agreed, binding upon the parties for the duration of the contract, but which may subsequently be reviewed by means of arbitration, litigation or by agreement'.

In the authors' view it was wise that this amendment was rejected and not included in the legislation. There are certainly some elements of this definition that are attractive but others which conflict with the balance of the legislation in its final form. Our reasons for saying this are developed below.

Adjudication as set out in the Act is not just that part of the process that involves the making of a decision, albeit that this is the one thing an adjudicator must do. It encompasses the whole procedure from the initial notice of intention to refer a dispute to adjudication, through to the making of the decision by the adjudicator. When adjudicating, the adjudicator is not only deciding on the merits, he is also administering the process.

There are others with the title adjudicator, for example VAT or immigration adjudicators. They are similar to the construction industry adjudicator in that their title encompasses their whole function, not just the decision-making aspect.

The nearest definition to the authors' view of construction industry adjudication as brought in by the Act is included in the Reader's Digest Universal Dictionary: 'to hear and settle (a case) by judicial procedure'. There is only one word in that definition which, in the authors' opinion, is not applicable as a definition of construction industry adjudication and that is the word 'procedure', of which more later. There are those, no doubt, who will be surprised to hear construction industry adjudication described in any way with a word such as 'judicial'. We are firmly of the view, however, that it is a 'judicial process' and we shall develop that theme later in this chapter. This is distinct from judicial procedure.

There has been little assistance from the courts, in the 171 cases that we have found, in defining the nature of new adjudication. The majority of the judgments in the courts are first instance which recycle, by analogy, law from arbitration and expert determination. There are more indications of what adjudication is not rather than of what it is. There are a number of quotations in the current case law which make observations on what the courts think adjudication might be:

> 'An adjudicator may not be a classic judicial tribunal but in practice an adjudication will probably be closer to an arbitration rather than expert determination. Whatever similarities adjudication may have with arbitration the decision has only temporary effect and validity.'[14]

> 'Adjudication is a special creature of statute.'[15]

> 'Adjudication is intended as a summary process. There is implicit within it a risk of injustice; but Parliament has considered that risk to be acceptable because an adjudication is of limited temporal effect and only of an interim nature.'[16]

> 'In the first place, the adjudication was meant to produce a rough-and-ready answer as a stop-gap solution. Secondly, it would be absurd if an adjudicator could ''decide'' that he had too little

[14] *Glencot Development & Design Co Ltd* v. *Ben Barrett & Son (Contractors) Limited* (13 February 2001).
[15] *Herschel Engineering Ltd* v. *Breen Property Ltd* (14 April 2000).
[16] *Shepherd Construction Limited* v. *Mecright Limited* (27 July 2000).

information to make a determination… It appears from the cases cited to me that different views have been taken as to the appropriate legal framework within which to address the issues raised by adjudicators' decisions: in particular whether the adjudicator is to be regarded as a statutory decision-maker, albeit one whose statutory powers and duties have been clothed in contractual form (the approach adopted by Lord Macfadyen in *Homer Burgess Ltd* v *Chirex (Annan) Ltd*, as I understand his Opinion), or whether adjudication should be regarded as a contractual procedure (as Dyson J appears to have regarded it in, for example, *Macob Civil Engineering Ltd* v *Morrison Construction Ltd* [1999] BLR 93).'[17]

'The question for me is whether the adjudication procedure which I have outlined is "quasi legal proceedings such as arbitration or not". On behalf of the applicant it has been argued strongly that it is not. Mr Royce argued that it is the equivalent of some decision by an expert or a valuer giving a certificate. Decisions such as this, it seems to me, are largely matters of impression but I have come to the clear conclusion that the adjudication procedure under section 108 of the Act and/or clause 41 is quasi legal proceedings such as an arbitration within the classification of Vice-Chancellor Browne-Wilkinson in *Re. Paramount Airways*. It seems to me that it is, in effect, a form of arbitration, albeit the arbitrator has a discretion as to the procedure that he uses, albeit that the full rules of natural justice do not apply. The fact that it needs to be enforced by means of a further application does not stop it from being an arbitration. It is the precursor to an enforceable award by the court. It seems to me that it is ''other proceedings'' within section 11(3) and in my judgment accordingly leave is required.'[18]

'This case concerns the provision of the Housing Grants, Reconstruction [sic] and Regeneration Act 1996, which sets up a system of adjudication to protect parties to construction contracts who may be caught up in the web of large contractors making allegations, pursuing large counterclaims, not being paid themselves, and therefore depriving, sometimes rightly and sometimes wrongly, the sub-contractor of their rightful monies on an immediacy basis to enable the sub-contractor to continue working. We are all familiar with the old situation where a main contractor would string along a sub-contractor until he went bust.
So the 1996 Act provided for a system of adjudication during the contract works whereby persons who were the contracting parties, either the main contractor or the sub-contractor, could go along and get decisions and statements of monies owing at any particular time within a very short period.'[19]

'The Housing Grants, Construction and Regeneration Act 1996 introduced changes of some importance to the construction industry. It gave an entitlement to stage payments, made provision for the date when payments under a construction contract became due, dealt with the need to give effective notice of intention to withhold payments, provided a right to suspend performance for non-payment, prohibited conditional payment provisions and imposed a statutory set of contractual provisions which in default took effect as implied terms of the contract concerned. It also gave the important and practical right to refer disputes to adjudication so as to provide a quick enforceable interim decision under the rubric of ''pay now, argue later''.'[20]

'The question is whether the European Convention on Human Rights Article 6 applies to proceedings before an adjudicator. In the first place, the proceedings before an adjudicator are not in public, whereas the procedure under Article 6 has to be in public. I can see that the problems arise over whether one refers to a decision as a final decision or whether one has to consider whether Article 6 applies to a decision that is not a final decision, but it seems to me that if Article 6 does apply to proceedings before an adjudicator it is manifest that a coach and horses is driven through the

[17] *Ballast Plc* v. *The Burrell Company (Construction Management) Ltd* (21 June 2001).
[18] *A Straume (UK) Ltd* v. *Bradlor Developments Ltd* (7 April 1999).
[19] *Bridgeway Construction Ltd* v. *Tolent Construction* (11 April 2000).
[20] *RJT Consulting Engineers Ltd*. v. *DM Engineering (Northern Ireland) Ltd*, CA (8 March 2002).

whole of the Housing Grants, Construction and Regeneration Act. Maybe it is, of course because the Convention is something which though not at the moment binding by way of statute soon will be and the courts have to take account of it.
In my judgment, Article 6 of the European Convention on Human Rights does not apply to an adjudicator's award or to proceedings before an adjudicator and that is because, although they are the decision or determination of a question of civil rights, they are not in any sense a final determination. When I say that, I am not talking about first instance or appeals, but merely that the determination is itself provisional in the sense that the matter can be re-opened.
In those circumstances, therefore, I think the fact that the procedure before the adjudicator is very much a rough and ready procedure cannot of itself be regarded as a reason for not ordering summary judgment. I do not think the special circumstances to which I have referred alter that position.'[21]

There are eight cases that have been subject to appeal in England and two in Scotland. In his judgment in *Ferson* v. *Levolux*[22], Lord Justice Mantell sets out in sequence various comments that had been made by the courts in explaining the nature of adjudication as included in section 108 of the Act:

'The scheme provided by section 108 was explained by Dyson J in *Macob Civil Engineering Ltd* v. *Morrision Construction Ltd* [1999] BLR 93 at para 24:

''The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decision of adjudicators to be inforced pending the final determination of disputes by arbitration, litigation or agreement: see section 108(3) of the Act and paragraph 23(2) of Part 1 of the Scheme. The timetable for adjudications is very tight (see section 108 of the Act). Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. So far as procedure is concerned, the adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially (section 108(2)(e) of the Act and paragraph 12(a) of Part 1 of the Scheme). He is, however, permitted to take the intitiative in ascertaining the facts and the law (section 108(2)(f) of the Act and paragraph 13 of Part 1 of the Scheme). He may therefore, conduct on entirely inquisitorial progress, or he may, as in the present case, invite representations from the parties. It is clear that Parliament intended that the 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. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Cruically, it has made it clear that the decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.''

Further explanations are to be found in *Bouygues* v. *Dahl-Jenson 2000* BLR 522 and *CB Scene Concept Design Ltd* v. *Isobars Ltd* 2002 EWCA Civ 46. In the former, at para 2 Buxton LJ described the section as being:

''To enable a quick and interim, but enforceable, award to be made in advance of what is likely to be complex and expensive disputes.''

In the same case at para 26 Chadwick LJ stated:

''The purpose of those provisions is not in doubt. They are to provide a speedy method by which disputes under construction contracts can be resolved on a provisional basis. The adjudicator's

[21] *Elanay Contracts Ltd* v. *The Vestry* (30 August 2000).
[22] *Ferson Contractors Ltd* v. *Levolux AT Ltd* [2003] BLR 118.

> decision although not finally determinative, may give rise to an immediate payment obligation. That obligation can be enforced by the courts. But the adjudicator's determination is capable of being reopened in subsequent proceedings. It may be looked upon as a method of providing a summary procedure for the enforcement of payment provisionally due under a construction contract.''

In the latter, Sir Murray Stuart-Smith lent further emphasis to the draconian character of section 108 at para 23:

> ''The whole purpose of section 108 of the Act, which imports into construction contracts the right to refer disputes to adjudication, is that it provides a swift and effective means of resolution of disputes which is binding during the currency of the contract and until final determination by litigation or arbitration section 108(3). The provisions of 109-111 are designed to enable the contractor to obtain payment of interim payments. Any dispute can be qucikly resolved by the adjudicator and enforced through the courts. If he is wrong, the matter can be corrected in subsequent litigation or arbitration.''

The case of *Bouygues* is a good illustration of the scheme put into practice. The adjudicator had made what was acknowledged to be an obvious and fundamental error which resulted in the contractor recovering monies from the building owner whereas in truth the contractor had been overpaid. The Court of Appeal held that since the adjudicator had not exceeded his jurisdiction but had simply arrived at an erroneous conclusion, the provisional award should stand. In this context the court adopted the test formulated by Knox J in *Nikko Hotels (UK) Ltd* v. *MEPC Plc 1991* 2 BGLR 103 at 108B:

> ''If he 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.'' '

There is thus little to assist in case law in giving a single definition of new adjudication. The cases give observations on what the courts think new adjudication might be in given circumstances in enforcement proceedings. There is no doubt that the various angles on what adjudication might be will continue to develop in subsequent court proceedings.

Construction industry adjudication is thus a unique process. It is not adjudication as judges and arbitrators know it. It is far wider than that. It is also not mediation or conciliation. It is not expert determination, although it probably remains closer to this form of dispute resolution than any other. It is not arbitration. It is certainly not litigation.

Adjudication has been described as a procedure where, by contract, a summary interim decision-making power in respect of disputes is vested in a third-party individual (the adjudicator) who is usually not involved in the day-to-day performance or administration of the contract, and is neither an arbitrator nor connected with the state. This definition was in a paper published in 1991 before the advent of the Act.[23]

Seeking to define the word adjudication using previous definitions or referring to other areas where the word is used, for example in statutory contexts in the field of public law, such as prisons, asylum and immigration, social security, tax, complaints against solicitors and car parks in London, may prove unhelpful. In this field of the law, adjudication is supported by statute or regulation. Many of the cases reported in this field concern the failure to apply the rules of natural justice which has, of course, been a major aspect of many of the headline cases on adjudication.

Adjudication in the construction industry is also provided for by statute as a default position, excepting those areas where it has already been agreed to incorporate adjudication

[23] Mark C McGaw, *Adjudicators, Experts and Keeping Out of Court*. Centre for Construction Law and Management, September 1991 Conference, Current Developments in Construction Law.

provisions in contracts on a consensual basis. Why then cannot adjudication in construction be described as statutory adjudication? The answer is because the statute does not actually demand that parties take their disputes to adjudication. All the statute does is give the right to a party to take a dispute to adjudication if that party so wishes and the other party has to go along with it. The statute imposes new terms in construction contracts in a similar way to terms imposed on transactions for the sale of goods by the Sale of Goods Act 1979.

Although the right to adjudication is in statute, its source is in contract. Even where a contract does not comply with the minimum requirements of section 108 of the Act and therefore the Scheme applies by default, the requirements of the Scheme are treated as implied terms of the contract. Adjudication is therefore a creature of contract. Although adjudication is not consensual, it is not a requirement of the Act; all the Act is doing is regulating certain terms that must be contained within the contract.

The standard forms of contract which were redrafted in 1998 and shortly after to comply with the requirements of the Act do, in many instances, go beyond the minimum criteria required by the Act. These new clauses will be given their full effect through the law of contract and not through any requirement in the statute. It is to be noted that the court is prepared to enforce decisions that arise out of contracts that are not governed by the Act (*Parsons Plastics* v. *Purac*[24])

Construction is a risky business. A building contract is the means by which the parties to that contract allocate that risk between themselves. Parties to a contract may well not fully understand how that risk is allocated between them. That is why in so many building contracts, reference has hitherto had to be made to an arbitrator or to the courts, with all the time and cost that these processes can entail. Arbitration and the courts decide the dispute save for limited rights of appeal. Adjudication has been introduced to provide an intermediate step which, whilst its primary purpose is to determine the dispute on a temporary basis, can explain to the parties the allocation of risk that they have undertaken. It does not finally decide the dispute but it does give the parties an impartial view, which has the benefit of being obtained after the expenditure of relatively little time or cost and may assist them in understanding their respective rights and obligations under the contract and thus enable them to resolve the dispute themselves.

Adjudication is often grouped into the general category of dispute resolution processes. This is not, strictly speaking, correct. A number of procedures that are described as dispute resolution processes do not actually resolve the dispute. They may facilitate the resolution of the dispute but that is all. The resolution of the dispute depends on more than the process itself. A true dispute resolution process has at its end a decision, determination, award or judgment that brings the dispute to an end.

An adjudicator's decision does not do this. All adjudication can do is to put the parties into the position of understanding their rights and obligations under the contract that they have entered into. Adjudication is not final and binding. The dispute is not settled by adjudication, although it may be if the parties choose to accept the decision. Once an adjudicator has made his decision, it is for the parties to decide whether they should agree to accept those conclusions, or have the dispute heard again by a tribunal that will give them a decision that is final and binding. They are quite at liberty not to accept the conclusions, albeit they are bound by the decision, temporarily at least. Adjudication by itself does not and cannot resolve the dispute; for the dispute to be resolved each party has to decide for itself that it is going to take the matter no further.

[24] *Parsons Plastics (Research & Development) Limited* v. *Purac Limited* [2002] BLR 334, CA.

The adjudicator states what his conclusions are and this decision may well be based upon very limited information. It certainly will have been made in a limited time. Both these factors may well mean that the answer that the adjudicator reaches leaves a lot to be desired. The adjudicator will certainly not have had sufficient time to make a full forensic investigation. It may be that the adjudicator considers that the dispute is of such a nature that it is totally impossible for him to reach any sort of conclusion. We examine this situation elsewhere when considering making the decision. In the vast majority of disputes, however, it is to be hoped that the skilful adjudicator, experienced in the industry, will be able to utilise the information produced by the parties, together with his own knowledge and the results of his own investigations, to reach a decision that will in fact reflect the rights and obligations of the parties under their contract; and that those parties will accept the decision as it stands or perhaps in some instances use the decision as a basis for negotiations and thus the dispute is resolved. To that extent only, adjudication may become a dispute resolution process.

Construction adjudication as introduced by the Act provides for a process that gives the opportunity for improvements in cash flow and for the resolution of disputes, at least on a temporary basis, before they are allowed to escalate into something that requires vast amounts of time and money to resolve. The process is quick and relatively cheap, particularly in comparison to litigation and to those arbitrations that have somewhat unfortunately, for whatever reason, been allowed to become more time consuming and costly than they should have been.

All this does perhaps leave us with the simple statement 'it is what it is' but this will not satisfy the enquiring mind. Because the word adjudication as adopted by the Act encompasses the whole process and as the process itself has many aspects that cannot easily be encapsulated in a few words, the definition has to be rather complex. If this were to be set out in a single sentence it would be of inordinate length so the constituent parts are broken down below.

Adjudication in the construction industry is a process that:

- provides for the referral of a dispute arising under the contract at any time, to a person (an adjudicator) who,
- acting impartially,
- on the basis of such information as the parties to the dispute are able to provide him, or he is able to ascertain for himself,
- in a very limited time-scale,
- reaches conclusions as to the parties' rights and obligations under their contract on the basis of that information,
- those conclusions being set out in a decision that is contractually binding on the parties until the original dispute is finally determined by legal proceedings or by arbitration (if the contract so provides or the parties so agree) or by agreement between the parties.

Is adjudication a judicial process?

It may come as a shock to many readers but the authors are firmly convinced that adjudication is a judicial process. This is not to say its procedures are judicial, far from it, but it certainly is a judicial process.

To understand how this conclusion has been reached the nature of the adjudication process must be examined. Adjudication arises out of a contract. The parties have rights and obligations under that contract. For an adjudication to be necessary there must be a dispute

as to those rights and obligations. A good way of explaining this is to look at a dispute as to the quality of work.

The man in the street might think that a dispute regarding plaster relates merely to a matter of it being good plastering or bad plastering. This is, however, a misconception. What the dispute actually relates to is whether the plasterwork as executed complies with the specification. The specification is a part of the contract. The dispute is actually whether the plasterer has complied with the duties and obligations that are placed upon him by the contract.

The task of the adjudicator is to decide whether the plasterer has in fact complied with the specification. In other words, has he complied with the contract? He is deciding upon the obligations that the plasterer has entered into when he made the contract. A person who makes such decisions is undertaking a judicial process. Determining the rights of the parties by applying the law to the facts is a judicial process. This is what every adjudicator is required to do under the Act, the Scheme and the new standard form contracts. This is a judicial function and not a commercial decision.

What the adjudicator is not doing is carrying out a judicial procedure. A judicial procedure, in our view, has connotations of pleadings, discovery, further and better particulars, evidence under oath and all other such matters beloved of the legal fraternity. This is not an appropriate way of conducting construction industry adjudication. There is not the time or the necessity to adopt a judicial or formal court procedure.

Adjudication does not generally require judicial procedures such as those found in the court rules. It would be impossible to conduct adjudications within the framework of very formal procedures. The management of the process needs inventiveness to understand a case at a very early stage and tailor the procedures to suit the dispute itself and the statutory timeframe. This has been recognised by the courts which have accepted the concept of procedural fairness as a yardstick for the conduct of adjudications within the necessarily limited time-scale.

This is not to say that there are not sometimes exceptional circumstances where the parties to adjudication proceedings with many millions of pounds at stake agree to a procedure that involves a rather more formal approach, but this requires both parties to be willing and a lengthy extension of time.

Comparison of adjudication with other forms of dispute resolution

The adjudication process is similar to, but different from, a number of other processes that are utilised in the resolution of disputes in the construction industry. These are, as mentioned above, mediation, conciliation, expert determination, arbitration and litigation.

The mediator, conciliator, independent expert and the adjudicator are all creatures of the contract and their powers are specifically constrained by it. In this they are distinct from the arbitrator who has powers created by statute, albeit the parties can amend them in their arbitration agreement or subsequently. Arbitration is consensual because the parties volunteer to put it in their contract, but the arbitrator is not a creature of the contract but of the arbitration agreement and statute. The arbitration agreement under which arbitration takes place has a separate existence by virtue of section 7 of the Arbitration Act 1996 and is not necessarily dependent upon the contract in which it was originally included. While there are requirements in the Act regarding what the contract must include in respect of adjudication, it is not the statute that governs the adjudication but the contract. Even in a situation where the contract does not comply with the Act and the Scheme applies, the

process is still contractual. In that event the provisions of the Scheme become terms of the construction contract.

Mediation and conciliation

For the purposes of this comparison we shall refer to mediation only. The only substantive difference that we can identify is that in the ICE procedure conciliation allows the conciliator to make a recommendation at the end of the process. That is not the generally accepted situation in mediation.

Adjudication is similar to mediation only in that it is not a dispute resolution process in itself; they are both processes which may or may not result in the dispute being resolved. The role of the mediator is, however, to seek to facilitate an agreement between the parties by negotiation. There is no place for negotiation in adjudication, albeit the adjudicator may meet with the parties in an attempt to ascertain matters that he would otherwise not be able to find out in the time allowed. That will in all likelihood, however, take the form of an inquisitorial process rather than a negotiation.

Expert determination

Adjudication is in some ways quite similar to expert determination but the principles are rather different. The basic similarity is that they are both contractual procedures and they involve an impartial third party carrying out a review of the parties' rights and obligations under the contract.

In expert determination, the expert uses the results of his own knowledge and investigations in making his determination. The whole process relies on this procedure. The expert has no obligation at all to tell the parties the extent of his own knowledge that he uses or the results of his investigations into the facts and the law in reaching his determination.

Adjudication is similar but only to the extent that the adjudicator is permitted to ascertain the facts and the law for himself. There is, however, no obligation for him to do this. Time may in any event preclude such an option. If the adjudicator does use his own knowledge or ascertain matters of fact or law he must be careful to ensure that he acquaints the parties of such things or the courts will not enforce his decision (*RSL* v. *Stansell*[25]).

The expert's determination is contractually binding on the parties with no longstop provision, whereas the adjudicator's decision, whilst binding, is only so until the original dispute is finally determined by other means.

Arbitration

Adjudication is also similar in many ways to arbitration but again it is also very different. Both arbitration and adjudication involve the production of evidence before a tribunal and the tribunal reaching a decision on the parties' respective rights and obligations under the contract. Arbitration is definitely a judicial process as, in the authors' opinion, is adjudication.

[25] *RSL (South West) Ltd* v. *Stansell Ltd* (16 June 2003).

The difference is in the procedures used. There is an absolute obligation in arbitration that the arbitrator shall give each party a reasonable opportunity of putting its case and dealing with that of his opponent. There is also a statutory obligation on the arbitrator to adopt procedures suitable to the circumstances of the particular case, so as to provide a fair means for the resolution of the matters falling to be determined.

This can, in the case of complex disputes, lead to the utilisation of procedures that can be as costly and time consuming as litigation. This should not occur to such a degree in future given the introduction of the Arbitration Act 1996 with its provisions for the arbitrator to adopt suitable procedures and to cap costs.

In adjudication the time factor is paramount. All the requirements of arbitration, which can be loosely defined as being the 'rules of natural justice' and which are still important in adjudication, are secondary to the requirement that the adjudicator shall reach his decision in a very limited period.

The adjudicator may be prevented by the exigencies of a process that has to be completed so very quickly from giving each party an exhaustive opportunity of putting its case and dealing with that of his opponent. The adjudicator may also, by the time constraints, be put in the position of having to do things that might, in arbitration, if done by the arbitrator, be considered to breach the requirement to provide a fair means of resolving the matters to be determined. As has already been mentioned, the idea of procedural fairness is adopted by the courts to fulfil the requirement to be as fair as can be within the time limitations.

The adjudicator is empowered to take the initiative in ascertaining the facts and the law. The arbitrator has a like power, albeit that it can be limited or removed by the parties by agreement. In neither process is there any general obligation upon the arbitrator or adjudicator to do so save for one exception. That is when an adjudicator is operating under the Scheme for Construction Contracts. Paragraph 12(a) of the Scheme requires that he 'shall reach his decision in accordance with the applicable law in relation to the contract'. This effectively means that he has an absolute obligation to ascertain the law himself unless the parties provide him with everything that he needs in this respect. There is certainly no question of the adjudicator being under an obligation to make such investigations in the standard forms of contract unless such a procedure is agreed by the parties as an amendment. The non-legally qualified adjudicator should always be aware of the possibility that he could be taking on something that he is not competent to do and should always look carefully at any enquiry from an adjudicator nominating body with this in mind.

The adjudicator's decision is binding but not final unless the parties so agree. It is, however, not appealable. It is the dispute itself that can be reviewed subsequently. The arbitrator's award is by definition final and binding and only subject to very limited rights of appeal.

Litigation

In principle there is no comparison between litigation and construction industry adjudication. They are so utterly different.

It is worth making the point that, in the end, adjudication, like arbitration, has to be subject to the court system. It is a matter of contract and of enforcement. Ultimately, the only way any decision of an adjudicator can be enforced is for the courts to do it. There may be an intermediate stage where an arbitrator makes an award enforcing the adjudicator's decision, but if this award is not honoured the courts will have to enforce it.

The obligations placed upon the adjudicator

There are only two specific obligations placed upon an adjudicator by the Act. These are, first, that he reaches his decision within 28 days or such longer period as he may have as a result of an extension of this time period and, secondly, that he must act impartially.

The Act requires that the contract between the parties shall include these provisions. There is no requirement as to the form of the contract between the adjudicator and the parties. It is extremely unlikely that those who undertake the task of adjudicator will have time to enter into a formal contract with the parties to the contract out of which the dispute arises. The adjudicator will, however, be deemed to be aware that by taking on the task of adjudicator he is bound by these obligations. They will become express or implied terms of his contract. If he fails to comply with them he will be in breach of his contract.

The courts in their role as enforcers of adjudicators' decisions apply two specific obligations: has the adjudicator acted within his jurisdiction and has he complied with the requirements of procedural fairness?

The only other obligations placed upon an adjudicator will arise out of any procedures that may be included in the contract between the parties and any rules that apply to the adjudication process as a result of, or derived from, the Scheme for Construction Contracts if that is the regime that governs the adjudication. Such matters will also govern the adjudicator's contract and it is therefore most important that any adjudicator, before agreeing to act, ensures that he obtains precise information as to any rules or other provisions with which he will have to comply. It is of particular note that the JCT and ICE contracts widen the scope of the Act.

The powers of the adjudicator

It must be implied into the agreement under which the adjudicator operates that he has power to take any steps that he needs to in order to reach his decision within 28 days or any agreed extension to that.

As with the obligations, there are only two powers that the Act requires are given to the adjudicator in the contract. These are the power to take the initiative in ascertaining the facts and the law, and the power to extend the 28-day period by up to 14 days with the consent of the applicant. These powers are reflected in the Scheme and the various rules.

The adjudicator's powers relate solely to the contract under which he is appointed.

The various published sets of adjudication rules and the Scheme deal with the adjudicator's powers in slightly differing ways but almost all of them set out to reinforce the fact that the adjudicator has complete discretion as to procedure. Most set out a list of the powers that are available to the adjudicator. These are by way of examples only and are non-exhaustive. Some forms of contract set requirements relating to the time for submissions and the adjudicator should always be aware of such a possibility.

It is just as important that the adjudicator seeks to ascertain his powers before appointment, as it is that he ascertains his obligations. His powers may be restricted in some way and if the enquiry or referral documents give any indication that the contract is likely to contain provisions with which he is not familiar, he should take steps to find out the details of that contract at the earliest possible moment.

It must be remembered that the whole adjudication process is subject to the overall supervision of the court and it will generally be the forum for enforcement. If the adjudicator has failed to comply with the express and implied terms of his contract with the parties,

there may be a problem with enforcement. It is therefore vital that the adjudicator operates strictly within the contract under which he is appointed.

Possible liabilities of the adjudicator

The Act requires the contract to provide that the adjudicator is not liable for anything done or omitted in the discharge or the purported discharge of his functions as adjudicator unless the act or omission is in bad faith.

This immunity applies only to the parties themselves and does not provide protection to the adjudicator should a third party decide to sue him.

It may be that the adjudicator will have the opportunity to obtain an indemnity from the parties in respect of suit by others. This is extremely unlikely where the adjudicator is nominated by an adjudicator nominating body because of the time restrictions. It will probably only occur where the adjudicator's agreement is in a standard form or the adjudicator is named in the contract between the parties and the contract provides such an indemnity. Even if an indemnity is given, the adjudicator should always be aware that the parties giving the indemnity may not always exist and in the case of insolvency on the part of both parties, a not unknown situation, the indemnity will disappear with them. In any event, professional indemnity insurance should be a must for any adjudicator.

What personal qualities should the adjudicator have?

The adjudicator's task is not an easy one. In that respect it is no different from any similar position where someone is required to make a decision that will affect others.

There are, as we have already identified, certain aspects of the adjudication process that make it unique and it presents similarly unique problems to those who adjudicate. Anyone can adjudicate but those who make a success of the process have clearly mature personal qualities.

We are not talking here about things like technical knowledge, awareness of adjudication procedures or knowledge of contracts and contract law. These can be learnt. We are not talking about professional experience. What we are considering are those rather less definable qualities that relate to the personality of the adjudicator. These are the qualities that enable the adjudicator to make a success of the process.

Adjudication can be a tricky business. The timescale involved makes this almost inevitable. The adjudicator cannot just sit back and wait for things to happen; if he is to make a success of the process he has to be pro-active and drive forward any adjudication to which he is appointed. In anything other than the simplest of disputes he will have to be setting procedures that will enable him to be in possession of the fullest information when he sits down to write his decision. This is the only way that the adjudication process will provide the opportunity for the parties to settle their dispute.

The adjudicator has to exercise his judgement. This is not the judgement that he will need when reaching his decision. This is judgement in the way that he deals with the procedural aspects of the adjudication and the way that he deals with the parties. It is the judgement that he needs when faced with difficulties that he cannot avoid and that have to be resolved.

An adjudicator must also be decisive. It is no use the adjudicator taking so long to make up his mind over a procedural issue that the delay affects the adjudication as a whole. This decisiveness will be brought to the fore in the need to decide upon the most appropriate

procedure for the adjudication at a very early stage, probably on the basis of limited information.

Decisiveness and judgement also come to the fore when the decision on the issues that have been put to him is to be made. There is also a need for an analytical ability, logic and clarity of thought at this time.

These facets must be mixed up with such things as integrity, flexibility and initiative, and much of this comes down to simple common sense.

All these qualities when put together produce an adjudicator who exudes an air of competence and has what has been described as gravitas or judicial capacity. The parties will respect such an adjudicator who will, when combining these attributes with his knowledge and experience, provide the parties with a decision that they can use as a basis for resolving the dispute.

Summary

Adjudication cannot be categorised readily with other forms of dispute resolution. It is closest to expert determination in that both are creatures of contract. They differ in that expert determination is consensual; the parties choose to provide for expert determination in their contract and expert determination is binding and finally resolves the dispute. Construction adjudication is completely new. It is not consensual; it is forced upon the parties by the requirements of the Act. It is not binding; the decision is only temporary until the dispute is resolved by another means. Construction adjudication is probably *sui generis*, the only one of its kind.