Chapter 12
Enforcement and Appeals

Save for those who were not in favour of the legislation, there was more concern about enforcement of adjudicators' decisions than any other single issue relating to the adjudication. This has been assuaged by decisions made by the courts that adjudicators' decisions should, as a matter of principle, be enforced. Adjudication is a creature of the contract brought about as an imposed regime on contracts that are defined as construction contracts within the Act.

All the customary remedies for dealing with the enforcement of a contract are available to deal with enforcement of adjudicators' decisions.

There are at the time of writing over 170 decisions of the court that relate to adjudication. Most of these are simply about whether or not an adjudicator's decision should be enforced. Some of the decisions are the result of early applications to the court in respect of the jurisdiction of the adjudicator, but these are relatively few and not directly concerned with the subject matter of this chapter.

The effects of the decision

Section 108 (3) of the Act states that:

> The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.
>
> The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

Adjudication is thus, unless agreed otherwise, only of a temporary effect. The decision is intended to be binding on the parties for the time being and has been described as being 'temporarily binding'.

If the contract does not provide for the wording in section 108(3), the Scheme applies.

Paragraph 23(2) of the Scheme provides exactly the same wording as section 108(3) of the Act except that there is no provision for the parties to accept the decision as finally determining the dispute.

As soon as the decision is made the parties are bound by it. That is what their contract provides. How temporary is the decision? The wording of the Act and the Scheme, and therefore any contract, makes the decision binding unless and until one of the parties chooses to challenge it. If neither party wishes to challenge the decision it remains binding. The contract can be completed and the final account settled and the decision still remains binding. In this way the decision finally determines the dispute. In practice the adjudication has, in the majority of cases, formed the basis of the final resolution of the dispute between the parties. No other action is taken.

The Act also makes provision that the parties can otherwise agree. It is unlikely in practice

that a party that has the decision in its favour will opt to agree to alter the effects of that decision. The only grounds on which such an agreement will be reached will be a compromise to avoid the costs of a possible litigation or arbitration.

Enforcement – initial considerations

The time to consider enforcement is before the decision is even made. The relief sought in the decision will determine the route for enforcement or indeed whether the decision is enforceable or not.

For example, where there is a dispute concerning the quality of the brickwork, the decision the adjudicator makes should declare whether or not the brickwork complies with the contract. A decision should not be sought on whether the brickwork should or should not be pulled down. The adjudicator does not have the authority to make such a decision. He is determining the rights of the parties under the contract. It is for the architect to decide whether or not he wants to keep or dispose of the brickwork when the adjudicator has determined whether or not it complies with the contract. The adjudicator does not have the power to issue such instructions; this remains the job of the architect or engineer as the case may be. The adjudicator's job is to decide the respective rights and duties of the parties.

If there is a decision which declares that the brickwork does comply with the requirements of the contract, what is there to enforce? The parties are bound by that decision. There is nothing further for anybody to do. If the architect still insists that the brickwork is taken down and rebuilt, he would need to issue an instruction to that effect and the contractor would be paid for that work which is then additional to the contract. If the payment for the work is not certified there is a new dispute which can be dealt with in adjudication. The evidence that the brickwork complied with the contract is in the first adjudication decision. Unless this is set aside in arbitration or litigation, it will remain good evidence of the fact that the brickwork complied with the contract requirements.

An adjudicator makes a decision which entitles a contractor to an extension of time. The architect then refuses to honour that decision and grant the extension of time. Whether or not the architect grants the extension of time, both the employer and the architect are bound by the adjudicator's decision. Why take any steps to enforce this decision? If at a later date the architect certifies that the contractor has failed to complete the works by a date, and ignores the adjudicator's decision, there is no entitlement for the employer to deduct liquidated and ascertained damages. If the employer then deducts a sum in respect of damages for a delay covered by the extension of time granted by the adjudicator, the decision made by the adjudicator, which was previously of no monetary value, then becomes the basis of an enforcement action by the contractor. He simply commences an action to collect the money which has been wrongly deducted. In support of his claim he has the adjudicator's decision which says he is entitled to an extension of time. The employer has no defence to this as his architect has failed to follow the decision to which both are bound.

It can be seen that not all adjudicators' decisions will have to be enforced; their very nature simply makes them stand alone as a declaration of the position under the contract.

What of those decisions which do require enforcement in some form? The decision is the product of the adjudication, which is a contractual dispute resolution process. The decision therefore has a separate existence from the contract itself and the subject matter of the dispute. In *Agromet Motobimport*[1] v. *Maulden Engineering* it was decided that:

[1] *Agromet Motobimport* v. *Maulden Engineering Co (Beds) Ltd* [1985] 2 All ER 436.

> 'an action to enforce an arbitrator's award was an independent cause of action, arising from the breach of an implied term in the arbitration agreement that the award would be honoured and not from the breach of contract which had been the subject of the arbitration'.

There is no reason that adjudicators' decisions should not enjoy a similar status. The decision ought to be the source of an independent cause of action. The decision, if no express term is provided in the contract, should carry the implied term that it ought to be honoured.

Agromet was followed in *International Bulk Shipping* v. *Minerals & Metals*[2]. The text from this case gives the policy in respect of honouring arbitrators' awards:

> 'The six-year limitation period for the enforcement of an arbitral award began whenever a claimant became entitled to enforce the award; in legal terms, when his cause of action arose. Conceptually, such a claim arose under a contractual undertaking to honour the award, which might render the party against whom the award was made under an immediate obligation to pay the amount of the award. Alternatively, if the claim was for damages for breach of the implied promise to pay, a reasonable period for payment should be allowed, three months at most, but that period could not be extended by reference to the attitudes of the parties and their representatives during the process of seeking to enforce payment, nor could the claimant's cause of action and right to enforce the award be deferred until the respondent had unequivocally refused to pay.
> . . . approved the following passage from the current edition of Mustill and Boyd *Commercial Arbitration* (2nd edn, 1989) p. 418: ''Time begins from the date on which the implied promise to perform the award is broken, not from the date of the arbitration agreement nor from the date of the award.''. . .
> It cannot seriously be argued that the causes of action arose before the awards were published. It is unnecessary for present purposes to decide whether an award has the same effect as a judgment, so that a cause of action arises when the award is published. I respectfully agree, however, that conceptually the claim arises under a contractual undertaking to honour the award. This may mean that the party against whom the award is made becomes under an immediate obligation to pay the amount of award, which strictly should be construed as a liquidated debt obligation. Alternatively, if the claim is for damages for breach of the implied promise to pay, then a reasonable period should be allowed for the necessary payment to be made. This period would be co-extensive with whatever is allowed by ''forthwith''. If regard is had to the time needed for the payment process, then this period might be, say, 28 days. It could hardly be longer than, say, three months.'

It cannot be argued that an adjudicator's decision has the same status as an arbitrator's award in terms of being directly enforceable by application to the courts. It does not have the same effect as if it were a judgment. It should however have a similar effect if the matter arises under a contract and creates either an implied or an express term that it should be honoured. This should be conceptually helpful in the enforcement of adjudicators' decisions. The simplest method of enforcement is for the parties to simply comply with what the decision says. What we are concerned with here is the situation when one party will not comply with the decision.

The Act itself provides no assistance in seeking means of enforcement. There are many who have argued this is a serious oversight in the primary legislation. Where the Scheme applies it provides its own steps for enforcement albeit that part of this paragraph is tortuous. Paragraph 23(1) states that the adjudicator may, if he thinks fit, order any of the parties to comply peremptorily with his decision or any part of it. Paragraph 23(2) repeats the first paragraph of section 108(3) of the Act regarding the binding nature of the decision.

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[2] *International Bulk Shipping & Services Ltd* v. *Minerals & Metals Trading Corp of India and Others* [1996] IRLN 45; [1996] 2 Lloyd's Rep 474.

As we discussed in Chapter 11, the formal enforcement provisions of the Scheme are reliant on an amended version of section 42 of the Arbitration Act 1996 as set out in paragraph 24 of the Scheme. In order for this to work the adjudicator has to state in his decision that the whole decision or part of it must be complied with peremptorily. The adjudicator also has to give permission for the application to the court to be made under the revised section 42(2)(b) of the 1996 Arbitration Act.

Since *Macob* v. *Morrison*[3] this does not appear to trouble the court and decisions are being enforced by another route:

> '37. Thus, section 42 apart, the usual remedy for failure to pay in accordance with an adjudicator's decision will be to issue proceedings claiming the sum due, followed by an application for summary judgment.
> 38. It is not at all clear why section 42 of the Arbitration Act 1996 was incorporated into the Scheme. It may be that Parliament intended that the court should be more willing to grant a mandatory injunction in cases where the adjudicator has made a peremptory order than where he has not. Where an adjudicator has made a peremptory order, this is a factor that should be taken into account by the court in deciding whether to grant an injunction. But it seems to me that it is for the court to decide whether to grant a mandatory injunction, and, for the reasons already given, the court should be slow to grant a mandatory injunction to enforce a decision requiring the payment of money by one contracting party to another.'

It was this case that set the whole pattern for enforcement of adjudicators' decisions in the English courts.

Arbitration

Where there is an arbitration clause in the contract it might be thought that section 9 of the Arbitration Act 'Stay of legal proceedings' (to arbitration) would preclude any reference to the court for the enforcement of a decision. This was one of the submissions resisting enforcement made to the court in *Macob* but it was unsuccessful:

> '29. But what the defendant could not do was to assert that the decision was a decision for the purposes of being the subject of a reference to arbitration, but was not a decision for the purposes of being binding and enforceable pending any revision by the arbitrator. In so holding, I am doing no more than applying the doctrine of approbation and reprobation, or election. A person cannot blow hot and cold: see *Lissenden* v. *CAV Bosch Ltd* [1940] AC 412, and *Halsbury's Laws* 4th Edition Volume 16, paragraphs 957 and 958. Once the defendant elected to treat the decision as one capable of being referred to arbitration, he was bound also to treat it as a decision which was binding and enforceable unless revised by the arbitrator.'

There is an important aside here for disputes concerning jurisdiction. The Royal Institution of Chartered Surveyors has a scheme for appointing arbitrators to deal with jurisdictional challenges. The concept of this scheme is that an arbitrator can be appointed quickly during the currency of an adjudication and a declaratory award can be made on the jurisdictional point while the adjudication is in process. This has been rarely used, as has the equivalent procedure of seeking a decision of the court as to the nominated adjudicator's jurisdiction in the early stages of an adjudication, parties seemingly preferring that the adjudicator reaches

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

his own non-binding conclusion as to his jurisdiction, and only raising the question of jurisdiction if they are not prepared to accept the decision on the substantive issues or are unable to use the decision as a basis for compromising the dispute.

The standard forms of contract

The Act only requires that the decision will be binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement. This provision must be incorporated in the contract otherwise the Scheme will apply. The Scheme only repeats the Act in respect of the binding nature of the decision. There is nothing to prevent the parties to the contract making further stipulations that may assist in the enforcement of the decision.

The various JCT contracts and their associated sub-contracts have amended their arbitration clauses to take account of enforcement of adjudicators' decisions. Significantly they exclude enforcement of adjudicators' decisions from the arbitration clause. They now also permit arbitration to commence at any time on any issue. There is no longer the limitation of waiting until the practical completion before the arbitration can be commenced.

The JCT clauses assist matters by making two provisions. The first covers the requirement of the Act in that it deals with the binding nature of the decision. The second provision requires that the parties actually comply with the decision. These can be simply viewed as provisions which relate to the nature or status of the decision and to the performance of the decision. It is a separate breach of contract to fail to comply with the decision under this contract. That separate breach would be actionable in its own right. This assists the enforcement process.

Effect of adjudicator's decision

41A. 7 .1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given.

41A .7 .2 The Parties shall, without prejudice to their other rights under the Contract, comply with the decisions of the Adjudicator; and the Employer and the Contractor shall ensure that the decisions of the Adjudicator are given effect.

41A .7 .3 If either Party does not comply with the decision of the Adjudicator the other Party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 41A.7.1.

The ICE civil engineering contracts and their associated sub-contracts also exclude the enforcement of adjudicators' decisions from the arbitration clause.

This contract complies with the Act in clause 66(7) in stating the binding nature of the decision in the terms of section 108(3). In clause 66(9) it excludes from arbitration disputes arising from failure to give effect to a decision of an adjudicator and then goes further and where the parties fail to serve a notice to refer to arbitration within three months of the adjudicator's decision, the decision becomes binding.

The ICE Adjudication Procedure provides in clause 6.7 that the parties are entitled to the relief and remedies set out in the adjudicator's decision and to seek summary enforcement of them, regardless of whether the dispute is to be referred to legal proceedings or arbitration.

This contract by reference incorporates its own adjudication procedure. The terms of the adjudication procedure also form part of the contract. This gives a source of further assistance in enforcement of the decision. The parties are entitled to the relief and remedies in the decision. This paragraph then entitles them to seek summary enforcement regardless of whether the dispute is to be referred elsewhere for final determination.

The NEC Engineering and Construction Contract and the associated sub-contract set a period for notification of a challenge of an adjudicators' decision of four weeks after the decision has been made. These contracts include review of adjudicators' decisions by a tribunal. This may be a tribunal in the conventional sense where arbitration is chosen in the contract data as the final means of resolving the dispute. In this case the means of enforcement will be through arbitration. The NEC does however allow the parties to choose the tribunal and thus adjudicators' decisions can be enforced either by arbitration or the courts.

The GC Works Contracts exclude enforcement of adjudicators' decisions from the arbitration clause.

> 59. (9) Notwithstanding Condition 60 (Arbitration and choice of law), the Employer and the Contractor shall comply forthwith with any decision of the adjudicator; and shall submit to summary judgment and enforcement in respect of all such decisions.

This contract also provides an additional obligation beyond the binding nature of the decision. It is similar to the ICE contract. The parties are under a separate contractual obligation to comply with the decision forthwith. It then imports summary judgment as being the method to enforce the decision.

Litigation

The courts have proved to be an effective and rapid system of enforcing adjudicators' decisions. Adjudication is a rapid process. Delay in achieving enforcement through the court system would have detracted from the speed desired by the process.

At an early meeting of ORSA (The Official Referees Solicitors Association) now TeCSA (Technology and Construction Solicitors Association) in discussion with the Official Referees, they undertook to deal expeditiously with matters concerning adjudicators' decisions. The documents should be clearly marked for the court 'In the Matter of an Adjudication or In the Matter of a Proposed Adjudication' so that the Registry is made aware at the time of issue, of the nature of the proceedings. The enforcement of adjudicators' decisions is not subject to the Pre-action Protocol for the Construction and Engineering Disputes.

An arbitrator's award can be enforced under the provisions of section 66 of the Arbitration Act 1996 but there is no direct enforcement of an adjudicator's decision in the same way as an arbitrator's award.

Adjudicators' decisions have no direct statutory status either under the Act or the Scheme, save for the provisions in paragraphs 23 and 24 for enforcement.

Before Macob *v.* Morrison

In *Cameron* v. *Mowlem*[4] it was held that:

[4] *A. Cameron* v. *John Mowlem & Co plc* (1990) 52 BLR 24.

'A decision of an adjudicator given under clause 24 of DOM/1 was binding only until the determination by an arbitrator on the disputed claim to a set-off, and so was not ''an award on an arbitration agreement'' within the meaning of section 26 of the Arbitration Act 1950, and could not be enforced summarily under that section . . .

The first procedure adopted was an application under section 27 of the Arbitration Act 1950 on 20 April 1989 for leave to enforce the decision of Mr Knowles in the same manner as a judgment of the court. The application came before Judge Esyr Lewis QC who dismissed it. Cameron's appeal against that decision is the first appeal before the court. Section 26 of the Act of 1950 allows enforcement only of an ''award on an arbitration agreement''. Is an adjudicator's decision under clause 24.3.1 an award on such an agreement? The learned judge held that it is not, and his basis was that ''the adjudicator . . . does not perform an arbitral function and does not make any final award definitive of the parties' rights''. . .

The decision has an ephemeral and subordinate character which in our view makes it impossible for the decision to be described as an award on an arbitration agreement. The structure of the subcontract is against that conclusion.'

Although the provisions on adjudication that are now required by statute differ from those limited proceedings under the set-off provisions of DOM/1, it is thought that the temporary nature of decisions in the legislation will not change the view expressed in *Cameron*. In that particular case one of the factors was that the sum decided as being due by the adjudicator was not in fact due.

In *Drake & Scull* v. *McLaughlin & Harvey*[5] Judge Bowsher considered the circumstances in which an injunction could be used to provide a means of enforcement of an adjudicator's decision. He held:

'The plaintiff was not disregarding the arbitration procedure, but was coming to court to enforce an order made by the adjudicator in the course of the arbitration procedure. *The Channel Tunnel Group Ltd* v. *Balfour Beatty Construction Ltd* [1992] 2 WLR 741; 56 BLR 23 considered.

There was no reason why a mandatory injunction should not be granted. A mandatory injunction which in effect anticipated the outcome of the action, would be granted only in the most extreme circumstances. However, the injunction sought was a conditional injunction which would be effective pending arbitration and which would, in any event. be subject to discharge or variation of the adjudicator's award by the arbitrator.'

This case needs to be read carefully, particularly the passage which deals with the principles of granting injunctions:

'The general principles governing the grant of interlocutory mandatory injunctions are summarised in *Halsbury's Laws of England* 4th Edn, Vol 24, page 445, para 848, as approved by Mustill LJ in *The Sea Hawk* [1986] 1 WLR 658:

''A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff – a mandatory injunction will be granted on an interlocutory application.'' '

The grant of an injunction does not provide a remedy for enforcement in every case. It is probable as in the *Drake & Scull* case that any injunction granted would consider whether both parties will be in existence at the time the matter in dispute is finally decided in litigation or arbitration.

[5] *Drake & Scull Engineering Ltd* v. *McLaughlin & Harvey plc* [1992] 60 BLR 102.

An application to the courts for an order for specific performance will not be a means of enforcing adjudicators' decisions. Specific performance is an equitable remedy and is therefore granted at the discretion of the courts and not as of right. The usual test is that specific performance will not be granted where damages will provide an adequate remedy. We cannot think of many instances where specific performance would be required to enforce an adjudicator's decision. There are other ways in which such matters may be dealt with and these are discussed below.

Since Macob *v.* Morrison[6]

In the short time that adjudication has been available, the approach of the courts to enforcement has developed rapidly and almost gone full circle. It was inevitable that the first case on enforcement would set the scene for the whole of the enforcement regime.

The first aspect of this case explored whether or not arbitration was appropriate for enforcement:

> '24. Miss Dumaresq submits that clause 27 of the contract does not apply to disputes as to the validity of an adjudicator's decision. Thus, she argues, a dispute as to whether a decision should be set aside on grounds that it was made ultra vires or in breach of natural justice is not amenable to arbitration. The jurisdiction of the arbitrator is limited to disputes as to the substantive content of the decision itself. The basis for this submission is not that an arbitrator can never have jurisdiction to decide questions as to the lawfulness of an adjudicator's decision. In my judgment, there can be no objection in principle to the parties to a construction contract giving an arbitrator the power to decide such questions. Rather, Miss Dumaresq submits that, upon the true construction of clause 27, the parties to this contract did not give the arbitrator that power.'

The court's view was simply that there was nothing that would prevent the parties having an arbitration clause drafted widely enough to permit enforcement by arbitration.

The second aspect dealt with in this judgment is whether there should be a stay to arbitration, which we have considered earlier in this chapter.

The next aspect the case dealt with was injunctive relief and summary judgment:

> '33. There was some limited discussion as to whether, section 42 apart, the appropriate procedure was by way of writ and an application for summary judgment, or by way of a claim for a mandatory injunction. Miss Dumaresq submits that an injunction is more appropriate. She suggests that summary judgment is not suitable in the context of a provisional decision, which may be revised by an arbitrator at a later stage. Mr Furst submits that the summary judgment route is the correct route to follow.
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> 34. I do not consider that the mere fact that the decision may later be revised is a good reason for saying that summary judgment is inappropriate. The grant of summary judgment does not pre-empt any later decision that an arbitrator may make. It merely reflects the fact that there is no defence to a claim to enforce the decision of the adjudicator *at the time of judgment*.
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> 35. I am in no doubt that the court has jurisdiction to grant a mandatory injunction to enforce an adjudicator's decision, but it would rarely be appropriate to grant injunctive relief to enforce an obligation on one contracting party to pay the other. Clearly, different considerations apply where the adjudicator decides that a party should perform some other obligation, e.g. return to site, provide access or inspection facilities, open up work, carry out specified work, etc. Nor do I intend to cast any

[6] *Macob Civil Engineering Ltd* v. *Morrison Construction Ltd* [1991] BLR 93.

doubt on decisions where mandatory judgments have been ordered requiring payment of money to a third party, e.g. to a trustee stakeholder as in *Drake & Scull Engineering Ltd* v. *McLaughlin & Harvey Plc* (1992) 60 BLR 102.
36. The words of section 37 of the Supreme Court Act 1981 are widely expressed viz: ''the High Court may by order (whether interlocutory or final) grant an injunction. . . in all cases in which it appears just and convenient to do so''. But a mandatory injunction to enforce a payment obligation carries with it the potential for contempt proceedings. It is difficult to see why the sanction for failure to pay in accordance with an adjudicator's decision should be more draconian than for failure to honour a money judgment entered by the court.
37. Thus, section 42 apart, the usual remedy for failure to pay in accordance with an adjudicator's decision will be to issue proceedings claiming the sum due, followed by an application for summary judgment.'

The pattern was set by this case that the correct means of enforcement of adjudicators' decisions was by an application for summary judgment. This is now covered by Part 24 of the Civil Procedure Rules which enables the court to decide a claim or a particular issue without a trial.

Time

The courts have recognised the need to deal with enforcement speedily. This was first explored in *Outwing* v. *Randell*[7]:

'9. Thirdly, I consider that the issue of a summons to abridge time was justified. There are three aspects. First, it may be rare for time to be abridged but in this court (as in commercial, mercantile and other courts) it is done from time to time. Order 3, rule 5(1) is wide and without material limitation. The editors of the *Supreme Court Practice* suggest that the guiding criterion is the avoidance of injustice, i.e. the lack of prejudice to the other party. This criterion naturally re-appears in the Civil Procedure Rules under the head of the overriding objective (see Rule 1.1). It is significant that in Rule 3.1 the list of court's typical powers of management starts with ''(a) extend or *shorten* time for compliance with any rule. . . ; (b) adjourn or *bring forward* a hearing;''. I see no reason why even the standard time limits for acknowledging service and for opposing an Order 14 application cannot be abridged.
10. Next, ought they to be abridged in a case such as this? In principle in my judgment the answer is: yes. Action to enforce an adjudicator's decision is not comparable to the ordinary process of recovering an apparently undisputed debt. The Rules of the Supreme Court provide a reasonable time for the defendant in an ordinary case to take stock of its position in case there is a defence to the claim. The HGCRA (and the statutory instruments made under it) constitute a remarkable (and possibly unique) intervention in very carefully selected parts of the construction industry whereby the ordinary freedom of contract between commercial parties (without regard to bargaining power) to regulate their relationships has been overridden in a number of areas, one of which is dispute resolution. The overall intention of Parliament is clear: disputes are to go to adjudication and the decision of the adjudicator has to be complied with, pending final determination. There is no provision for a ''stay of execution'' (unless it is part of the decision itself), presumably since that would undermine the purpose which is finality, at least temporarily. In addition the provisions in the Scheme for the enforcement of peremptory orders via what is thought to be a quick and effective procedure reinforce the conclusion that Parliament intended that adjudicators' decisions and orders, if not complied with, were to be enforced without delay. It is clear that the purpose of the Act is that disputes are resolved quickly and effectively and then put to one side and revived, if at all, in

[7] *Outwing Construction Limited* v. *H. Randell & Son Limited* [1999] BLR 156.

> litigation or arbitration, the hope being that the decision of the adjudicator might be accepted or form the basis of a compromise or might usefully inform the parties as to the possible reaction of the ultimate tribunal. Thus before a writ is issued to enforce the order of an adjudicator (whether or not declared to be a peremptory order) there will normally have been careful consideration of the underlying dispute, its ramifications and of the adjudicator's decision by all parties. The defendant's room for manoeuvre and its need for further time will be limited.
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> 11. I do not consider that Mr Chambers is right in his submission that if Parliament really intended that adjudicator's orders should be given preferential treatment it ought also to have changed the Rules of the Supreme Court. Parliament does not work through every aspect of its intention expressed in legislation, much of which has to be interpreted purposively, as it is now commonly said. It may only set the direction. It is then for the courts to follow it through and, in so far as it affects the procedure of the courts, to do so in a manner which is fair and respects the interests of the parties. Parliament's intention is in my judgment sufficiently expressed in the Act.'

The general rule now is that when starting an application for summary judgment the matter should be marked 'concerning the enforcement of an Adjudicator's Decision' or similar. At the same time as issuing the Part 7 claim form, the claimant may issue an application without notice to abridge time for the defendant to acknowledge service of the claim form. That application can be heard on the same day as issuing the claim form. The Technology and Construction Court will treat these matters as requiring an early hearing.

CPR Part 8 Alternative procedure for claims

Part 8 is normally used where there is no substantial dispute of fact, such as where the case raises only the question of the construction of a document or statute, suitable to be disposed of on written evidence. (This was what used to be known as a 'construction summons'.)

It is possible to run CPR Part 24 proceedings seeking summary judgment, and CPR Part 8 proceedings seeking a declaration in tandem. The court may deal with both at once. This was the approach adopted in the first instance in *Bouygues* v. *Dahl-Jensen*[8]. Part 24 was being used to enforce the decision and Part 8 was seeking declarations to void the decision.

In *Shepherd* v. *Mecright*[9] the court decided by way of a Part 8 application that a decision was void due to a full and final settlement agreement.

In *ABB* v. *Norwest Holst*[10] the court made a declaration on whether or not there was a construction contract. Similarly in *Staveley* v. *Odebrecht*[11] the court had to make a declaration concerning the expression attached to the land.

Interestingly in *Comsite* v. *Andritz*[12] the court was initially asked to declare that the work under a sub-contract contained construction operations and was a construction contract. However the court had to examine its own jurisdiction to see if it could deal with the Part 8 proceedings where the dispute resolution clause was subject to Austrian law.

About 20 of the enforcement actions in the courts have been Part 8 proceedings. These proceedings were all in the first instance seeking a declaration. The seeking of a declaration can be used positively to make an adjudication valid, or negatively to seek that an adjudication was void.

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[8] *Bouygues UK Limited* v. *Dahl-Jensen UK Limited* (17 November 1999) and *Dahl-Jensen UK Limited* v. *Bouygues UK Limited*

[9] *Shepherd Construction Limited* v. *Mecright Limited* [2000] BLR 489.

[10] *ABB Power Construction Ltd* v. *Norwest Holst Engineering Ltd* (1 August 2000).

[11] *Staveley Industries Plc (t/a EI. WHS)* v. *Odebrecht Oil & Gas Services Ltd* (28 February 2001).

[12] *Comsite Projects Limited* v. *Andritz AG* [2003] EWHC 958.

The use of insolvency proceedings for enforcement purposes

Where the decision involves payment of money or makes a declaration that monies are due, enforcement ought to become a much simpler proposition. There is no reason why the money should not be pursued through insolvency proceedings. A statutory demand for payment can be made under sections 123 or 268 of the Insolvency Act 1986. The party on whom the demand is made has 21 days within which to pay the amount demanded. If payment is not made within this time a petition for bankruptcy or winding up of the defendant may be made to the court. If there is a defence or the claim is contested in some way, the court will not make a bankruptcy or winding-up order. The defence however must be a real defence and not merely a ruse to avoid the proceedings and payment. This procedure will certainly apply pressure to the party who is reluctant to pay. Insolvency procedures are only useful for enforcement of liquidated monetary decisions.

This is not at all straightforward. Although the decision was not enforced because there were cross claims, the interesting point in *Parke* v. *Fenton Gretton*[13] was that adjudication created a debt which could be pursued by statutory demand.

In *Mohammed* v. *Bowles*[14] some detailed questions were considered:

> '1. Is the adjudicator's decision a debt sufficient to form the basis of a statutory demand?
> The simple answer is ''yes''.
> 2. If yes, what is the nature of the debt?
> The nature of the debt is that it is a binding contractual obligation on the applicant to pay the sum quantified by the adjudicator's decision unless and until that decision is varied by further process either by way of arbitration or legal proceedings.
> 3. Does the applicant dispute the debt on substantial grounds?
> In my judgment ''no''. He has already put his arguments on jurisdiction to the adjudicator who has rejected them. If he is unhappy with that decision his remedy is to go to court but in the absence of any such application it is not for this court to consider those arguments, although in my view they do not show an arguable case. On the substantive issues raised by the applicant whereby he seeks to argue procedural unfairness and a technical contractual point again on the evidence before me I do not consider that they are sufficient to argue that the debt is disputed on substantial grounds.
> 4. Are there any other grounds on which the statutory demand should be set aside?
> The applicant's counsel submitted that without taking a further step and obtaining summary judgment the respondent cannot seek to enforce the decision of the adjudicator. For the reasons set out above I reject that argument.
> 35. 1 therefore dismiss this application to set aside the statutory demand, the respondent may petition forthwith and the applicant is to pay the respondent's costs.'

It follows that enforcement using a statutory demand remains a possibility.

Insolvency proceedings have had both positive and negative effects on enforcement of adjudicators' decisions.

Insolvent companies

Leave of the court is required to pursue a company in administration in adjudication proceedings. In *Straume* v. *Bradlor*[15] the court decided that adjudication was 'other proceedings' for the purposes of the Insolvency Act 1996:

[13] *Parke* v. *The Fenton Gretton Partnership* (24 July 2000).
[14] *Jamil Mohammed* v. *Dr Michael Bowles* (11 March 2003).
[15] *A. Straume (UK) Limited* v. *Bradlor Developments Limited* (7 April 1999).

> 'The first question, as I have indicated, is whether leave is necessary under Section 11(3) of the Act (Insolvency Act 1996). As is well known, Section 11(3)(d) provides:
> ''During the period for which an Administration Order is in force no other proceedings and no execution or other legal process may be commenced or continued and no distress may be levied against the company or its property except with the consent of the administrator or the leave of the court and subject, where the court gives leave, to such terms as aforesaid.''
> . . . 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.'

There is nothing that prevents companies in receivership pursuing debts or participating in an adjudication.

In *Faithful & Gould* v. *Arcal*[16] the adjudicator issued fee accounts in the name of his firm. Arcal by its administrative receivers, the two others named as defendants in the action for recovery of the fees, had been the unsuccessful referring party in the adjudication and the adjudicator's firm sought to recover fees from Arcal who were in administrative receivership. The adjudicator's firm was allowed to pursue the debt and the receivers were held liable for the fees and expenses.

In *Costain* v. *Wescol*[17] the receivers for a sub-contractor successfully used adjudication in pursuit of the company's debts and resisted a Part 8 application to void the adjudicator's decision.

Risk of bankruptcy

If an adjudicator's decision is enforced and then the recipient of the money goes into liquidation, receivership or bankruptcy, where does this leave the payer in the adjudication who has a legitimate claim in further proceedings to get the money back or to pursue a cross claim? This was examined in *Bouygues* v. *Dahl-Jensen* (see above) both at first instance and in the Court of Appeal.

At first instance there was only the mention of a possibility of insolvency being the cause of injustice, and the adjudicator's decision was enforced. The Court of Appeal explored insolvency set-off which in any event does have an effect on mutual debts. They left the first instance enforcement in place but granted a stay of execution.

In *Rainford House* v. *Cadogan*[18] a stay of execution was granted on the basis of strong prima facie evidence that Rainford House was currently insolvent. There was a similar result in *Isovel* v. *ABB*.[19]

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[16] *Faithful & Gould Limited* v. *Arcal Limited (in administrative receivership)* and Others (25 May 2001).
[17] *Costain Ltd* v. *Wescol Steel Ltd* (24 January 2003).
[18] *Rainford House Limited* v. *Cadogan Limited* (13 February 2001).
[19] *Isovel Contracts Limited (in administration)* v. *ABB Building Technologies Limited (formerly ABB Steward Limited)* (30 November 2001).

In *Total* v. *ABB*.[20], despite the arguments that Total had been tardy in filing accounts, the adjudicator's decision was enforced save for the set-off on which there had been no adjudication as there was no valid withholding notice.

In *Lovell* v. *Legg and Carver*[21] the court rejected argument on potential insolvency of the contractor as the reason for not enforcing an adjudicator's decision on the grounds that evidence of insolvency was insubstantial.

In *Trentham* v. *Lawfield*[22] the Scottish courts refused an application to remove an inhibition on the grounds that there was significant risk of insolvency.

Set-off

Where the adjudicator's decision involves payment of a sum of money, some assistance may be obtained in the Act to ensure that payment is made. The first point of assistance is section 111(4). This follows any effective notice of intention to withhold payment where an adjudicator's decision is then made on whether or not the payment can be withheld. If the adjudicator decides the payment cannot be withheld, the payment then falls due within seven days from the date of the decision or on the date when final payment would have been made apart from the notice, whichever is the later. These provisions are as follows:

> **111** (4) Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than–
>
> (a) seven days from the date of the decision, or
>
> (b) the date which apart from the notice would have been the final date for payment, whichever is the later.

It would be unfortunate if the final date for payment exceeded the period to be taken up by the adjudication. However, even if this is the case the period to the final date for payment will expire at some point. The money is then due. Proceedings can then be commenced to collect the money. The second point of assistance as an alternative to commencing proceedings is to invoke the suspension provisions in section 112 of the Act. There is no doubt in this instance that failure to pay the money to which there is an entitlement under the adjudicator's decision is a ground on which the works can be suspended. In fact any decision which entitles a party to money and the final date of payment is passed, would entitle a party to invoke the suspension provisions in section 112 of the Act. The threat of suspending the works may well be a more effective option than commencing arbitration or litigation to enforce the decision.

The real question is, is set-off available to resist enforcement of an adjudicator's decision? This really is a vexed question because a wide availability of set-off would create a situation where it would be simple to defeat the object of the whole legislation and nothing would ever be enforced.

There was a trend that had started to develop where set-off at enforcement had become a real possibility. We ignore insolvency set-off here as that is a special category of set-off in any event. We also ignore matters that have been dealt with during the course of the adjudication under a withholding notice. The core question is, has the Act modified in any way the common law right of set-off?

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[20] *Total M & E Services Limited* v. *ABB Building Technologies Limited (formally ABB Steward Limited)* (26 February 2002).
[21] *Lovell Projects Ltd* v. *Legg and Carver* (July 2003).
[22] *Barry D. Trentham Limited* v. *Lawfield Investments Limited* (3 May 2002).

In *VHE* v. *RBSTB Trust*[23] the question of the assertion of a common law set-off was raised to resist summary judgment.

> '36. The first subject of dispute as to the effect of section 111 is whether section 111(1) excludes the right to deduct money in exercise of a claim to set-off in the absence of an effective notice of intention to withhold payment. Mr Thomas, for RBSTB, submits that it does not. I am quite clear, not only that it does, but that that is one of its principal purposes. I was not taken to the reports or other preparatory material leading to the introduction of this part of the Act, nor to anything said in Parliament, but the see-saw of judicial decision, drafting fashion and editorial commentary in this area is familiar to anyone acquainted with construction law, and in my judgment section 111 is directed to providing a definitive resolution of the debate. The words ''may not withhold payment'' are in my view ample in width to have the effect of excluding set-offs and there is no reason why they should not mean what they say.
> 37. The other subject of possible dispute is the ambit of section 111(4). Clearly it requires there to have been an effective notice to withhold payment. Mr Furst, for VHE, submits that a further requirement is that the notice must precede the referral and that the ''matter'' referred to adjudication must include the effect of that notice and the validity of the grounds for withholding payment which it asserts. It may be that that was not challenged by Mr Thomas, but in case of any doubt on that score I record that in my judgment it is correct. The effect of the subsection is that, after there has been an effective notice of intention to withhold and an adjudication, payment cannot be enforced earlier than seven days from the date of the decision. There is no reason why that should be so unless the adjudication relates to the notice. Moreover that is the natural point of reference of the expression ''the matter'', with its definite article, as a matter of construction.'

It is clear from this that at least at that time, the courts were comfortable with the idea that the Act did modify the common law right of set-off. The other important point in this case is that any withholding notice should precede the referral.

In *KNS* v. *Sindall*[24] the provisions of the contract were held to have effect at enforcement. The contract had been lawfully terminated by the time the adjudication required payment. The contract provided that no further payment need be made after termination.

> 'There is nothing in the Act to suggest that, for example, section 111(4) means that a decision that a payment should be made, notwithstanding an effective notice of intention to withhold payment, overrides the parties' other contractual rights. An adjudicator is appointed to decide whether in the circumstances of the dispute a particular right exists and should be enforced. Unless the parties specifically agree, an adjudicator is not appointed to adapt the terms of the contract or to vary, add or take away from the terms of the contract. An adjudicator's powers are limited to those conferred by the contract and thus no more than those of a contract administrator, such as an architect, engineer or surveyor, when entrusted with the resolution of disputes. Their role is to apply the terms of the contract. An adjudicator does the same, but decisions of an adjudicator are now more immediately enforceable pending the result of litigation or arbitration. Any other interpretation would also mean that a party who, albeit apparently wrongly, questioned the existence or ambit of its obligations under the contract so that an adjudicator's decision was against it, would be worse off as a result for if had it not done so it would undoubtedly have retained its other rights under the contract. Accordingly if it had been necessary to do so, KNS's application would have been dismissed on this ground and directions given for the further conduct of the proceedings.'

In *Farebrother* v. *Frogmore*[25] the courts refused to consider a set-off at enforcement:

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[23] *VHE Construction PLC* v. *RBSTB Trust Co Limited (as trustee of the Mercury Property Fund)* (13 January 2000).
[24] *KNS Industrial Services (Birmingham) Limited* v. *Sindall Limited* (14 July 2000).
[25] *Farebrother Building Services Limited* v. *Frogmore Investments Limited* (20 April 2001).

> 'I take the view that it is not right for the court to try and dismantle or reconstruct a decision. It seems to me that a party cannot pick and choose amongst the decisions given by an adjudicator, assert or characterise part as unjustified and then allege that the part objected to has been made without jurisdiction. That is not permissible under the TeCSA Rules. Either the adjudicator has jurisdiction or he does not. If he had jurisdiction, it seems to me that his decision is binding even if he was wrong to reach the conclusion he did. I take the view this award ought to be enforced in the sum found by the adjudicator and that it is not right to seek to set off the £300,000-odd which the defendant seeks to deduct from the award. I propose to make a summary order.'

In *Millers* v. *Nobles*[26], which was an application for summary judgment where there had been no adjudication, the court would not entertain any set-off without there having been a valid withholding notice in place.

In *McAlpine* v. *Pring & St Hill*[27] the court refused to allow set-off at enforcement. The matter to be set-off at enforcement was the subject of a further adjudication. The court did however refuse a stay of execution until the following adjudication had been completed.

Parsons v. *Purac*[28] was heard both at first instance and in the Court of Appeal. In both cases the set-off at enforcement was upheld.

In *McLean* v. *Swansea*[29] the court refused summary judgment on the basis that a counterclaim for liquidated damages had a reasonable prospect of success in proceedings that had already commenced.

In *Bovis* v. *Triangle*[30] the court held the following:

> '1. The decision of an adjudicator that money must be paid gives rise to a separate contractual obligation on the paying party to comply with that decision within the stipulated period. This obligation will usually preclude the paying party from making withholdings, deductions, set-offs or cross-claims against that sum.
> 2. For a withholding to be made against an adjudicator's decision, an effective notice to withhold payment must usually have been given prior to the adjudication notice being given, or possibly the decision being given, and which was ruled upon and made part of the subject matter of that decision.
> 3. However, where other contractual terms clearly have the effect of superseding, or provide for an entitlement to avoid or deduct from, a payment directed to be paid by an adjudicator's decision, those terms will prevail.
> 4. Equally, where a paying party is given an entitlement to deduct from or cross-claim against the sum directed to be paid as a result of the same, or another, adjudication decision, the first decision will not be enforced or, alternatively, judgment will be stayed.'

The most important case on this subject is *Levolux* v. *Ferson*[31]. It was held at first instance:

> '41. A party has no right to set-off claims not dealt with by the adjudicator as a defence to the enforcement of the adjudicator's decision. See *VHE Construction plc* v. *RBSTB Trust Company Limited* [2000] BLR p. 187, judgment of HHJ Hicks QC at pages 199 and 196; *Northern Developments (Cumbria) Limited* v. *J&J Nicol* [2000] BLR, judgment of HHJ Bowsher QC pages 158 and 164; *Solland International Limited* v. *Darayden Holdings Limited* TCC judgment of HHJ Seymour QC, 15 February 02.'

The Court of Appeal went further in voiding any clause that would defeat the intentions of Parliament:

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[26] *Millers Specialist Company Limited* v. *Nobles Construction Limited* (3 August 2001).
[27] *Sir Robert McAlpine* v. *Pring & St Hill Limited* (2 October 2001).
[28] *Parsons Plastics (Research & Development) Limited* v. *Purac Limited* (13 August 2001); [2002] BLR 334, CA.
[29] *David McLean Housing Contractors Limited* v. *Swansea Housing Association Limited* (27 July 2001).
[30] *Bovis Lend Lease Limited* v. *Triangle Development Limited* (2 November 2002).
[31] *Levolux A.T. Limited* v. *Ferson Contractors Limited* [2002] BLR 341; [2003] BLR 118, CA.

> '30. But to my mind the answer to this appeal is the straightforward one provided by Judge Wilcox. The intended purpose of section 108 is plain. It is explained in those cases to which I have referred in an earlier part of this judgment... The contract must be construed so as to give effect to the intention of Parliament rather than to defeat it. If that cannot be achieved by way of construction, then the offending clause must be struck down. I would suggest that it can be done without the need to strike out any particular clause and that is by the means adopted by Judge Wilcox. Clause 29.8 and 29.9 must be read as not applying to monies due by reason of an adjudicator's decision.'

The GC/Works sub-contract applied to this contract, the sub-contract had been determined and clauses 29.8 and 29.9 are those clauses that allow the main contractor to avoid making any payment in these circumstances.

This principle was applied in *Dumarc* v. *Mr Salvador Rico*[32].

The premise now is that set-off against an adjudicator's decision will not apply except in limited circumstances. These limited circumstances are when the contract is not a construction contract. This applies in the *Parsons* and *Bovis* cases above.

Appeals

There is in fact no entitlement or means by which an adjudicator's decision can be appealed. The decision itself is pro tem, of a temporarily binding nature. The Act requires that the decision is only binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement. These provisions do not provide a mechanism for appeal from an adjudicator's decision which is in some way unsatisfactory or flawed, but a replacement process to hear the dispute de novo, from new. The dispute is heard again on its merits and decided from new on the facts and evidence presented in the new forum.

This may be by litigation as provided in the Act or by arbitration if the contract so provides, or the parties may agree on arbitration on an ad hoc basis to resubmit the dispute that was the subject of an adjudication. It may be that the parties will choose to consolidate several disputes into one set of proceedings. The words 'is binding until the dispute is finally determined' make it clear that the nature of adjudication is a temporary decision which will be replaced with a new determination from another process. The parties may agree finally that they are satisfied to be bound by the adjudicator's decision or that they will substitute a new arrangement for that decision. Where they take these steps such agreement should be recorded in writing in order to show that the dispute has indeed been compromised and to preclude any future attempt to reopen it.

Unless they do something by way of arbitration, litigation or agreement, the decision, because of lack of any action by the parties, will remain binding. The proceedings to finally determine the dispute can be commenced at any time but there can be no appeal from the adjudicator's decision. Enforcement can be resisted on grounds such as want of jurisdiction or procedural unfairness but the only 'appeal' from the decision is to commence new proceedings in litigation or possibly arbitration which involve a completely new examination of the parties' contentions, and in all normal circumstances the adjudicator's decision is irrelevant to these.

[32] *Dumarc Building Services Limited* v. *Mr Salvador-Rico* (31 January 2003).

Grounds for resisting enforcement

The analogous area of law in respect of challenge of decisions is in the field of expert determination. The experience in expert determination is that decisions of experts are extremely difficult to challenge. Expert determination provides decisions which are invariably permanent rather than temporarily binding. Expert determination is also a creature of contract. The courts have been reluctant to interfere with decisions which arise from this process.

The guidelines for enforcement and resisting enforcement in adjudication were established early by the courts and are summarised in *Sherwood & Casson* v. *Mackenzie*[33]:

> '24. These provisions, and the well-known background to the enactment of the HGCRA, have led Dyson J to formulate clear guidance to the approach to the enforcement of adjudicators' decisions which, although persuasive and not binding on me is guidance that I gratefully adopt. The three decisions are: *Macob Civil Engineering Ltd* v. *Morrison Construction Ltd* (1999) Building Law Reports 93; *The Project Consultancy Group* v. *The Trustees of The Gray Trust* (unreported) 16 July 1999; and *Bouygues UK Ltd* v. *Dahl-Jensen UK Ltd* (unreported) 17 November 1999. I can summarise this guidance as follows:
>
> 1. A decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced (*Macob*).
> 2. A decision that is erroneous, even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced (*Bouygues*).
> 3. A decision may be challenged on the ground that the adjudicator was not empowered by the HGCRA to make the decision, because there was no underlying construction contract between the parties (*Project Consultancy*) or because he had gone outside his terms of reference (*Bouygues*).
> 4. The adjudication is intended to be a speedy process in which mistakes will inevitably occur. Thus, the court should guard against characterising a mistaken answer to an issue, which is within an adjudicator's jurisdiction, as being an excess of jurisdiction. Furthermore, the court should give a fair, natural and sensible interpretation to the decision in the light of the disputes that are the subject of the reference (*Bouygues*).
> 5. An issue as to whether a construction contract ever came into existence, which is one challenging the jurisdiction of the adjudicator, so long as it is reasonably and clearly raised, must be determined by the court on the balance of probabilities with, if necessary oral and documentary evidence (*Project Consultancy*).'

This list is not exhaustive as other cases have developed the policy on enforcement and possible grounds for resistance of enforcement, but it does give the basic principles.

Jurisdiction

Jurisdiction is a wide subject in itself and is dealt with in Chapter 9.

A challenge on jurisdiction grounds can survive the reference and prevent an adjudicator's decision being enforced. If the adjudicator proceeds despite objections to jurisdiction and reaches what purports to be a decision, if he had no jurisdiction at all the decision can be successfully challenged.

In *AMOCO* v. *Amerada Hess*[34] the question of jurisdiction of an expert was explored. It was held:

[33] *Sherwood & Casson Limited* v. *Mackenzie* (30 November 1999).
[34] *AMOCO (UK) Exploration Co and Others* v. *Ameralda Hess Ltd and Others* CHD 25 [1994] 1 Lloyd's Rep 330.

'1. In my judgement, the dispute does fall within the terms of clause 1.8.8. By clause 1.8.1, there is referred to the expert for his decision, all elements comprising a key step which are unagreed. What he should look at and the data he should take into account, was not referred to him as an unagreed element, the difference only emerged subsequently. I see no reason why it should not have been if the difference had emerged at an earlier stage. The determination of what is and what is not data and what is and is not appropriate to be included in the agreed database, as provided for by clause 1.9, seems to me to be an unagreed element suitable for his determination at the proper key step or key steps. So the question of what is and what is not ''data'' and whether or not it is ''within a TSC's (Technical Sub-Committee) own agreed database'' is not a suitable matter for his determination, notwithstanding that it may involve legal elements as well as scientific.
2. Accordingly, in my judgement, it is within the remit of the expert to decide what he is entitled to pay regard to, notwithstanding that legal questions may be involved, as an independent unagreed element. But if that is wrong, in my judgement it is clear that that question, namely what material he may take into consideration in deciding the unagreed element of faults in wells, is, ''in respect of that matter'', in dispute. The question arises directly from the dispute concerning the unagreed matter. As has been said in other contexts, the phrase ''in respect of'' has the ''widest possible meaning of any expression intended to convey some connection or relation between two subject matters to which the order refers''.'

This deals with the remit to an expert and his terms of reference. This is analogous to adjudication. It is important that adjudicators work within the boundaries of both their jurisdiction and powers. There needs to be particular care taken when deciding which documents are to be considered to assist in making the decision.

Probably the most important case that goes to jurisdiction is *Nikko* v. *MEPC*.[35] This case is dealt with under 'Errors and mistakes' below but the passage quoted also goes to jurisdiction.

Errors and mistakes

What if the adjudicator makes a mistake in a finding of fact or some error of fact in making his decision? What if the adjudicator gets the law wrong? Save for those matters which are obvious on the face of a decision without reasons, such error or mistake would be difficult to find. The following cases illustrate the court's reluctance to overturn decisions made in the field of expert determination.

In *Jones* v. *Sherwood*[36] the following extract gives guidance on mistakes:

'They say that the mistakes, if they were mistakes, would have been mistakes of law, or of mixed law and fact, as to the true construction and effect of the provisions of appendix 1 and particularly of paragraph 2.
It is therefore necessary to see how the law stands on the question of challenging an expert's certificate on the grounds of mistake. We are not of course here concerned with any question of fraud or collusion on the part of the expert.
The cases have been fully analysed by Sir David Cairns in *Baber* v. *Kenwood Manufacturing Co Ltd* [1978] 1 Lloyd's Rep. 175, 181–183, and by Nourse J in *Burgess* v. *Purchase & Sons (Farms) Ltd* [1983] Ch. 216. The starting point for the modern statement of the law is, in my judgment, the decision in *Campbell* v. *Edwards* [1976] 1 WLR 403 and in particular the passage in the judgment of Lord Denning MR, at p. 407:

[35] *Nikko Hotels (UK)* v. *MEPC PLC* [1991] 28 EG 86.
[36] *Jones* v. *Sherwood Services Plc* [1992] 1 WIR 284, CA.

> ''It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything.''
>
> That statement was, as a matter of principle and disregarding the earlier authorities, endorsed by Megaw LJ in *Baber's* case [1978] 1 Lloyd's Rep. 175, 179, and concurred in by the other members of this court in *Baber's* case. It is in line with the passage, cited by Sir David Cairns in *Baber's* case, at p. 181, from the judgment of Sir John Strange MR in *Belchier* v. *Reynolds* (1754) 3 Keny. 87, 91:
>
> ''Whatever be the real value is not now to be considered, for the parties made Harris their judge on that point; they thought proper to confide in his judgment and skill and must abide by it, unless they could have made it plainly appear that he had been guilty of some gross fraud or partiality.''
>
> On principle, the first step must be to see what the parties have agreed to remit to the expert, this being, as Lord Denning MR said in *Campbell* v. *Edwards* [1976] 1 WLR 403, 407G, a matter of contract. The next step must be to see what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect – e.g. if he valued the wrong number of shares, or valued shares in the wrong company, or if, as in *Jones (M.)* v. *Jones (R.R.)* [1971] 1 WLR 840, the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that – either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do.'

The principal enunciated in *Jones* v. *Sherwood* is that the courts will give effect to the contractual arrangements made by the parties. Where an adjudicator makes a decision it should not be set aside lightly. A mistake of itself is not enough to set the decision aside. It is only the nature of the mistake which may provide grounds for setting the decision aside. The only grounds here are if the adjudicator departs from his instructions in a material respect. If the notice of adjudication instructs him to answer one question and he answers a completely different question, this would be grounds for challenge of the decision. Departures from the instructions which are not material, minor procedural technicalities, will not provide grounds in mistake to set the decision aside.

Nikko v. *MEPC* also involved the question of a mistake in law:

> 'The position is that if the parties agree to refer to the final and conclusive judgment of an expert an issue which either consists of a question of construction or necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive, and therefore not open to review or treatment by the courts as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be found that the expert has not performed the task assigned to him. If he has answered the right question in the wrong way, his decision will nevertheless be binding. If he has answered the wrong question, his decision will be a nullity.'

Even where the adjudicator is wrong in law the parties will be bound by the decision unless the adjudicator has not performed the task assigned to him. This could have serious consequences when at the time that the dispute is finally determined one of the parties is no longer in business. It is argued that one of the disadvantages of monetary decisions by adjudicators is that they cannot be reversed at a later stage if the party who has to repay the sum is insolvent. If indeed there is no right of challenge where the adjudicator is wrong in law, this unfortunate situation will prevail.

The principle identified in this case was considered and/or applied in a number of other cases[37].

[37] *Bouygues UK Ltd* v. *Dahl-Jensen (UK) Ltd* [2000] BLR 49; [2000] BLR 522 CA; *Karl Construction (Scotland) Ltd* v. *Sweeney Civil Engineering (Scotland) Ltd* [2001] SCLR 95; *Barr Limited* v. *Law Mining* (15 June 2001); *C & B Scene Concept Design Ltd* v. *Isobars Ltd* [2002] BLR 93, CA; *Ferson Contractors Limited* v. *Levolux AT Ltd* [2003] BLR 118, CA.

In *Mercury* v. *Telecommunications Directors*[38] doubt was cast on the binding nature of experts' decisions and the lack of right to challenge as follows:

> 'Reference was made to *Jones* v. *Sherwood Computer Services Plc* [1992] 1 WLR 277 where the Court of Appeal held that in a case where parties had agreed to be bound by the report of an expert the report could not be challenged in the courts unless it could be shown that the expert had departed from the instructions given to him in a material respect. In that case the experts had done exactly what they were asked to do.
>
> What has to be done in the present case under condition 13, as incorporated in clause 29 of the agreement, depends upon the proper interpretation of the words ''fully allocated costs'' which the defendants agree raises a question of construction and therefore of law, and ''relevant overheads'' which may raise analogous questions. If the Director misinterprets these phrases and makes a determination on the basis of an incorrect interpretation, he does not do what he was asked to do. If he interprets the words correctly then the application of those words to the facts may in the absence of fraud be beyond challenge. In my view when the parties agreed in clause 29.5 that the Director's determination should be limited to such matters as the Director would have power to determine under condition 13 of the BT licence and that the principles to be applied by him should be ''those set out in those conditions'' they intended him to deal with such matters and such principles as correctly interpreted. They did not intend him simply to apply such meaning as he himself thought they should bear. His interpretation could therefore be reviewed by the court. There is no provision expressly or impliedly that these matters were remitted exclusively to the Director, even though in order to carry out his task he must be obliged to interpret them in the first place for himself. Nor is there any provision excluding altogether the intervention of the court. On the contrary clause 29.5 contemplates that the determination shall be implemented ''not being the subject of any appeal or proceedings.'' In my opinion, subject to the other points raised, the issues of construction are ones which are not removed from the court's jurisdiction by the agreement of the parties.'

The point here is if the adjudicator is wrong in law he has not actually carried out the task he was asked to do. This principle was applied in *C & B Scene* v. *Isobars* by the judge at first instance[39]. He characterised an error in law as answering the wrong question and therefore there was no jurisdiction. This was overturned by the Court of Appeal[40] which favoured the analysis in *Nikko* v. *MEPC*.

Decisions can always be challenged on the basis that there was no jurisdiction. It is unlikely, particularly with the dependence on *Nikko* v. *MEPC*, that the courts will be persuaded that a simple error or mistake of law or fact can be characterised as want of jurisdiction.

It is possible that the court may be persuaded that it should not enforce decisions where the adjudicator makes a determination on the basis of an incorrect interpretation of matters which are entirely outside his jurisdiction.

It is thought that *Mercury* v. *Telecommunications Directors* is not authority for the proposition that the court can always intervene. The judges subsequently made a practical point that the court should usually decline to intervene before a decision has been reached because the application to the court has a tendency to increase the cost of the dispute. What was also not considered in this case is whether the court should decline to intervene if private systems of dispute resolution have not broken down.

In *Conoco* v. *Philips Petroleum*[41] the question of construction of the contract was revisited. It was held that:

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[38] *Mercury Ltd* v. *Telecommunications Directors* [1996] 1 WLR 59, HL.
[39] *C & B Scene Concept Design Ltd* v. *Isobars Ltd* TCC (21 June 2001).
[40] *C & B Scene Concept Design Ltd* v. *Isobars Ltd* [2002] BLR 93, CA.
[41] *Conoco (UK) Ltd and Others* v. *Phillips Petroleum and Others*, QBD (1996).

'1. The expert had been required to place his own interpretation on the language of the procedural rules in the agreement. If his interpretation was obviously wrong, then it could be challenged on that count. If it could be demonstrated that the expert had not effectively performed his task, not only would that be a manifest error, but also an independent ground for challenging the decision.
2. However, a minor contravention of the procedure could not justify a challenge. Hence, the court should ask whether the expert had performed the task allocated to him, and, if so, whether the determination was manifestly wrong either because of the way he had interpreted the rules or on substantive grounds. An error would be ''manifest'' if it were an oversight or a blunder so obvious as to admit no difference of opinion. Whether such an oversight or blunder would have made any difference to the result was irrelevant. On the evidence, the court concluded that there had been no obvious procedural or substantive error in the expert's work.'

The interpretation placed on the procedure by the adjudicator needs to be obviously wrong. This may prove difficult where adjudicators' decisions are given with very little detail. If a matter of construction is obviously wrong that would be grounds for a challenge. This differs from the position in *Mercury* v. *Telecommunications Directors*. This case goes to two points, procedural unfairness which is dealt with below and want of jurisdiction. If the adjudicator has not performed the task assigned to him this forms a further ground of challenge. There is some sensible help here on what constitutes a manifest error. The error has to be so obvious that there is no doubt that it is wrong. Whether the error would have made any difference to the result is irrelevant. It is a matter which provides grounds for challenge.

British Shipbuilders v. *VSEL*[42] deals with both error and jurisdiction:

'Looking at the agreement, the accountants' role did not extend beyond the certification process because:
1. The agreement did not contain details of a role for the expert in resolving disputes between the parties as to their rights inter se;
2. VSEL's obligation under clause 5.5 was prima facie enforceable by specific performance or injunction and the expert had no jurisdiction in either of these respects;
3. If the expert were to have jurisdiction, clause 5.5 would have preceded clause 5.2 and 5.3;
4. VSEL had conceded that it had been intended that the court should retain jurisdiction over clause 5.5 unless and until the accountants disagreed. Consequently, if the expert went outside his remit, the court could intervene and set his decision aside. Similarly, the expert's decision could be set aside by the courts in cases of manifest error.'

The importance of remaining inside the remit is emphasised here. Where a manifest error occurs, the decision can arguably be set aside.

Dixons v. *Murray-Oboyinski*[43] follows *Jones* v. *Sherwood* and the expert's determination was upheld:

'HELD, granting the declarations sought and striking out the paragraphs in the defence which sought to challenge Mr Jackson's determination
(1) The interpretation of the agreement was left to the expert therefore whether there was any requirement in the agreement as to the basis of determination was a matter for the expert to decide.
(2) There was no evidence as to what basis of determination had been applied by the expert and therefore it could not be shown that he had failed to follow his instructions. *Jones* v. *Sherwood Computer Services plc* [1982] 1 WLR 277 applied.

[42] *British Shipbuilders* v. *VSEL Consortium PLC* [1997] 1 Lloyd's Rep 106, CHD 2 February 1996, TLR 14 February 1996.
[43] *Dixons Group PLC* v. *Jan Andrews Murray-Oboynski* (1997) CILL 1330; 86 BLR 16.

(3) A manifest error was an error that may easily be seen by the eye or perceived by the mind. There was no such plain and obvious error on the face of the expert's award and the terms of the agreement did not contemplate an error which after a lengthy enquiry might be made manifest. *Healds Foods Ltd* v. *Hyde Dairies Ltd* (unreported, 1 December 1994) QBD, Potter J considered.'

This illustrates again the area of difficulty where a decision is given with no reasons. If evidence cannot be provided to demonstrate that the adjudicator has failed to follow his instructions, any challenge must also fail. Similarly, errors must be plain and obvious and on the face of the adjudicator's decision, before a challenge can succeed. Unless the contract provides otherwise there should be no lengthy inquiry to seek out errors in proceedings to enforce adjudicators' decisions.

Procedural unfairness

This can be a difficult area under which to challenge an adjudicator's decision. There is a restraint in terms of the overall time available. The adjudicator has only 28 days in which to reach his decision. There is no requirement that this time be allocated equally between the parties; the allocation of time will very much depend on the nature of the dispute itself. There is no need to permit an adversarial process or procedure. The adjudicator has the authority to conduct an inquiry. Unless the adjudicator takes the lead and makes that necessary inquiry there will be problems with the timetable. It is against these restraints that any procedural unfairness will be judged. Adjudication cannot therefore be judged on the same basis of perfection that other systems of dispute resolution be judged where the time restraint is not as limiting.

In respect of arbitration awards it has been held that 'an award obtained in violation of the rules of natural justice even where there is no breach of the agreed procedure would be set aside on grounds of public policy' (*London Export* v. *Jubilee*[44]). What will be interpreted as the application of the rules of natural justice in the context of adjudication remains to be seen. It must be a factor that the process can be inquisitorial and there is a severe time restraint.

In *R* v. *Disciplinary Committee of the Jockey Club*[45], it was said:

'The remedies in private law available to the Aga Khan seem entirely adequate. He has a contract with the Jockey Club. The club has an implied obligation under the contract to conduct its disciplinary proceedings fairly. If it has not done so, the Aga Khan can obtain a declaration that the decision was ineffective and, if necessary an injunction to restrain the Jockey Club from doing anything to implement it.'

Procedural error may cover the breach of the rules of natural justice but it cannot solely be classified on that basis. There are no hard and fast rules of natural justice. In *Russell* v. *Duke of Norfolk*[46] the Court of Appeal said:

'There are, in my view, no words which are of universal application to every kind of enquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth; accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is

[44] *London Export Corporation* v. *Jubilee Coffee Roasting Company* [1958] 1 Lloyd's Rep 197.
[45] *R* v. *Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909.
[46] *Russell* v. *Duke of Norfolk* [1949] 1 All ER 109; (1949) 65 TLR 225; (1949) 93 SJ 132.

adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.'

In *Wiseman* v. *Borneman*[47] the House of Lords said:

'Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental principle degenerate into hard-and-fast rules.'

The process must in essence be fair and allow each side a reasonable opportunity of presenting its case. This was explored in *Macob* v. *Morrison* where there were challenges on the grounds of breach of the rules of natural justice:

'The present case shows how easy it is to mount a challenge based on an alleged breach of natural justice. I formed the strong provisional view that the challenge is hopeless. But the fact is that the challenge has been made, and a dispute therefore exists between the parties in relation to it. Thus on Mr Furst's argument, the party who is unsuccessful before the adjudicator has to do no more than assert a breach of the rules of natural justice, or allege that the adjudicator acted partially, and he will be able to say that there has been no ''decision''.

. . . In that event, it would be necessary to ascertain the correct meaning from the scheme of the Act and the Scheme, and the background against which it was passed. Adopting that purposive approach to the construction of the word ''decision'', I am in no doubt that it should not be qualified in the way suggested by Mr Furst. The plain purpose of the statutory scheme is as I have earlier described. Mr Furst would not accept that his construction would drive a coach and horses through the scheme. On any view, it would substantially undermine it, and enable a party who was dissatisfied with the decision of an adjudicator to keep the successful party out of his money for longer than envisaged by the scheme.'

The robust view adopted by Dyson J in *Macob* v. *Morrison* did not immediately meet with favour in the Scottish Courts. In *Homer Burgess* v. *Chirex*[48] Lord Macfadyen said:

'In coming to that conclusion I also derive support from the views expressed by Dyson J in *The Project Consultancy Group* v. *The Trustees of the Gray Trust*. The respect in which the adjudicator's decision in that case was beyond the proper scope of his jurisdiction was somewhat different, but the passage which I have quoted above from paragraph 6 of Dyson J's judgment figures an example which is close to the circumstances of the present case. I would add, however, that I wish to reserve my opinion as to the soundness of the distinction which Dyson J drew between the effect of an assertion that the decision of the adjudicator was one which he was not empowered to make, and the effect of an assertion that the decision of the adjudicator was invalid on some other ground such as breach of the rules of natural justice. Although that point does not bear directly on the matter which I have to decide, I have some difficulty in reconciling Dyson J's distinction with what was said in *Anisminic*, for example by Lord Reid at 171C. Moreover, although I have expressed my views in terms of the effect of an error in law on the part of the adjudicator as to the scope of his jurisdiction, since that is what is alleged to have happened in the present case, I do not wish to be taken to have decided that an error of fact on the part of an adjudicator which resulted in his purporting to make a decision on a matter outside his jurisdiction would not have the same effect. I reserve my opinion on that matter too. For the purposes of the present case, it is sufficient that I am of opinion that if, as the defenders allege, the adjudicator erred in his construction of the term ''plant'' in section 105(2)(c) and consequently purported to issue a decision on matters which fell outside his jurisdiction, that is a relevant defence to the present action.'

[47] *Wiseman* v. *Borneman* [1971] AC 297; [1969] 3 WLR 706; [1969] 3 All ER 275.
[48] *Homer Burgess Limited* v. *Chirex (Annan) Limited* [2000] BLR 124.

This case was really dealing with a straightforward excess of jurisdiction and should not be representative of cases dealing with procedural unfairness.

Another category of procedural unfairness is bias. It does not have to be actual bias, favouring one party over another; it only needs to be a perception or danger of bias having occurred. This was explored in *Discain* v. *Opecprime*[49] where the judge said:

> 'It does seem to me there was a very serious risk of bias, and there were clear failures to consult with one party on important submissions which were made by the other party. It is said on behalf of the claimant that this is irrelevant because the matter goes only to jurisdiction (that is accepted) and I am looking at the matter of jurisdiction anyway. If there has been a breach of the rules of natural justice (and I find that there has) it is submitted that it does not make any difference because the question of jurisdiction in any event is under review.
> I find it distasteful and I cannot bring myself to enforce an adjudication which has been arrived at in that way. I do not wish to criticise the adjudicator, I fully understand his difficulties, but he should have made sure that the other party was involved in the discussions regarding his jurisdiction, which he failed to do. I wish to stress that I am not criticising the adjudicator; I do understand that adjudicators have great difficulties in operating this statutory scheme, and I am not in any way detracting from the decision in *Macob*. It would be quite wrong for parties to search around for breaches of the rules of natural justice. It is a question of fact and degree in each case, and in this case there is an issue to be tried whether the adjudicator overstretched the rules.'

In *Woods Hardwic*k v. *Chiltern*[50] the court expressed a straightforward view on partiality and procedural unfairness. This gives with clarity some of the grounds on which an adjudicator's decision will not be enforced:

> '39. I am also conscious that the adjudicator attempted to act in an impartial manner and showed no conscious bias or hostility to Chiltern. However, the statutory requirement to act impartially requires the adjudicator to act in a way that does not lead to a perception of partiality by one party which might objectively be held by that party. In this case, the adjudicator led the parties to believe that there would be no need for a hearing. Such a view would only be tenable if the adjudicator took other steps, by way of written communications for example, to inform both parties of any relevant additional information he subsequently obtained to enable them to comment upon it. Having left the parties with the impression that he did, he acted in a manner which could readily be perceived to be partial in approaching one side without informing the other, in seeking much additional information from third parties and in then making adverse findings against the party left in ignorance of these steps. These difficulties were then compounded by the adjudicator voluntarily providing a witness statement which seeks to put forward Woods Hardwick's case in favour of enforcement and which elaborates on the reasons for making adverse findings against Chiltern.
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> **6.3. The Effect of the Findings on the Enforcement Proceedings**
> 40. The adjudicator, in order to make a valid and enforceable decision, must act in conformity with the rules of the Scheme. There will be occasions when an adjudicator's departure from those rules is insignificant and not such as to preclude enforcement. Where, however, the departures are significant, the decision is one taken outside the framework of the Scheme and is not one which a court will ordinarily enforce. The consequence is that I must dismiss the summary judgment application. The claim based on the Chapel Street adjudication will be dealt with and tried at the same time as the action brought by Chiltern against Woods Hardwick that is concerned with this development. Further directions in this action will be given at the first case management conference held in that action. Meanwhile, the costs of the Chapel Street enforcement proceedings will be costs in the case. There will be permission to either party to apply for further directions if necessary.'

[49] *Discain Project Services Ltd* v. *Opecprime Development Ltd* (9 August 2000).
[50] *Woods Hardwick Ltd* v. *Chiltern Air Conditioning* [2001] BLR 23.

There is a difficulty when mediation is combined with adjudication. This was explored in *Glencot* v. *Ben Barrett*[51]. This case provides a full discourse on bias. The adjudicator in this case was not found to be actually biased:

> '20. It is accepted that the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit: see *Discain Project Services Ltd* v. *Opecprime Development Ltd* [2000] BLR 402. Secondly, in my judgment it was not intended by Parliament the words should have anything other than their usual meaning, and, in so far as the parties are to be treated as having adopted the wording as a matter of their contract, then contractually they are to bear the same meaning. Thirdly, and similarly, if the concept of impartiality or lack of bias were to be restated or redefined in the light of new legislation, such as the Human Rights Act, then the latest meaning, as it were, applies, obviously in law and as a matter of contract. Otherwise in relation to each of these reasons the words might bear one meaning in general and another meaning by contract or under the HGCRA, which to my mind would be verging on the absurd and is not correct.
> 21. Accordingly is Mr Talbot's conduct such as to be regarded not ''impartial''? It must be emphasised that there is no question of actual bias. It is a case of ''apparent bias''. Mr Talbot's personal impartiality is presumed. In *Gough* Lord Woolf reiterated that ''bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect''. Hence there is a need for an objective test. The views of the person involved are either irrelevant or not determinative. The test is whether the ''circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased''.
> 22. In my judgment the defendant has shown that it has real prospects of success in establishing that Mr Talbot was no longer impartial as a result of what took place over most of 29 September. First, Mr Talbot's own appreciation of those events led him to write his letter of 2 October and, in paragraph 7, to ask the parties to decide whether they wished him to continue. I am sure that he was right.'

This case does not rule out mediation during the currency of an adjudication. Had the mediation succeeded the matter would not have been before the courts. The problem arises when matters that are confidential in the mediation are revealed to the mediator/adjudicator and then the adjudication continues and one or both parties end up dissatisfied with the result.

In Discain (No.2)[52] the distinction between procedural error and breach of the rules of natural justice was made:

> 'The reference in that paragraph to a ''procedural error'' has been read as meaning that breaches of natural justice are to be regarded as ''procedural errors'' and to be disregarded when considering whether decisions of adjudicators should be enforced. One can test that proposition by thinking the unthinkable, going to an extreme and asking what would be the approach if it were shown that an adjudicator refused to read the written submissions of one party because they were typed with single rather than double spacing. It would never happen. But if it did, his decision would not be enforced. So there must be some breaches of natural justice that would persuade the court not to enforce the decision of an adjudicator. How is the line to be drawn?
> In an article in the *Construction Law Journal* (2000) 16 Const LJ 102, Mr Ian Duncan Wallace QC, who has achieved the remarkable position of being a controversialist in the dry area of construction law, also considered the decision of Dyson J in *Macob*. He said:

[51] *Glencot Development & Design Co Ltd* v. *Ben Barrett & Son (Contractors) Limited* (13 February 2001).
[52] *Discain Project Services Limited* v. *Opecprime Developments Limited* (11 April 2001).

''It is respectfully submitted that the words 'a procedural error which invalidates the decision' in this passage go too far if they mean, as Dyson J (probably obiter) states, that enforcement of an award arrived at in breach of the principles of natural justice cannot be resisted on those grounds in summary proceedings at all.

On the other hand, with all respect, it is a startling proposition that an adjudicator's decision, if arrived at in serious breach of a principle of natural justice, must as a matter of law nevertheless be enforced in circumstances where payment under an invalid decision could easily turn out to be irretrievable and precipitate the insolvency of the party affected (particularly where, as here, there had not even been a decision by the adjudicator on the merits, but only a procedural one shutting out consideration of any defence or cross-claim). Even given the inherent and obvious pro-producer and anti-customer and anti- paymaster bias of the HGCRA's statutory adjudication proposals, it is submitted that, in the absence of express wording, Parliament can only have intended adjudicators' decisions validly arrived at on the merits or law of a properly referred dispute to be binding on the parties for the comparatively lengthy period which could be involved before final judgment or award and almost inconceivable that Parliament intended to accord to adjudicators' decisions or conduct an immunity and enforceability not accorded by the law to arbitrators and their awards or even to the judiciary and their judgments.''

There is much to be said in support of what Mr Ian Duncan Wallace there writes.'

There is a simple rule that where the adjudicator discovers something or has a view of his own it must be put to the parties and they must be allowed to address the point or points. This is old law in the sense that it has been applied in arbitration. It also applies in adjudication despite the time restraints. This is partly what the facility to extend time is for in the legislation. This was explored fully in *Balfour Beatty* v. *Lambeth*[53] which expounds among other matters the duty to act fairly:

'Thus in *Fox* v. *Wellfair Limited* [1981] 2 Lloyd's Reports 514 at page 529, Dunn LJ said:

''If the expert arbitrator, as he may be entitled to do, forms a view of the facts different from that given in the evidence which might produce a contrary result to that which emerges from the evidence, then he should bring that view to the attention of the parties. This is especially so where there is only one party and the arbitrator is in effect putting the alternative case for the party not present at the arbitration.

Similarly if an arbitrator as a result of a view of the premises reaches a conclusion contrary to or inconsistent with the evidence given at the hearing, then before incorporating that conclusion in his award he should bring it to the attention of the parties so that they may have an opportunity of dealing with it.''

In *Interbulk Limited* v. *Aiden Shipping Co Limited (The ''Vimeira'')* [1984] 2 Lloyd's Reports 66 at page 75, Robert Goff LJ said:

''In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal.''

Ackner LJ also said at page 76:

''Where there is a breach of natural justice as a general proposition it is not for the courts to speculate what would have been the result if the principles of fairness had been applied. I adopt, with respect, the words of Mr Justice Megarry in *John* v. *Rees* [1969] 2 All ER 275 at p. 309 where he said: 'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of

[53] *Balfour Beatty Construction Limited* v. *The Mayor & Burgesses of the London Borough of Lambeth* (12 April 2002).

fixed and unalterable determinations that, by discussion, suffered a change.' But, in this case, speculation does not arise. If the arbitrators had informed the parties of what they had in mind, the consequences would have been obvious. Firstly, the charterers would have sought to persuade the arbitrators that it was common ground on the evidence that there was adequate room to turn the vessel and that, therefore, the arbitrators should decide the dispute according to the evidence. If they failed so to persuade the arbitrators, they would have sought, and would have been entitled to, an adjournment. Having obtained an adjournment, the charterers would have called the evidence which in fact was called at the sub-arbitration and would have satisfied the arbitrators that the turning area was adequate.''

Mr. Acton Davis also referred to a passage in *Gbangbola* v. *Smith & Sherriff* [1988] 3 All ER 730 at page 740B where I said:

''A tribunal does not act fairly and impartially if it does not give a party an opportunity of dealing with arguments which have not been advanced by either party''.'

The following passage appears in the judgment in *RSL* v. *Stansell*[54]:

'32. It is elementary that the rules of natural justice require that a party to a dispute resolution procedure should know what is the case against him and should have an opportunity to meet it. In paragraph 17 of The Scheme for Construction Contracts it is provided in terms that ''The adjudicator ... shall make available to [the parties] any information to be taken into account in reaching his decision''. At one point in her oral submissions Miss Hannaford seemed to come close to relying upon the absence of an equivalent provision in clause 38A of the sub-contract as an indication that there was no similar requirement in relation to an adjudication governed by terms similar to those of the sub-contract. If and insofar as Mr Hinchcliffe, or anyone else, may have thought that the effect of clause 38A.5.7 was that an adjudicator could, subject only to giving the parties to the relevant adjudication advance notice that he was going to seek technical or legal advice, obtain that advice and keep it to himself, not sharing the substance of it with the parties and affording them an opportunity to address it, it seems to me that he or she has fallen into fundamental error. It is absolutely essential, in my judgment, for an adjudicator, if he is to observe the rules of natural justice, to give the parties to the adjudication the chance to comment upon any material, from whatever source, including the knowledge or experience of the adjudicator himself, to which the adjudicator is minded to attribute significance in reaching his decision. Thus in the present case it was plain, in my judgment, that Mr Hinchcliffe should not have had any regard to the final report of Mr Adie without giving both RSL and Stansell the chance to consider the contents of that report and to comment upon it. If he needed an extension of the time allowed for his decision to enable him to provide the necessary chance, then he should have explained that to the parties in seeking their consent to an extension. *If he had explained that he needed an extension in order to afford the parties an opportunity to comment upon Mr Adie's final report, and the parties, with knowledge of the significance of the request for an extension, had not agreed to one, the likelihood is that they would be taken to have waived the right to object that they had not had the opportunity which they had refused* [emphasis added]. However, it is absurd to suggest that a party requested, for no definite reason, to agree to an extension of time for the making by an adjudicator of a decision, who refuses it should be precluded from resisting the enforcement of the decision on the ground that he had no opportunity to address an issue of importance in the ultimate result because there was no time, if the deadline for the making of the decision without an extension was to be met, to give him the opportunity which he was denied.'

We are pleased to note the inclusion by Judge Richard Seymour QC of the sentence that we have emphasised in the above extract. This gives some relief to the adjudicator who has to walk a narrow line between complying with the approach that the courts are taking to the rules of natural justice and complying with the time limits set by Parliament.

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

We are however a bit concerned about the words: 'It is absolutely essential, in my judgment, for an adjudicator, if he is to observe the rules of natural justice, to give the parties to the adjudication the chance to comment upon any material, from whatever source, including the knowledge or experience of the adjudicator himself, to which the adjudicator is minded to attribute significance in reaching his decision', and particularly, bearing in mind the technical aspects of most issues and the technical background of most adjudicators, about the reference to the adjudicator acquainting the parties of any knowledge or experience he has himself to which he is minded to attach significance.

Not all challenges on the grounds of breach of rules of natural justice or lack of impartiality or procedural unfairness will or have succeeded. It is however clear that the court is looking more and more closely at the actions of the adjudicator and this area is becoming a more and more difficult one.

Human rights

The question of whether or not the Human Rights Act 1998 applies to adjudication is academic in the sense that even if it does not apply to the adjudication process itself, it will apply to the courts at the enforcement stage. In *Elanay* v. *The Vestry*[55] the court stated the following in respect of human rights:

> '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 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 *Austin Hall* v. *Buckland*[56] the courts made a clear statement concerning the applicability of the human rights legislation and natural justice:

> 'I should make it plain that although in my view Article 6 of the Convention on Human Rights does not apply to the acts and decisions of adjudicators in construction contracts, adjudicators are required expressly by section 108(2)(e) of the Act of 1996 to act impartially. Where the Statutory Scheme under the 1996 Act applies, paragraph 12 of the Scheme sets out the duty to act impartially in more detailed terms, and paragraph 17 requires that
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> ''The adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute and shall make available to them any information to be taken into account in reaching his decision.''

[55] *Elanay Contracts Limited* v. *The Vestry* (30 August 2000).
[56] *Austin Hall Building Limited* v. *Buckland Securities Limited* [2000] BLR 272.

> In practice, I would think that adjudications are governed by rules of natural justice that are not very far different from Article 6 of the Convention except for the requirement of a public hearing and public pronouncement of the decision. The time limits that are under attack in this application are also subject to the rules of natural justice, but there is no question of an Act of Parliament being attacked in the courts as being in breach of the rules of natural justice. In our democracy, Parliament is still regarded in the Courts as supreme. The adjudicator was constrained by Act of Parliament to impose the time limits that he did, so he cannot be criticised for breaching the rules of natural justice. I agree with the statement of Judge Humphrey Lloyd QC in *Glencot Development & Design Co Ltd* v. *Ben Barrett & Son (Contractors) Limited* Unreported 13 February, 2001 that, ''It is accepted that the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit''.'

The influence of the human rights legislation on the courts at the time of enforcement is unavoidable. We suspect that the applicability or otherwise of the Human Rights Act in the adjudication process itself will be raised again.

Final determination

If the parties so choose they can agree that the adjudicator's decision finally determines the dispute. This agreement ought to be recorded in writing, although an oral agreement would still bind the parties. The parties can agree to amend or modify the adjudicator's decision and reach a new agreement using that decision as a basis, or to reach an entirely new agreement ignoring the adjudicator's decision. If they decide to do this, the agreement should be recorded in writing.

If the adjudicator's decision is unacceptable to one of the parties and a new agreement cannot be reached, the method stipulated in the contract as being the final means of resolving the dispute will apply.

This may be arbitration or litigation. Some of the standard forms now offer this choice where previously the only option was arbitration. If there is no arbitration provision in the contract there is nothing to prevent the parties making ad hoc arrangements to still proceed to arbitration.

The final determination of the dispute is a new process. It does not rely on the adjudicator's decision at all. The parties need not seek to uphold or challenge that decision in these new proceedings. The decision may have some evidential value to support a fact or to show why a party has paid a sum of money that it is now seeking to retrieve. The adjudicator's decision remains binding on the parties until the dispute has been considered afresh and the award is made in an arbitration or judgment given in court.