Adjudication for architects and engineers

John Timpson and Brian Totterdill

Legal Notes by Roger Dyer

Thomas Telford

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Foreword

I count it a privilege to have been invited to write a foreword to a new book, particularly one whose authors are such outstanding practitioners in their own fields.

Adjudication has been a feature of construction contracts, particularly subcontracts, for at least 20 years; generally, it has been confined to dealing with disputes concerning set-off, but, in more recent years, has been used less and less as ways were found to avoid implementing adjudicators' decisions. All that has changed; following the report of Sir Michael Latham, *Constructing the team*, Government was persuaded that primary legislation was required to give all parties to construction contracts a statutory right to have disputes decided by adjudication, which was to be a rapid and relatively inexpensive process in all cases. That legislation (the Housing Grants, Construction and Regeneration Act 1996) is now in force and disputes are being referred to adjudication.

This book, therefore, could not be more timely. There are many ideas about what adjudication under the Act is and should be, and, undoubtedly, the process will develop and its practitioners will perfect their own expertise; nevertheless, the need for informed guidance is paramount.

The authors—an architect, an engineer and a barrister—all have extensive experience as arbitrators, and although adjudication is not arbitration, the techniques and principles of deciding only on the evidence adduced and respecting the principles of natural justice as far as possible are common to any process of third party intervention.

Written in an easy-to-read style, this book is comprehensive yet easily manageable; learned in the true sense. The combined wealth of experience of the authors is apparent on every page, spiced with sound legal advice but tempered by lessons learned in long years of practice.

The title of the book implies that this text is relevant only to architects and engineers. Nothing could be further from the truth; this book should be an essential companion to all adjudicators, construction professionals, employers and their advisers, contractors and subcontractors, and lawyers involved in adjudication. The book will also be invaluable in the training and continuing professional development of adjudicators.

I have no hesitation in commending this book to a wide readership; I know it will find a welcome spot on my own shelves and, more importantly, on my desk as an essential reference.

Harold Crowter
Chairman, Chartered Institute of Arbitrators

Authors' note

The adjudication process which is discussed in this book is a new process. Standard forms of contract have been amended and rules have been published. As experience is gained, the published amendments and rules are being revised and additional documents are being published.

The authors had to draw the line between delaying the publication of this book in order to wait for further published documents or publishing the book to cover the information which was already available.

For this reason, the reader must check the current versions of any contracts or rules, or the Act itself, to see whether or not further revisions have been made since the date the book was passed for publication.

Contents

Glossary

ADR Alternative dispute resolution. Dispute resolution processes which encourage or facilitate disputants to reach their own solution. Includes conciliation, mediation, and the 'mini-trial'.

Adjudication This is a process in which an impartial person makes a binding decision on a dispute within a fixed time period.

Adversarial System The system by which the advocates representing each side adduce arguments to persuade the tribunal that they have the better legal case. In contrast, the inquisitorial system, qv, which allows the tribunal to find out as many relevant facts as possible, is applied in most legal systems on the mainland of Europe.

Affirmation This is used as a substitute for a religious oath when the witness's beliefs will not permit him to take an oath.

Arbitration A method of resolving disputes between two or more Parties by reference to one or more persons appointed for that purpose. If there is written agreement to refer, the arbitration in England and Wales is normally subject to the Arbitration Act 1996.

Award This is the terminology in arbitration for the decision, which is reached by the Arbitrator.

Burden of Proof The Party who is making an assertion has to produce evidence which proves his assertion for the assertion to be accepted as being true and then the burden shifts to the other Party to produce contrary evidence to rebut the presumption.

Calderbank Letter An offer made in the course of arbitration or litigation whereby the letter, if properly phrased, has the same effect on costs as a payment into Court. So called after the matrimonial case of *Calderbank v Calderbank* 1976. See also *Sealed Offers* and *Offers to settle.*

Collateral warranties A form of agreement, assurance, etc., which is independent of, but subordinate to, a contract affecting the same subject matter.

Common Law The law of the land formulated, developed and administered by the old common law Courts, that is to say the decisions of the Courts. Common law has to be distinguished from equity, statute 1aw, any special law, and the Civil Law (of Rome, i.e. Continental law).

Conciliation *See ADR.* In conciliation, the Parties in dispute agree that a neutral Third Party should help them reconcile their differences and reach a solution.

Declaratory (Judgement, Award or Decision) A decision which declares the rights, obligations or liabilities of one or both of the parties.

Discovery (of documents) The process by which the parties to a dispute disclose to their opponents the documents to which they have (or have had) access. The principle is the litigants should put their cards on the table.

Documents only A case (often but not exclusively where only small sums are disputed) which does not justify the cost of a hearing or where the case is otherwise self-explanatory on the papers. Such a procedure is not normally suitable where evidence needs to be tested by cross-examination.

Further and better particulars Information which is requested by one party or the other in order to enable him to answer a case which is not clear from a pleading.

Injunction An order or decree by which a Party to an action is required to do, or to refrain from doing a particular thing.

Inquisitorial This is a procedure used more frequently on the Continent than in England and Wales by which the Tribunal takes a much more active part in the proceedings than it does in the Adversarial system. An Adjudicator fulfils an Inquisitorial role when he makes positive enquiries into the facts and the law of a case rather than waiting for the Parties to present their information.

Jurisdiction The competence of a tribunal to entertain an action or other proceeding. Jurisdiction to determine matters may be restricted by agreement or statute. Equally, a tribunal may exceed its jurisdiction by deciding matters beyond its scope.

Mediation *See ADR.* In mediation, the Parties in dispute agree that a Third Party should actively assist them to reach a solution. A more positive approach than conciliation *(which see)*.

Mini-trial See *ADR.* The Parties in dispute agree that each shall present its case to a panel or tribunal with authority to negotiate a settlement. The panel will consist of managerial representatives from each side with a neutral adviser in the chair. The mini-trial approach is often adopted for reasons of commercial expediency.

Offers to settle Offers to settle a dispute may be made at any stage in the process of resolution. They may be open, sealed, or without prejudice. They may be intended to limit liability of costs.

Order for Directions An order made by a judge or arbitrator or Adjudicator setting the timetable and procedures for an action or claim. In Court proceedings, this may follow the issue of a Summons for Directions.

Pleadings The written or printed statements whereby the parties to a dispute are required to set out the factual basis of their respective cases. Normally, these are the claim, the defence, and the reply, although there are other categories.

Precedent The reasoning and judgement of a higher Court in a preceding case which is binding in similar cases occurring later in lower Courts.

Privileged Documents Documents withheld on the ground of some special reason recognised by law, which need not be revealed to the opposite side and should not be made available to the tribunal before the substantive decision is handed down.

Quantum The amount of damages or the amount fixed as compensation for particular losses.

Security for costs A deposit or guarantee given by a Claimant or Counter Claimant to meet the costs of the Defendant/Respondent if the claim fails.

Statement of Case The written statement made by a claimant but which has to be distinguished from a pleading in which evidence and points of law are not normally allowed.

Statute An act of Parliament.

Statute barred A situation where a claim is beyond the period laid down in the Limitation Act 1980 as amended by the Latent Damage Act 1986. Also referred to as being 'out of time'.

Third Party A Party who is not one of the two Parties involved in the proceedings.

Without prejudice A term applied to a privileged offer made by a Party which prevents that offer being referred to thereafter in subsequent proceedings. May also be applied to correspondence, procedures or meetings.

1

Introduction

What is Adjudication?

Adjudication was a term used in the Latham Report *Constructing the Team* which was published in 1994. The dictionary meaning of Adjudication focuses on the act of adjudicating or pronouncing judgement. Sir Michael Latham's intention, so far as dispute resolution was concerned, was to bring more emphasis on alternative dispute resolution, conciliation, mediation and a strongly recommended process called 'Adjudication'. The stated intention was to reduce the confrontational ethos within the industry, reduce disputes and assist subcontractors particularly, who were at the end of a long chain when it came to receiving payment.

Adjudication was only one of the measures which Sir Michael Latham had in mind.

Unfortunately, the Latham Report did not explain what was meant by the term 'Adjudication'. At that time, Adjudication existed only within the terms of certain construction contracts, notably the New Engineering Contract, although it also played a part in 'JCT 1981 With Contractor's Design' and in certain sub-contract documents published in connection with JCT Contracts.

While there have been statutes for a period of about three centuries defining the activities of an Arbitrator, prior to the publication of the Act,[1] there was no comparable guidance on the

1 When we refer to the 'Act' it is to the Housing Grants Construction and Regeneration Act 1996.

law and practice of Adjudication in construction contracts. The Act and the Scheme[2] do not go very far in giving a full understanding of how the process will work. The shortcomings of both the Latham Report and the Act are covered in *Construction Contract Reform: a plea for sanity*, edited by John Uff (The Construction Law Press, London, 1997).

Previously, the powers and duties of an Adjudicator within a contract arose from the terms of those particular contracts. We then had the statutory arrangements of the Act and in particular from the Scheme which was circulated as a series of drafts intended to be incorporated in the Act. Neither the Act nor the Scheme spell out completely how the Adjudication process should work. The full process can only be derived from an understanding of contract procedures and dispute resolution processes already established in law and practice and by implication translating the requirements of the Act and the Scheme into working arrangements.

In the opinion of the authors, the stated intention and spirit of the Latham Report (so far as Adjudication was concerned) can be summed up as follows: two Parties to a contract have their contractual obligations recorded in writing; if they cannot agree on how the contract is to be interpreted in the circumstances which occur, they call in a respected and impartial person who is knowledgeable about the activities involved and ask him/her to give a quick working decision on the issue which has arisen. This enables the contract to continue and if one Party wishes to go on to have a full Arbitration or Litigation then they can do that at a later date.

A similar concept is embodied in the procedure which is taken from a roads contract dated 14 November 1824.[3] It required that:

> Any doubt, decision or question shall be referred to the decision of two referees, one named and appointed by each Party. If these two people do not agree and issue their decision

2 When we refer to the 'Scheme' it is to the Scheme for Construction Contracts Regulations 1998 which are referred to in the Act.

3 Extracted from *A Treatise on Roads* by Sir Henry Parnell, 1838.

within one month, they nominate a third person and refer the matter to him. The third person's decision shall be given within one month of the reference to him and shall be final and conclusive between the Parties.

Contracts which contained provision for Adjudication before the Latham Report generally only allowed certain types of dispute to be referred to Adjudication. 'JCT 1981 With Contractor's Design' included a list of 'Adjudication Matters', which could be referred to an Adjudicator for a decision to be made.

The first edition of the New Engineering Contract included a provision that if the Contractor was not satisfied with a particular action, or failure to act, by the Project Manager then the Contractor could refer the matter to Adjudication. However, the current revisions to contracts allow for *any* dispute under the contract, and sometimes also in connection with the contract, to be referred to Adjudication. This, of course, is a direct result of the Act. The experience of the authors is that some disputes are clearly not suitable for a decision within a very limited time period.

- A dispute which involves the study of complex points of law cannot be fully analysed, with presentations by both sides, responses to opposing arguments, answers to queries and then allow time for the Adjudicator to reach his decision, all within 28 days.
- There is also a group of issues where the consequences of an Adjudicator reaching some decisions will leave the Parties in a legal no-man's-land unless the Adjudicator confines his decision to an award of time or money (which can subsequently be reversed if the matter goes to Arbitration or Litigation). An example could be a dispute regarding the structural sufficiency of a prime, load-bearing element of the building.
- Disputes which may have arisen from a series of events, such as a matter involving determination, failure to agree the final account, allegations of professional negligence, or involving third Party action or expertise such as insurance matters, are unlikely to be resolved satisfactorily within 28 days.

- Disputes involving matters such as health and safety, VAT or taxation may need to be referred to the appropriate authority rather than to an Adjudicator.
- A Party who has been ordered to pay a large sum of money may be reluctant to pay if he feels that the decision has been reached with undue haste, based on an inadequate analysis of the problem.
- Disputes which concern matters such as design or quality of work will need to be carefully delineated in order to avoid further problems arising at a later date. The Adjudicator's decision may be reversed by later Arbitration or Litigation. If the decision is financial then it can be reversed, provided the recipient of the finance is still in business. However, a decision to do something, or to do it in a particular way, may not be capable of being reversed. The right of the Employer to stipulate what he requires in a project must be respected, both by the Adjudicator and by the person who writes the notice which constitutes the instructions to the Adjudicator.
- Any dispute which has not been fully studied, by both sides, before submission to the Adjudicator, is likely to result in an unsatisfactory decision. When a Claimant submits evidence which has not previously been considered by the Respondent then the limitation on the time period may prevent the Adjudicator from receiving properly balanced submissions of allegation and response.

On the other hand, there is a wide range of disputes which may be suitable for a fast decision by an Adjudicator:

- single issue disputes for which one submission by each Party can identify the problem and provide the Adjudicator with the opposing points of view and all the necessary supporting evidence
- single issue valuations or extensions of time claims
- problems of quality or workmanship for which the question of compliance with the specification can be determined by a

person with the appropriate experience, following a site inspection
- disputes for which a decision on one aspect, such as liability, would enable the Parties to continue their negotiations on other matters, such as quantum
- disputes which have already been analysed by both sides and documents exchanged giving the opposing points of view, so that the Adjudicator can be asked to decide between the previously established arguments
- disputes for which the Parties will agree to extend the time period for as long as is required by the Adjudicator.

At the present time, in relation to construction contracts, the term, 'Adjudication' can have any one of three meanings:

- contract Adjudication within the terms of Adjudication as embodied in the Contract which *do not* comply with the statutory arrangements
- contract Adjudication within the terms of a contract which *do comply* with the statutory requirements and
- statutory Adjudication in accordance with the Scheme for Construction Contracts referred to in the Housing Grants, Construction and Regeneration Act 1996.

An Adjudicator then, *must* have regard to the *particular contract arrangements* or to the requirements incorporated in the Statutory *scheme* in each particular case or the decision may not fully cover, or may exceed, the matters referred to Adjudication. If the decision does not deal properly with the matter referred, it may be set aside by a final decision by Litigation or Arbitration. Since the intention appears to have been that Adjudication should be available and accessible to any Parties in a Construction Contract, without necessarily the employment of lawyers, there is also a danger that the Parties to a dispute may not fully appreciate the limits of an Adjudicator's jurisdiction in any particular case, or may not articulate a particular issue properly. There is also the potential problem that where the contract contains Adjudication arrange-