

ADJUDICATION IN UK CONSTRUCTION CONTRACTS A CRITICAL LOOK¹

Administrative

1. This brief paper arises out of a 39 Essex Chambers seminar on the 19 March 2015. The title of the Seminar was "Adjudication Enforcement: Time for a Change?". The seminar comprised two debates². The first debate considered the strengths and weaknesses of adjudication as it stands at the moment. The second debate looked afresh at the Human Rights Act and asked whether or not it might yet impact adjudication. Each debate has a short introduction. This paper is an amalgam of the two introductions.
2. As is usual, the material in this paper is put forward subject to all the usual caveats and specifically³ as a basis of discussion and not as opinion or advice.
3. References to the "Act" or the "Bill" are references to the Housing Grants, Construction and Regeneration Act 1996 and its time as a Bill and in particular to Part II thereof. The expression "the Scheme" refers to the Scheme for Construction Contracts (England and Wales) Regulations 1998⁴. Where a particular judge is named the traditional expression "as he then was" has been omitted where the particular individual has been elevated from the status which obtained at the time of the judgment. No disrespect is intended but the repetition of the expression seems unduly portentous. The expression A1P1 refers to Article 1 Protocol 1 of the Human Rights Act 1998.

¹ In assembling this note I have had great input from my colleagues at 39 Essex Street (as it then was) and also from colleagues at 4 Pump Court, Atkin and Keating Chambers (the order is the computer default alphanumeric order). Mistakes are All My Own Work.

² Mr. Justice Akenhead generously gave up his time to chair the proceedings. The debates were conducted by Hefin Rees Q.C., Karen Gough, Rachael O'Hagan and Rose Grogan.

³ But without prejudice to the generality of the foregoing

⁴ SI 998 No 649

4. Two propositions were mooted at the seminar – the first went to the fact that various unsatisfactory aspects of the way that adjudication was carried forward had been noted by the judiciary but had not been sanctioned. The second went to the question of whether the Human Rights Act and in particular A1P1 was possibly a way to cure the ills that had been noted. This paper only looks at the former; and the suggestion is that more could have been done in the past to mitigate the problems identified by the judiciary and maintain long established principles and safeguards in the resolution of disputes. It is suggested that more should be done in the future.

The back story to adjudication

5. Builders need cash. Indeed they need a steady flow of cash. The consequence is that contracts for construction work, minute and domestic or grand and multinational, have schemes for providing that flow. Once the project has any form of formal contract it is likely to have payment in tranches and most likely in accordance with certificates⁵. Certificates have traditionally been monthly. Where the project is at all complicated and involves contractual chains down from the building owner, through the contractor to the subcontractor and beyond the certification scheme applied, whereby, in a perfect world, the "...[t]he interim certificate is regarded as the equivalent of cash..."⁶ and the money cascades down the chain.
6. Inevitably there might be disputes about the certified sums. To address this many of the formal contracts had a provision permitting a certificate dispute to be arbitrated (arbitration was the usual dispute resolution procedure) prior to the end of the contract, unlike other disputes which had to await the completion or termination of the main contract.

⁵ Another scheme is to use stage payments. Adjudication is equally applicable to stage payment contracts and other arrangements, but the certificate model was the more usual and therefore the one convenient to use for this part of the paper.

⁶ Denning M.R. in *Dawnays v F. G. Minter and Trollope and Colls*, (1971) 1 BLR at page 20

7. Since certificates were “monthly” it is obvious that, for an interim arbitration about the amount certified, the procedure should take less than a month – otherwise it would be overtaken by the next certificate, which might compound the error, if error it was, in the previous certificate and thus, effectively, trigger a second interim arbitration.
8. For practical purposes this interim arbitration procedure was not used. Instead main contractors regularly set off unliquidated and unestablished cross claims – e.g. for delay - against sums certified in favour of their subcontractors and thus avoided paying them. This suited main contractors since they could then put off the question of payment until the arbitration post completion or termination of the main contract – often years away.

Dawnays to Gilbert-Ash

9. Eventually a subcontractor jibbed. It claimed a certified sum, issued proceedings and launched an application for summary judgment. Both the master and the judge at first instance rejected the claim but the subcontractor pressed on, as it transpired, to glory. The habit of setting off unliquidated and unestablished cross claims for delay was roundly and unanimously condemned in *Dawnay’s v Minter*⁷ by a strong Court of Appeal⁸ and the subcontractor got summary judgment.
10. This forthright and trenchant decision opened the floodgates for three years, as adjudication was to do some 28 years later; and it only stopped when *Gilbert-Ash Northern v Modern Engineering (Bristol (1973) 1 BLR 73* where the same issue, but under a different contractual regime,

⁷ *Dawnays Ltd v F. G. Minter Ltd and Trollope & Colls Ltd [1971]1 WLR 1205, (1971) 1 BLR 18* and see *Pegram Shopfitters Ltd. V Tally Weiji (UK) Ltd [2004] BLR 65* per May LJ.

⁸ Edmund Davies and Stamp LJ were the other two. They also refused leave to appeal, as did an equally strong Judicial Committee consisting of Lords Wilberforce, Pearson and Diplock

effectively⁹ restored the right of contractors to set off claims which had not been established¹⁰.

The Arbitrator's attempt

11. Some fourteen years later an arbitrator, faced with a challenge to a specific certificate and being of the view that as both a qualified architect and quantity surveyor he would be able to decide it speedily, attempted to hold an interim arbitration of the sort anticipated by the standard contracts. His efforts were frustrated first by the claimant contractor who took an wholly inappropriate time to put its claim together and then expanded it beyond the single certificate; and second by the Official Referees, when it was decided¹¹ that the truncated procedure the arbitrator adopted – dispensing with a formal hearing and allowing lawyers to attend his meetings with the parties' technical advisers only as observers - did not satisfy the requirements of natural justice. But it was a procedure which is much closer to the modern concept of adjudication.

Latham

12. The cause of cash flow was next taken up by the Latham Reports, with the final one published in 1994. This advocated that "Adjudication should be the normal method of dispute resolution..." in the construction industry¹². It sketched out the substance of adjudication, immediately invocable, applicable to achieve cash flow and immediately enforceable if the respondent was recalcitrant. One of his paragraphs was prophetic:

⁹ See next footnote

¹⁰ *Gilbert-Ash* got a full hearing before the House of Lords, comprising Lords Reid, Morris of Borth-y-guest, Diplock and Salmon, and Viscount Dilhorne. Strictly speaking the case left *Dawnays* untouched, but there were extensive negative obiter observations about it. Indeed Lord Reid thought that it was correctly decided and Lord Morris took care not to express a view on it. The legal profession focused on the obiter and concluded that *Dawnays* no longer was good law.

¹¹ *Town & City Properties (Development) Limited v 1. Wiltshier Southern Limited and 2. Gilbert Powell (1988) 44 BLR 109*

¹² Item 26, Executive summary

If adjudication is introduced as the normal method of dispute resolution in construction, the courts will perhaps take account of the wishes of the industry to ensure that cash does flow speedily. [and if a losing party is recalcitrant about honouring the decision the successful party] should be able to approach the Official Referee immediately and obtain a judgment for payment under an expedited procedure.....the courts should have a role to support the adjudication system...."¹³

The Housing Grants, Construction and Regeneration Act and Bill

13. Remarkably, a lot of the Latham recommendations were taken up by the government and to a considerable extent implemented. Adjudication was tacked onto the Bill along with a scheme of fast track arbitration¹⁴. By this means it came before Parliament and was introduced into the House of Lords. The scheme for fast track arbitration was vigorously attacked in the House of Lords precisely because it was arbitration, even if fast track – and it was left to Lord Ackner to formulate clearly and succinctly the aim of the proposed procedure:

What I have always understood to be required by the adjudication process was a quick, enforceable interim decision which lasted until practical completion when, if not acceptable, it would be the subject matter of arbitration or litigation.

That was a highly satisfactory process. It came under the rubric of "pay now argue later", which was a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up the completion of important contracts¹⁵

¹³ See paragraph 9.13

¹⁴ It was following the Arbitration Bill through the system and see s. 108 (6) of the Act.

¹⁵ Hansard, 22 Apr 1996, Col 988-990

14. It is worth noting the characteristics as to the ambit of timing - a "...decision which lasted until practical completion¹⁶..." - and the cost - "...way of dealing expeditiously and relatively inexpensively with disputes....". It is indeed, at least so far as time and money is concerned, the procedure which one might have expected from an interim resolution of a certificate.
15. His formulation was warmly adopted by the peers¹⁷ who had been battling against the fast track arbitration procedure that the government had been intending to implement. Its formal manifestation was in the Scheme, which came into force on the 1 May 1998.

Macob

16. The next step was, as everybody knows, the dramatic decision in *Macob*¹⁸. It was this decision that gave adjudication its teeth. There was finally an effective mechanism whereby the construction industry could ensure a cash flow down the contractual chain. And since then both the industry and the Courts have embraced adjudication with an enthusiasm which must border on the unique as a partnership between law and commerce.

Where are things now?

17. It has become exceptionally difficult to resist the enforcement of an adjudicator's award, despite the fact that ambush is almost the name of the game in adjudication, and the well-known description of it as "quick and dirty" is in no sense an exaggeration. Is this what was intended by the House of Lords? Does it matter whether it was intended since the

¹⁶ As everyone knows one of the important aspects of the judicial interpretation of the requirements of the Act is the ability of a party to commence adjudication "at any time". This paper returns to this below, in particular at paragraph 83 and ff.

¹⁷ Labour, life and a construction background

¹⁸ *Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93*. It is to be noted that in *Macob*, the Claimant went by "the peremptory order by the adjudicator" route –see the Scheme at paragraph 24 and s. 42 of the Arbitration Act 1996 as modified. However the judgment cuts through this procedure with the observation that "Thus, s. 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." – see page 100, right hand column.

industry, at least on the contracting side, seems very happy with the procedure? After all the amendments of the Act that took place in 2009 in substance enlarged its range.

A Potpourri of cases

18. The cases which follow illustrate some of the problems that have been thrown up by the procedure.

Concurrent proceedings going forward simultaneously

19. Contrary to the normal rule, concurrent proceedings addressing the same dispute are acceptable. *Herschel Engineering Ltd v Breen Property Ltd*¹⁹. The procedural steps of this case are set out below at paragraph []²⁰. Proceedings ongoing in the High Wycombe County Court were overtaken by an adjudication. The Court proceedings were effectively trumped (temporarily) by the adjudication. Both parties of course were incurring costs in both sets of proceedings. The Courts recognise the possibility of two adjudications proceeding at the same time to resolve the same dispute – the effective award being that of the adjudicator who gets a decision out first, and provided there is no error of natural justice or jurisdiction that would invalidate it²¹. Effectively, as soon as one adjudicator issues a valid award, the other adjudicator loses jurisdiction.
20. Up until that point, it is to be presumed that both adjudicators had jurisdiction having acquired it when the respective referrals were received. It is presumably also theoretically possible to have three or more sets of concurrent proceedings relevant to the same contract, if not the same dispute – a Court hearing relevant to adjudication no. 1 and dispute no 1;

¹⁹ 2000 WL 491503, [2000] BLR 272

²⁰ See paragraph 27 infra

²¹ If the Respondent to the two adjudications proposes to challenge the decision of adjudicator A on the basis of breach of the rules of natural justice or lack of jurisdiction, it may want to encourage or discourage the second adjudicator to press on or not. If the respondent is successful in establishing that the first decision is flawed, the second one comes into its own. It is not a problem to find situations where there are two adjudications going forward simultaneously on the same dispute – see for instance *ISG v Seevic, cit. inf.* at paragraph 47 below.

two adjudications re dispute no 2²²; and an arbitration re both disputes and possibly others. Whatever this is it is not “relatively inexpensive” (but it certainly keeps the lawyers in work!).

21. This case is also one of the numerous “at any time” decisions that the Courts have handed down. The phrase appears in the Act²³ but not in the Scheme. It has been taken literally – there are cases of an adjudication being started five years after practical completion. The matter was discussed at Court of Appeal level in the case of *Connex South Eastern Limited v MJ Building Services Group plc* [2005] EWCA Civ 193.
22. The case had a number of issues which are not relevant to this paper. However, Connex sought to argue that it was an abuse of process for MJ Building to start adjudication proceedings on the 24 February 2004, some fifteen months after it had decided on the 29 November 2002 to treat Connex as having repudiated the contract between them. As part of this argument Connex argued that the phrase “at any time” cannot be read literally – for example, there could not be a reference to adjudication after the expiry of the relevant limitation period. There was no indication in the Act which favoured any particular intention on the part of Parliament as to how the phrase was to be interpreted and it should be interpreted restrictively. In the course of argument Connex made extensive reference to Hansard.
23. In giving the single judgment of the Court, Lord Justice Dyson addressed the point at a little length. It is an important passage²⁴:

Mr Ashton²⁵ made extensive reference to Hansard. I am very doubtful as to whether it is appropriate to refer to Hansard having regard to the principles stated in [Pepper v Hart \[1993\] AC 593, 634.](#)

²² The two disputes may be consecutive rather than concurrent – there is then a dispute about whether or not the two referrals are of the same dispute – see for example *Carillion Construction Ltd. v Smith* [2011] EWHC 2910 (TCC) *cit inf.*

²³ S 108 (2) (a) ..enable a party to give notice at any time of his intention to refer a dispute to adjudication...

²⁴ See paragraph 35 - 40

²⁵ For Connex

Nevertheless, it is of interest to note what was said in particular by Lord Lucas, the peer who took over responsibility for the bill from Earl Ferrers, the Minister of State for the Department of the Environment: the bill was introduced in the House of Lords. Lord Lucas said (p 362 on 22 April 1996)²⁶ that the words "at any time" were necessary since otherwise "it will be possible for a party bent on avoiding adjudication to insert a term which would allow notice to be given within an unreasonably narrow window, and we cannot allow that." He continued:

"I am of course aware that some have doubted the wisdom of allowing parties to refer a dispute to adjudication so long after work under the contract has ceased. However, as long as there is any possibility of disputes arising under a contract, parties will have to live with the fact that an adjudicator's decision may be sought. Indeed, there may be times, even at such a late stage, where it is desirable to have a quick and cheap procedure that can produce an effective temporary decision, particularly since this will not prevent parties from seeking a permanent decision through arbitration or the courts."

Mr Ashton submits that "Parliament was content for adjudication to take place after the cessation of work because this was seen in the context of a procedure which was (a) quick, (b) cheap and (c) a temporary decision. Once this quick, cheap and temporary decision had been taken, it could then be followed by a permanent decision via arbitration or the courts". But he argues that if, as a result of the passage time, it is no longer possible to have a quick, cheap and temporary adjudication, then it is an abuse of process to permit an adjudication to take place.

²⁶ This citation appears in various different forms in different reports. The text appears in Column 1344 on the 22 July 1996, on the return of the Bill to the House of Lords from the Commons for the Lords to consider the Commons' amendments (of which "at any time" was one).

I cannot accept these submissions. The phrase "at any time" means exactly what it says. It would have been possible to restrict the time within which an adjudication could be commenced, say, to a period by reference to the date when work was completed or the contract terminated. But this was not done. It is clear from Hansard that the question of the time for referring a dispute to adjudication was carefully considered, and that it was decided not to provide any time limit for the reasons given by Lord Lucas. Those reasons were entirely rational.

There is, therefore, no time limit. There may be circumstances as a result of which a party loses the right to refer a dispute to adjudication: the right may have been waived or the subject of an estoppel. But subject to considerations of this kind, there is nothing to prevent a party from referring a dispute to adjudication at any time, even after the expiry of the relevant limitation period.

Similarly, there is nothing to stop a party from issuing court proceedings after the expiry of the relevant limitation period. Just as a party who takes that course in court proceedings runs the risk that, if the limitation defence is pleaded, the claim will fail (and indeed may be struck out), so a party who takes that course in an adjudication runs the risk that, if the limitation defence is taken, the adjudicator will make an award in favour of the respondent.

*In the civil courts, the concept of "abuse of process" is well understood. It applies in a number of different contexts: see *Civil Procedure Volume 1*, para 3.4.3. But neither the Act nor the [Scheme for Construction Contracts \(England and Wales\) Regulations \(S1 1998/649\)](#) gives an adjudicator the power to strike out or stay an adjudication for abuse of process. Indeed, they contain no reference to "abuse of process". In my judgment, the only question is whether there is any limit on the time within which a party may refer a dispute to adjudication. The answer to that question depends on a proper interpretation of [section 108\(2\)](#) of the Act, and not on an application of the principles developed by the courts to control their own process so as to prevent abuse. In my judgment, there is nothing in the Act which indicates that the words*

"at any time" should be construed as bearing other than their literal and ordinary meaning.

24. His Lordship went on to recognise that the procedure as it operated was not perhaps what had been intended by the Government – he said “I can accept that Parliament intended adjudication to be quick and (relatively) cheap, although it may not have been entirely successful in bringing this about.” This latter point may be seen in the next case from the previous year.

Relatively inexpensive

25. In *CIB Properties Ltd v Birse Construction [2004] EWHC 2635 (TCC)*²⁷ His Honour Judge Toulmin observed

.... It is clear that Parliament has introduced an intervening stage in construction disputes which enables the parties to achieve a temporary solution in advance of the full process of litigation or arbitration.

8 The purpose of the litigation was described by Lord Ackner in the debate in the House of Lords (see Hansard HL Vol 571 cols 989–990):

"Adjudication is a highly satisfactory process. It comes under the rubric of 'pay now argue later' which is a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up completion of important contracts."

9 There is no doubt that the procedure is being used in disputes which are to be resolved long after the contract which is the subject matter of the dispute has come to an end. It has come to be used, as in this case, as a form of intense confrontational litigation²⁸

²⁷ This is the case that decided that it was up to the adjudicator to determine if he had enough time in which properly to determine the issue. If not then his option, if he cannot get appropriate agreements from the claimant/parties, is to resign. One fears that the well established syndrome of “optimism bias” may colour judgment in such a situation (and of course ANBs might not wish to appoint people who then resign, triggering the whole process again).

²⁸ Emphasis added

which can be very costly. I was told that CIB's costs of the two adjudications amounted to £973,732.41 and Birse's costs to £1,161,341.70, in each case excluding VAT. To this must be added the Adjudicator's costs in the two adjudications. The Adjudicator's costs in the second adjudication amounted to over £150,000. This could not be described as inexpensive.....

26. In *John Roberts Architects Ltd. v Parkcare Homes [2005] EWHC 1637* and *[2006] BLR 106 (CA)* a dispute arose out of a 2002 contract for architectural services. In 2004 Parkcare's parent company claimed some £1.3 millions for poor work and went on to refer the matter to adjudication. However, it was agreed that there was no dispute at that point, and the first adjudicator was invited by both parties to resign. Parkcare then served a fresh notice and a second adjudicator was appointed. However in due course Parkcare discontinued the adjudication. John Roberts sought its costs. The adjudication provision in the engagement was the CIC's Model Adjudication Procedure, which made provision for the adjudicator to award costs "as part of his award". The parties disagreed as to whether he could make an order of costs in favour of John Roberts when the adjudication had been discontinued. May LJ, holding that he could, observed

The Parliamentary intention in making adjudication obligatory for construction contracts was described by Dyson J (as he then was) in [Macob]. It was to provide a speedy mechanism for settling disputes under construction contracts on a provisional interim basis. The statutory provisions have in general been salutary. But it is common experience that the policy of the statute is sometimes not achieved – as when a large dispute unrelated to immediate cash flow and not suitable for speedy resolution is oppressively²⁹ squeezed into the short timetable required by the Act; or when what was intended to an inexpensive procedure generates very large costs. It is not suggested that the first of these applies to

²⁹ Emphasis added

Parkcare's reference to adjudication in the present case. But the reference certainly did generate very large costs³⁰.

Complication is acceptable

27. In *Herschel Engineering Ltd v Breen Property Ltd*³¹: The timetable in this case was as follows after Breen had refused to pay two invoices that were submitted for stage payments.
- a. 26 October 1999. -Herschel issued proceedings in the High Wycombe County Court seeking judgment for the amounts covered by the two invoices.
 - b. 8 December 1999 – Herschel obtained judgment in default of defence.
 - c. 7 January 2000 - Breen succeeded in having the judgment set aside and in obtaining unconditional leave to defend. However the proceedings were stayed for 28 days “for adjudication to be considered”.
 - d. 13 January 2000 - Herschel gave notice of intention to refer to adjudication the same issue – namely payment of the sums invoiced.
 - e. 14 January 2000 - Herschel lodged a notice of appeal against the setting aside of the judgment.
 - f. 18 January 2000 – TECSA nominated adjudicator no. 1.
 - g. 20 January 2000 – Breen disputed the right to go to adjudication once court proceedings were on-going.
 - h. 31 January 2000³² - adjudicator no 1 resigned having failed to reach an agreement on fees.
 - i. 2 February - Breen issued an application to injunct Herschel from proceeding with the adjudication³³.

³⁰ Given that, apart from the costs issue itself, neither adjudication had got beyond the appointment of the adjudicator, it is notable that John Roberts claimed £87,131.04 in costs and the adjudicator awarded it £14,643.44.

³¹ 2000 WL 491503, [2000] BLR 272

³² Or thereabouts

- j. 21 February 2000 – Herschel issued a fresh notice of intention to refer to adjudication.
 - k. 22 February 2000 - TECSA appointed adjudicator no. 2³⁴
 - l. 10 March 2000 – the adjudication award was published ordering Breen to pay the invoiced amounts of some £17,000³⁵.
 - m. 23 March 2000 – Herschel issued an application for summary judgment based on this award.
 - n. 10 April 2000 – Breen filed a defence referring to its “fully particularised” defence in the County Court, alleging vexation and harassment and seeking “protection” against “double vexation”.
 - o. 11 April 2000 – Herschel’s application for summary judgment comes on for hearing.
 - p. 14 April 2000 – judgment for Herschel.
28. In giving judgment for Herschel, the Court accepted that in general that to allow a claimant to maintain the same claim in two sets or proceedings against a respondent is “oppressive and unjust” to the respondent. However the decision of an adjudicator, being only of temporary effect, does not give rise to an estoppel. A final judgment of a court (subject only to appeal) or an award of an arbitrator does give rise to an estoppel. What is more “it is inherent in the adjudication scheme that a defendant will or may have to defend the same claim first in an adjudication, and later in court or in an arbitration. It is not self-evident that it is more oppressive for a party to be faced with both proceedings at the same time rather than sequentially³⁶. As for the risk of inconsistent findings of Fact, on any view this is inherent in the adjudication scheme. ..”.
29. However the Court went on to deal with unmeritorious situations which might occur, and which were posited by Breen to support its objections to concurrent proceedings. One such example was where a claimant sought

³³ This should have been heard on the 15 February but went off because of a lack of court time and never did get to a hearing.

³⁴ An all too rare example of appointing a woman – Miss Victoria Russell.

³⁵ Breen did not participate in the adjudication. Nonetheless it seems likely that one way or another each side’s costs at the end of the day would exceed the amount at stake.

³⁶ One would respectfully comment that concurrent proceedings may require a larger legal team than sequential proceedings.

a tactical advantage by utilising a long adjournment in the county court proceedings, perhaps following on negative comment on the its case by the county court judge, to make a pre-emptive dash for an award by way of adjudication. Contemplating that sort of situation, the Court had this to say:

As I said in the course of argument, if an extreme case of this sort were to occur and the claimant were to succeed before the adjudicator, the most likely outcome would be that the defendant would not comply with the adjudicator's decision. If the claimant then issued proceedings and sought summary judgment, the court would almost certainly exercise its discretion to stay execution of the judgment until a final decision was given in the county court proceedings.

30. While the judge regarded the example as "far-fetched", it does not seem to be particularly extreme when compared with some of the situations that have resulted in other adjudication cases.
31. Another case which illustrates the level of complication and pressure that can result from a contentious adjudication is *Eurocom Limited v Siemens plc [2014] EWHC 3710 (TCC³⁷)*, one of the last decisions of Ramsey J in the TCC. For present purposes it is sufficient to look at the steps in the relevant adjudication.
32. The judgment meticulously records the stages of the second adjudication³⁸ – Eurocom had initiated and lost the first one, which appears not to have endeared the adjudicator to it. The time period from claim to award was 21 October 2013 to 6 February 2014 – 108 days. The award was for £1,614,313.13³⁹ ; enforcement proceedings were started on the 25 July 2014, there was a hearing on the 12 September 2014; Eurocom's application for summary judgment was dismissed on the 15 September

³⁷ The work was the installation by Eurocom of communications systems at Charing Cross and Embankment underground stations. Clearly we are moving on from "Mind the Gap".

³⁸ Triggered by the third notice of referral

³⁹ Inclusive of £93,029.38 interest

2014 and a reasoned judgment was given on the 7 November 2014, just over 12 months after the claim was lodged. The steps were as follows:

- a. 2013
- b. 21 October – Eurocom issue claim document accompanied by 16 files of supporting documents requiring satisfaction of the claim in 28 days, in the absence of which an adjudication would be started.
- c. 18 November - Siemens re documents, a time scale and rejecting the claim.
- d. 21 November - Knowles (Eurocom agents) served notice of adjudication
- e. 21 November - the RICS emailed Knowles and Siemens acknowledging the application and confirming that a nomination would be made.
- f. 22 November - the RICS nominated Mr Anthony Bingham.
- g. 22 November - The referral was served by email and web link.
- h. 26 November - hard copies of the referral with 16 files of attached documents were served starting the 28 day period for the adjudicator's decision.
- i. ? Date - The adjudicator directed Siemens to respond by 5 December.
- j. 5 December - Siemens served its response by email
- k. 6 December – Siemens sent supporting documents in hard copy in the a.m.
- l. 9 December - Knowles requested leave to serve a reply by 13 December 2013 and agreed to give the adjudicator an additional day in which to make his decision, extending the date to 4 January 2014.
- m. 13 December - Knowles emailed its reply by posting it on a weblink.
- n. 17 December - Hard copies of the reply were served.
- o. 16 December - Siemens sought leave to serve a short rejoinder. The adjudicator responded the same day and gave Siemens leave to serve a rejoinder on 18 December 2013, with Eurocom having the last word on 21 December 2013. The time for the decision was then extended to 14 January 2014.

- p. 18 December - Siemens served its rejoinder.
- q. 20 December 2013 Knowles requested an extension to 23 December 2013 for service of its "last word" submission, and agreed to put back the decision date to 16 January 2014.
- r. The adjudicator responded, agreeing.
- s. Siemens responded saying that the 28 days could only be extended by the referring party unilaterally to 42 days and that any extension beyond the 42 days required the agreement of the responding party. Given the date of Eurocom's referral being 26 November, Siemens said that Eurocom could only unilaterally extend the date of decision to 10 January 2014 but that Siemens consented to extending the period for the decision to 14 January 2014. Siemens requested that Eurocom's final submissions should be served as originally directed on 21 December 2013.
- t. 23 December - Eurocom emailed the weblink from which Siemens could download Eurocom's final submissions, which was given the title "surrejoinder"⁴⁰.
- u. 24 December - Hardcopies of the surrejoinder were served in the a.m. accompanied by six lever arch files of documents. In the covering letter Knowles said that, to the extent that the surrejoinder referred to and exhibited additional material that had not been addressed by Siemens, Eurocom was prepared to agree a reasonable time in which Siemens could make comments.
- v. 24 December - Siemens objected to the documents by letter in which it said that Siemens was closed for business from that afternoon until 6 January 2014. Siemens indicated that it would require at least until 20 January 2014 to respond.
- w. 27 and 31 December - Correspondence was exchanged.
- x. 31 December - In an email from the adjudicator he confirmed that the decision date remained at 14 January 2014 provided that Siemens served its submissions by 5:00pm on Friday 3 January 2014.
- y. 2014

⁴⁰ It is a fair while since these turned up regularly in construction disputes

- z. 3 January - Siemens emailed its submissions.
- aa. 5 January - The adjudicator emailed Siemens with a question concerning the extension of time provisions in clauses SC2.5 and 2.3(a).
- bb. 6 January - Siemens responded to those questions and also a question raised by the adjudicator in his email of 31 December 2013 concerning the effect of the decision on extension of time in a previous Adjudication.
- cc. 7 January - Knowles sought leave to send a further short submission in response.
- dd. 9 January - The adjudicator posed questions concerning the variations account and, in particular, which of the "*incident numbers*" dealt with in the First Adjudication were binding.
- ee. 9 January - Knowles and Siemens responded to those queries.
- ff. The adjudicator asked for the time for his decision to be extended from 14 to 21 January 2014.
- gg. Knowles agreed on the same day and, after initially imposing conditions on such an extension, Siemens also agreed to extend time to 21 January 2014.
- hh. ? Date - Siemens also sought permission to serve submissions in response to the surrejoinder. The adjudicator gave permission.
- ii. 10 January - Siemens emailed those submission.
- jj. ? Date/s - The adjudicator sent further emails asking for comments on various points.
- kk. 11 January - The adjudicator requested Eurocom to provide some "*signposting*" in relation to various variations.
- ll. 14 January - Knowles responded to that request in some seven emails.
- mm. 16 January - Siemens objected to the responses provided by Knowles which it said included substantial further documentation. Siemens requested that the adjudicator should refuse to admit any new documents at that late stage.
- nn. ? Date - On the basis that the parties agreed to extend time to 28 January 2014 the adjudicator gave Siemens until 22 January 2014 to serve a response in relation to Eurocom's latest submissions.

- oo. 21 January - That extension was granted by the parties.
 - pp. 22 January - Siemens sent its response to Eurocom's submissions.
 - qq. 23 January - The adjudicator sent a list of questions which he was intending to answer in his decision, asking whether he had missed any issue.
 - rr. 24 January - The adjudicator raised queries as to the parties' case on the quantum of each variation for each "*incident number*".
 - ss. 24 and 25 January - The parties responded.
 - tt. 26 January - The adjudicator sent an email to the parties saying "*The position appears to be that the task of valuing Variations is that of Siemens see clause 6.2. Comment welcome.*"
 - uu. 27 January - The adjudicator emailed saying "*Does the adjudicator take the values advanced by [Eurocom] if [Siemens], in breach, has not valued at all when the adjudicator accepts that they are to be valued? Must press you for a comment since the Award is to be served tomorrow*".
 - vv. 27 January - Knowles responded to those points, as did Siemens, who said that the adjudicator's suggestion as to the effect of Clause 6.2 was not part of Eurocom's case in the adjudication. However, without prejudice to that submission, Siemens answered the query raised by the adjudicator. Knowles then responded to Siemens' submissions.
 - ww. 28 January - The adjudicator issued his decision which, as amended under the slip rule on 6 February 2014, decided that Eurocom was entitled to £1,521,313.75, together with £93,029.38 interest, making a total of £1,614,343.13.
33. 47 steps in 108 days for the adjudication – not quite one every two days. It would also be interesting to have the figures for costs on either side. Is this really a satisfactory procedure?
34. Finally, one may note that the task of determining whether a second adjudication has indeed addressed the same issue as the first one can be quite complicated. The judgment in *Carillion Construction Ltd v Smith*

[2011] EWHC 2190 (TCC)⁴¹ demonstrates that comparing two extensive loss and expense claims requires a detailed analysis of the papers and certainly is not a straightforward task.

Ambush and the "procedural niceties"⁴² of natural justice

35. One of the niceties of the process of adjudication is that the claimant can take as long as it likes to prepare the claim ("at any time") but the initial position of the respondent and the adjudicator is that there are only 28 days to resolve the matter. An adjudicator can effectively put some pressure on a claimant by threatening to resign if he or she is prepared to say that the time available is insufficient – but given that the adjudication is "rough and ready", "quick and dirty", etc, it seems to be the case that this is a relatively rare event.
36. A particular nicety when it comes to ambush is the (ab)use of Christmas. In *The Dorchester Hotel Limited v Vivid Interiors Limited* [2009 EWHC 70 (TCC)] Vivid provided its draft final account of some £4.9 millions gross at the end of March 2008, and made clear that there was further information to come. This latter arrived piecemeal in the period May to October. By the end of October the gross sum was down to £4.032 millions and the net was some £1.8 millions. Nothing much happened between the end of October and the service of the notice of intention on the 12 December 2008, followed by the referral notice on the 19 December. The notice was 92 pages long, and incorporated 37 lever arch files. An extension of the adjudicator's time to the 28 February 2009 was agreed – providing the very generous time, by the standards of adjudication, of some 72 days for the adjudicator to reach his award⁴³.

⁴¹ The judgment implicitly criticises the second adjudicator for continuing when the parties had agreed to suspend the adjudication. However the adjudicator is clear that it was not effectively communicated to him that there was an agreement as to suspension.

⁴² Quoted in *Dorchester Hotel v Vivid cit inf*, from H H Judge Lloyd in *Balfour Beatty Construction Limited v The London Borough of Lambeth* [2002] EWHC 597 (TCC).

⁴³ It should be noted that this case is not the best example of the Christmas ambush because the adjudicator said that he would not take the case unless the Xmas period was excluded – but it does show the problem as the quotation from the judgment makes quite clear.

37. The Dorchester complained that, in effect, it would have only 18 working days for its defence, which, it was proposed, should be served by the 28 January 2009. The Dorchester went to court on the basis that the time periods were insufficient and that “there was a very real risk of there being a breach of natural justice”⁴⁴.

38. In dealing with natural justice the Court said this⁴⁵:

But these and other authorities have stressed that there are obvious limits on the application of these rules to the adjudication process. As HHJ Bowsher QC pointed out in Discaim , “The adjudicator is working under pressure of time and circumstance which make it extremely difficult to comply with the rules of natural justice in the manner of a court or arbitrator.” Or, as HHJ Lloyd QC put it in Balfour Beatty Construction Ltd v London Borough of Lambeth [2002] EWHC 597 (TCC), the purpose of adjudication is not to be thwarted “by an overly sensitive concern for procedural niceties”.

20 Accordingly, a Court has to approach an alleged breach of the rules of natural justice in an adjudication with a certain amount of scepticism. The concepts of natural justice which are so familiar to lawyers are not always easy to reconcile with the swift and summary nature of the adjudication process; and in the event of a clash between the two, the starting point must be to give priority to the rough and ready adjudication process. It seems to me that such an approach is even more necessary in circumstances where, as here, it may be said that the breaches of natural justice have not yet occurred and, depending on what happens, may never in fact arise⁴⁶.

39. A reference to “an overly sensitive concern for procedural niceties” when one is dealing with the rules of natural justice is an interesting

⁴⁴ Paragraph 1 of the judgment

⁴⁵ See paragraphs 19-20

⁴⁶ Emphasis added

proposition. And the “the pressure of time and circumstance” are in large part at least the result of the “oppressive” squeeze that Lord Justice May noted. Had adjudication stuck to the ambit of the defective certificate, then these adjustments to the normal rights to be expected in dispute resolution in systems with advanced legal rules might not be so necessary if necessary at all.

40. The Court had no doubt about the ambush nature of Vivid’s notice of intention:

I have concluded that the Defendant commenced these adjudication proceedings at a time (the last day before the Christmas vacation) and in a manner (a Referral Notice bringing with it 37 lever arch files including important new material never seen before) in order to obtain the greatest possible advantage from the summary adjudication procedure. Such conduct is not uncommon. It is a matter of regret that the adjudication process, which was itself introduced as a method of dispute resolution which would avoid unnecessary legal disputes and procedural shenanigans, is now regularly exploited in the same way. I am confident that the enthusiasts for adjudication in and out of Parliament in 1996 did not envisage that the system would be used for the making of a claim of this type and in these circumstances.⁴⁷

41. The judgment went on to observe that the Courts have long accepted that the Act “permits such claims to be made”.
42. In the event the Court refused the Dorchester’s application on a number of grounds. They included the adjudicator’s view that he believed he could determine the matter fairly; and that, if it all went wrong, the Dorchester would still have remedies. Given the difficulty of resisting an adjudicator’s award the latter reason is likely to be cold comfort to the party in the Dorchester’s position.

⁴⁷ Emphasis added

The Tactical Battle and Scooping the Pool

43. Galliford Try⁴⁸ in its various manifestations figures in a number of the cases about adjudication. A recent one was *Galliford Try Building Ltd. v Estura Ltd [2015] EWHC 412 (TCC)*.
44. A JCT Design and Build contract was in the sum of some £8 millions and provided in the usual way for progressive applications for payment. To avoid paying the application sum in full Estura had to serve a payment notice. It could also set off against any due payment any cross claim it might have if it served a pay less notice. Service in either case had to be within a limited time. The starting point of this case was that neither notice was in fact served by Estura. When the application sum was not paid Galliford obtained an adjudication award and was prima facie entitled to summary judgment. So far, so straightforward.
45. The Galliford application in question was very near the end of the contract and was called an "Indicative Final Account and Valuation Summary". It put the value of the project at some £12.7 millions. The difference between this figure and the sums previously paid was some £4 millions. Given the absence of any cross notices and the fact that the way that Estura had run its defence – limiting it to the basic assertion that what Galliford was entitled to was only some £147,000 + VAT – it was clear that the adjudicator was entitled to reject the Estura defence and award Galliford £3.9 millions plus. And equally it is clear on the authorities that therefore Galliford appeared to be entitled to summary judgment.
46. Estura however argued that this was not a case for summary judgment. Underlying Estura's unhappiness was the fact that if this sum was paid, Galliford would have "recovered almost everything that it was hoping to recover and so, submits Estura, it has no incentive whatever to submit its

⁴⁸ For those looking for interesting investments, it is rumoured that they may float later this year.

final account so that the sum that is properly due can be challenged and reassessed....”⁴⁹.

47. Effectively, in substantial part, the case involved re-visiting *ISG Construction Ltd. v Seevic College [2014] EWHC 4007 (TCC)*⁵⁰, published on the 3 December 2014. This is another case where the contract was the JCT Design and Build form (2011). In *ISG*, Seevic also had not served the appropriate notices in response to an application dated the 11 May 2014 and was therefore facing a more or less inevitable adjudication award and summary judgment.
48. In the first adjudication, in the absence of any cross notices, the adjudicator awarded the sum applied for – namely £1,097,696.29. That decision was published on the 5 September 2014. In the meantime, Seevic, recognising the parlous situation in which it found itself, had started another adjudication, asking for a valuation of ISG’s work as at the 13 May 2014⁵¹. In an award dated the 10 October 2014, the adjudicator concluded that the value of ISG’s works as at the date of the application was in fact £315,450.47. On the (erroneous) assumption that his first award had been honoured he reached the conclusion that ISG should repay the difference of £768,525.36. In court, ISG sought judgment for the first award and a declaration that the second award was unenforceable since the adjudicator had decided the same dispute, namely as to the entitlement of ISG as at the 11 May 2014, but had not had jurisdiction to do so. Seevic for its part accepted that it had to honour the first award but sought judgment in its favour in accordance with the second award.
49. The Court gave judgment for ISG in the full amount of the unchallenged application – holding that the value of the work at the date of the

⁴⁹ See paragraph 8

⁵⁰ Leave to appeal has been given in some of these cases but does not yet appear to have been followed through.

⁵¹ Although this was two days later than the date of the application, it was clear that for practical purposes, Seevic was focusing on the same date as the application; but in any event, according to the judgment, it would have made any difference to the outcome if it had been focused on a different date.

application was a single dispute in both adjudications and having been decided by the first adjudication award, the adjudicator had no jurisdiction to make the second award⁵². The Court went on to hold that “under this form of contract the employer [Seevic] has no right to demand a valuation of the contractor’s work on any date other than the valuation dates for interim applications specified in the contract. Seevic had no contractual entitlement to such a valuation, still less to any financial award as a consequence of it.”⁵³

50. In holding as it did, the Court provided the following statement of the effect of the adjudication regime.

The statutory regime would be completely undermined if an employer, having failed to issue the necessary payment or pay less notice, could refer to adjudication the question of the value of the contractor's work at the time of the interim application (or some later date) and then seek a decision requiring either a payment to the contractor or a repayment by the contractor based on the difference between the value of the work as determined by the adjudicator and the sums already paid under the contract.

48 If this were permissible, any such decision by an adjudicator would trump the contractor's interim application because the contractor would then be entitled to an amount representing the value of the work properly executed, as determined by the adjudicator, less the sums already paid. Of course, the amount determined by the adjudicator could be more than the amount claimed by the contractor in his last interim application, but in the nature of things this will not often be the case..⁵⁴.....Accordingly, if either the contractor or the employer asserts that the contractor’s right to payment at any particular time in the contract is a sum equal to the value of the work properly executed up to that time, less any sums already paid, that in my view would be to assert an

⁵² In this conclusion the Court was following the decision of H H Judge Lloyd Q.C. in *Watkin Jones & Son Ltd v Lidl UK GmbH* [2002] EWHC 183 (TCC)

⁵³ See paragraph 45

⁵⁴ See paragraphs 47-48, emphasis added

*entitlement that does not arise under the contract. In fact it does not arise at all*⁵⁵

51. The position of the Courts therefore is that there are cases where it is contrary to the object of the legislation and of adjudication for the contractor to be paid the value of the work properly carried out as evaluated by a competent neutral. It follows – and is recognised in the judgments – that with this sort of contract a party that has failed to serve a key notice should consider whether to start an adjudication immediately as to the proper value of the work as at the application date with the aim of getting its award first – and thus pre-empting any adjudication that the other party may be pursuing to enforce the application. Whether this manoeuvre will work remains to be seen.
52. Back to *Galliford Try v Estura* where the Court adopted the same approach as in *ISG v Seevic*. In Estura’s adjudication – the second one – Estura contended that the gross valuation in the Galliford application should have been £9.9 millions approximately. The argument was wide ranging and the judgment reflects this. It reviewed the whole course of the process that led to adjudication and the course of the adjudications once in place. It emphasised that the aim was to get the contractor its payment on time and that events that prevented this were frustrating the purpose of the Act. In the process of setting this out the Court said this:

It is now established that parties must comply with the decisions of adjudicators in the order in which they are made, even if an earlier decision is overtaken by a later decision (see Interserve Industrial Services Ltd v Cleveland Bridge [2006] EWHC 741 (TCC), per Jackson J). So, in the examples that I have given, the right of the successful party in the first adjudication to enforce the first decision would be overtaken by its obligation to comply with the second decision. In other words, assuming that the adjudicator in the second decision valued the work in an amount lower than the sum

⁵⁵ See paragraph 53

claimed in the application that was the subject of the first adjudication, the claimant would be entitled only to interest on the difference between the two sums between the date for payment ordered by the first adjudicator and the date of the second decision.

47 The effect of this tactic is that the successful party in the first adjudication is effectively kept out of his money between the contractual date for payment following the interim application and the adjudicator's decision in the second adjudication – thus defeating the very purpose that the Act was intended to achieve.

48 A further potential anomaly is presented by the application of the principle in the Interserve case, in that the rights of the parties may be determined differently, albeit on a provisional basis only, depending on the order in which the adjudications take place: see ISG v Seevic , at [49]-[51].⁵⁶

53. In the event the Court gave summary judgment for the full amount of Galliford's award of some £3.9 millions but stayed enforcement of some £2 millions, subject to various conditions.

Influencing the choice of tribunal and forum shopping.

54. It is now more or less common practice for a claimant to provide the ANB with a list of likes and dislikes. Given the time pressures on the ANB there is going to be little time to debate the issue and the simplest solution is to pick a like. There is even less opportunity for the Respondent to inject its two penn'orth into the discussion. The path by which one reaches this otherwise surprising situation seems eminently logical – the individual judgments are very persuasive.
55. In *Connex South Eastern Ltd. v MJ Building Services plc*⁵⁷ the Court of Appeal was invited to consider an "abuse of process" argument in the context of a complaint that the adjudication had been started some 18 months after termination. Given the "at any time" rule, this objection

⁵⁶ See paragraph 46-47

⁵⁷ *Cit sup* - see discussion above at paragraph 21 and ff

founded; but the Court went on to observe that "... neither the [Housing Grants] Act nor the Scheme Construction Contracts..... gives an adjudicator the power to strike out or stay an adjudication for abuse of process. Indeed, they contain no reference to "abuse of process". In my judgment, the only question is whether there is any limit on the time within which a party may refer a dispute to adjudication⁵⁸".

56. Then there was the series of battles between the parties involved in the construction of the toll road designed to ease traffic through Birmingham on the M6. On the one hand there was the consortium⁵⁹ building it and on the other was the concessionaire, with the government standing behind it and joining in or not, as the case might be, in one or other of the various disputes that arose. Three of the disputes got to the TCC and one of them got to the Court of Appeal. The battles that reached the courts were largely concerned with the junctions with the M6 – the connecting roads being referred to by the colourful and memorable name of "Tigers' Tails".
57. In the third one that reached the TCC – *Midland Expressway Ltd. and Another*⁶⁰ v *Carillion Construction Ltd. No. 3*⁶¹ one of the issues was whether CAMBRA⁶² - the contractor - could withdraw a claim from an existing adjudication. In holding that it could the court said this:

....In litigation, the right of a party to discontinue its claim or certain heads of claim is enshrined in and regulated by the Civil Procedures Rules. Adjudication, however, is a very different process from litigation. Every construction contract contains, either expressly or by statutory implication, a series of adjudication provisions which comply with [the Act]. [The Act] says nothing about the entitlement of a party to withdraw or not to withdraw a claim which has been advanced in adjudication.

⁵⁸ See paragraph 40

⁵⁹ Carillion was the lead contractor. The acronym for the consortium was CAMBRA

⁶⁰ The government was the second claimant

⁶¹ [2006] EWHC 1505

⁶² See footnote [58] above

*Having considered the competing submissions of counsel, I have come to the conclusion that it is impossible to read into either [the Act] or the Scheme any restriction prohibiting a party from withdrawing a disputed claim which has been referred to adjudication*⁶³

58. The court went on to give four reasons for this conclusion. As indicated in the quotation, there was nothing in the Act or scheme to suggest that any such restriction was intended. Next, given the informal nature of the process producing an interim resolution of disputes, it would be contrary to the statutory purpose to prohibit withdrawal. Otherwise parties would be forced to press on with bad claims – a “bizarre consequence”. Finally, the obiter on discontinuance in *John Roberts v Parkcare*⁶⁴ was relied on.
59. Of course, adjudication is also different from litigation in that if a party attempted to restart a claim that it had previously discontinued, that would likely give rise to a complaint about abuse of process and ultimately to an application to strike out. Given the “at any time” rule, it is difficult to see what complaint could be made about a party that withdraws a claim from an adjudication and then restarts it in a new adjudication before the same or a different adjudicator.
60. In *Makers (UK) Ltd. v London Borough of Camden*⁶⁵, the claimant considered that an adjudicator with specific qualifications would be suitable for the resolution of the dispute. It identified such a person and suggested to the RIBA that he be appointed – he was appointed. It was only after this point that the respondent learnt about the prior investigation and the request to the ANB. An eminently sensible judgment rejection the respondent’s complaint concluded with some very practical suggestions as to the future – one could summarise the judgment as amounting to “no harm done, but do better in future”.

⁶³ See paragraphs 100-101

⁶⁴ *Cit sup* – and see paragraph 26 above

⁶⁵ [2008] EWHC 1836 (TCC)

61. The next example of this aspect of adjudication is *Lanes Group plc v Galliford Try Infrastructure Limited t/a Galliford Try Rail*⁶⁶. This is a case with a considerable degree of complication comprising two judgments at first instance and a judgment in the Court of Appeal. In sum Galliford, having issued a notice to refer to adjudication, did not like the look of the adjudicator that the ANB (the ICE) had appointed and so let that adjudication lapse and issued a fresh notice for the same claim. A different adjudicator was appointed for the second adjudication and this time Galliford pressed on with the adjudication. The second adjudicator duly determined the matter and made an award in favour of Galliford. Lanes complained about this method of getting a preferred forum. For present purposes it is only necessary to look at brief extracts from the judgment of the Court of Appeal, which endorsed Galliford's approach.
62. The Court said this⁶⁷:

..... The court was initially attracted by [Lanes'] submission. The proposition that a claimant can allow an adjudication to lapse because it disapproves of the appointed adjudicator and then start a fresh adjudication before a different adjudicator is not an appealing one. ... [but] there are formidable difficulties in the case which Lanes advances.....it is possible to think of many situations, not all of which are provided for by express terms, in which the adjudication procedure would be thwarted if there were no right to re-start an abortive adjudication....Adjudication is an unusual procedure, distinct from arbitration and sui generis. The service of an adjudication notice and the subsequent appointment of an adjudicator do not start time running or clothe the adjudicator with jurisdiction. The adjudicator has no powers until there has been a subsequent referral..... Furthermore, ... the right of a claimant to drop one head of claim and to reserve it for later adjudication was recognised in [Midland Expressway]. the court raised the question whether Galliford's conduct could be characterised as

⁶⁶ [2011] EWCA Civ 1617

⁶⁷ See paragraphs 37-43

abuse of process. [Galliford] pointed out, however that abuse of process has no place in adjudication: see the reasoning of Dyson LJ in [Connex South Eastern] Forum shopping is never attractive.... [Galliford's] submissions have persuaded me, however, that Galliford's conduct was permissible under the contract and the second adjudicator did indeed have jurisdiction.....

63. In the light of the above decisions, it is clear that a considerable degree of room for manoeuvre exists that might be utilised by a claimant to ensure that it gets the adjudicator of its choice. However, two recent cases have provided pointers to where the limits might be. The first of these is *Eurocom Ltd. v Siemens plc*⁶⁸ where it was argued that Eurocom had have stepped over the line in seeking its preferred adjudicator,
64. In *Eurocom* the ANB was the RICS. It has (or had at time of this case) a standard document for those seeking an appointment. It contains the question "Are there any adjudicators who would have a conflict of interest in this case." This part of the form is commented upon by the RICS explanatory note as follows:

If it is known that specific adjudicators would be unable to act because of a conflict of interest, please give details here. Please note: the form will automatically be copied to the responding party. Where time permits, we will allow 24 hours for a response to be made before making a nomination. RICS reserves the right to copy any correspondence to the adjudicator and to the other party.

65. In this case the RICS did not copy the application form to Siemens.
66. Eurocom had retained consultants to advise it on this case and an member of the consultants filled in the box as follows:

We would advise that the following should not be appointed:

⁶⁸ [2014] EWHC 3710 (TCC)

Mr Leslie Dight and Mr. Nigel Dight of Dight and partners; Mr. Siamak Soudagar of Soudagar associates; Rob Tate regarding his fees — giving rise to apparent bias; Peter Barns for dispute of a minimum fees charge and apparent bias; Additionally Keith Rawson, Mark Pontin, J R Smalley, Jamie Williams, Colin Little, Christopher Ennis and Richard Silver, Mathew Molloy who has acted previously or anyone connected with Fenwick Elliott solicitors who have advised the Referring Party.”

67. In the event on the 22 November 2013, the RICS nominated a very well known adjudicator to determine the case, the referral was served the same day and the parties commenced on the 47 step 108 day adjudication already noted⁶⁹.
68. It was not only on the adjudication front proper that exchanges were going forward. What proved to be an important step was taken by Siemens on the 29 November 2013, when it sought from the RICS copies of all communications from and on behalf of Eurocom including in particular the written request of the 21 November 2013. Remarkably the RICS through its case officer asserted that it was “unable” to provide copies of documentation received, and suggested that Siemens should apply to Eurocom for them. Pressed by Siemens, the team manager reached a different conclusion. Siemens then sought an explanation from Eurocom “of the conflicts of interest alleged against “ the named individuals and also raised the question of the existence of a conflict with each of those individuals. Their answers, uniformly denying any such conflict, were sent to Eurocom (through its agents) and to the RICS. The judgment records that no response was received from the agents – it is not clear what if anything came back from the RICS.
69. At the end of May 2014, Eurocom threatened enforcement. Siemens made clear that any such application would be resisted on, among a number of grounds, the issue of the nomination process. At the end of

⁶⁹ See above at paragraph 32

July Eurocom did indeed commence proceedings for enforcement. Directions three days after the proceedings were commenced included an order for details of the conflicts identified in the application. There was a hearing on the 12 September 2014; Eurocom's application was dismissed on the 15 September 2014 and a reasoned judgment was handed down in November 2014.

70. The opposition to Eurocom's application for summary judgment for the amount of the adjudicator's award was supported by the usual suspects – namely that the issues had already been adjudicated; that the adjudicator's procedure had contravened the rules of natural justice; and whether, anyway, there should be a stay of enforcement of any sums summarily adjudged due to Eurocom. However, for present purposes, the line of resistance of interest was the attack on the method by which the ANB had reached its decision as to appointment and the influence that Eurocom had had upon it. This discussion does not look at the supplementary, ancillary and alternative arguments put forward by the parties.
71. The Siemens complaint was that the way that the "conflicts" box on the RICS application form had been filled in was a misrepresentation to the RICS that the named individuals had a conflict which rendered them unsuitable to adjudicate the matter. In fact all or nearly all were conflict free.
72. The point was summarised in this way:

[Siemens] submits that a false statement was made deliberately and/or recklessly by [Eurocom's agent in filling in the box] and that a nomination based upon such a misrepresentation is invalid and a nullity so as to go to the foundation of the adjudicator's jurisdiction.⁷⁰

⁷⁰ See paragraph 45

73. Alternatively and based upon obiter in *Makers*⁷¹, it was an implied term of the subcontract between Siemens and Eurocom “that a party seeking a nomination should not subvert the integrity of the nomination process by knowingly or recklessly making false representations to the adjudicator nominating body or so as improperly to limit or fetter the ability of the nominating body to [choose] an adjudicator”⁷².
74. Eurocom argued that a reasonable short cut had been taken and that Siemens was reading much too much into the use of the box to identify adjudicators that Eurocom did not want appointed. There was nothing wrong with preferring one adjudicator to another; and Eurocom could simply have asked for a nomination; refrained from serving a referral if it did not like the appointee; and issued a fresh notice of adjudication⁷³. Since this was a time consuming and expensive process, Eurocom had simply listed parties whom Eurocom did not want appointed – the endorsement in the box said in terms that “we would advise that the following should not be appointed”. There is no implied term preventing parties making representations as to who might be appointed – Siemens could have made their own representations. And in any event, there was no complaint about the adjudicator actually appointed.
75. The judge was not persuaded and held that there was a prima facie case of fraudulent misrepresentation and refused to enforce the adjudication award summarily⁷⁴.
76. If one rejects as irrelevant on the evidence the proposition that one should not assume fraud if incompetence or negligence is an adequate explanation - i.e. through thoughtlessness the names should have been put below the box or in an accompanying letter – then this decision is obviously right. Fraud unravels all. What however is interesting, it is

⁷¹ *Cit Sup*

⁷² See paragraph 47

⁷³ An approach sanctioned in *Lanes Group PLC v Galliford Try [2011] EWCA Civ 1617*, both at first instance and in the Court of Appeal.

⁷⁴ The application by Eurocom for summary judgment and enforcement of its award failed. The evidence was on affidavit and there was of course no cross examination. Accordingly the Court only reached a prima facie conclusion that there had been fraudulent misrepresentation.

respectfully suggested, is that the substance of the Eurocom argument is, on the current authorities, quite correct. Where the agents had “stepped over the line” was in linking their objections to an alleged conflict. In a sense the matter was indeed just over the physical line – if the names had been listed outside the conflicts box it is difficult to see how an objection could have been successfully mounted. Although on a prima facie basis, in a summary procedure, the course followed was objectionable, there seems to be little to stop claimants seeking strongly to influence the decisions of ANBs in slightly more careful ways.

A Strong negotiating position

77. Makers UK Ltd and the London Borough of Camden had a second trip to court. The first one has already been noted at paragraph 60 above. In that case, where the issue of how the adjudicator came to be chosen was debated, Makers had maintained its award by which it had been declared that Camden had been in repudiatory breach in determining Makers’ employment. The award had not addressed quantum. The decision of the Court in that case was handed down on the 25 July 2008.
78. The timetable of events in the case was that Camden had given a default notice on the 3 July 2007 followed by a determination notice on the 27 July 2007. The reference to adjudication of the validity of the determination had been in January 2008 and the award had been in March 2008.
79. Camden was concerned about Makers’ solvency and feared that it would follow up its success in the first adjudication with a further adjudication seeking to recover damages. If successful in that exercise, it would then seek summary judgment and enforcement and thereafter repay debts principally to its parent and go into liquidation, leaving no opportunity for Camden to recover the monies paid or the six figure sum of adjudication costs if Camden was able in the litigation to establish that it had in fact properly determined the contract. Camden commenced litigation to establish that it was justified in its termination and to seek judgment in its

favour in a seven figure sum. It obtained judgment in default of defence but accepted that there was a properly arguable defence when Makers sought to set aside the judgment. However it sought conditions to be imposed upon Makers as part of the order for setting aside.

80. On the evidence Makers was insolvent and dependent on the support of its parent; and that that financial weakness was not wholly due to Camden – even if Makers recovered the full £4 millions it was claiming, that would not resolve its problems since it had had been losing money for some time, it had a trading loss of some £8 millions and it had a capital liability of over £10 millions.
81. In the event the Court set aside the judgment without conditions; but made clear that in the light of the financial position as evidenced it was likely that there would be a stay of execution of any summary judgment following an award by an adjudicator⁷⁵. However the fact that that this would not address the substantial costs of fighting the various steps in the process and would take up unrecoverable staff time to a considerable degree. This puts a party such as Makers in a strong position to negotiate a settlement. Whether this is regarded as reprehensible (no doubt Camden’s view) or admirable in producing a settlement (presumably Makers’) it is an unquestioned consequence of the adjudication procedure.

Time for a Change

82. Adjudication has been a successful and popular mechanism in the construction industry and is widely seen as resolving a long standing ill. It was intended to be “a quick enforceable interim decision which lasted until practical completion” and in a very large number of cases it is just that. Effectively it provides the sort of remedy for an immediate determination of an issue arising out of an interim certificate that was to be found in the standard forms but which was never effectively implemented.

⁷⁵ And see *Bouygues (UK) Limited v Dahl-Jensen (UK) Limited* [2000] BLR 522 on staying enforcement where the potential recipient will not be able to repay and also for the impact of the Insolvency Rules.

83. The “at any time” provision took matters much wider and, it is suggested is a large part of the reason for cases which have given rise to concern on the part of the courts. The introduction of this term arose in the Commons and was confirmed in the Lords. At the time it was objected to by Lord Howie of Troon⁷⁶ (who had had a large hand in the formulation of the terms of the Bill at all stages in the Lords). He had expressed concern on behalf of some sections of the industry that the amendment might apply “long after the project had been completed”⁷⁷. His amendment, not perhaps very happily drafted, was opposed by Viscount Ullswater⁷⁸, who referred to Latham as having put forward

the three basic principles which this section of the Bill follows: first, that there should be no restriction on the issues capable of being referred to the adjudicator, conciliator or mediator, either in the main contract or in sub-contract documentation; secondly, that the award of the adjudicators should be implemented immediately; and, thirdly, that any appeals to arbitration or the courts should be after practical completion and should not be permitted to delay the implementation of awards. I believe that the Government have interpreted those principles in the words of [the section].

84. Lord Lucas⁷⁹ for the government then observed

I am of course aware that some have doubted the wisdom of allowing parties to refer a dispute to adjudication long after work under the contract has ceased. However, as long as there is any possibility of disputes arising under a contract, parties will have to live with the fact that an adjudicator's decision may be sought. Indeed there may be times, even at such a late stage, where it is desirable to have a quick and cheap procedure that can produce an effective temporary decision, particularly since this will not prevent

⁷⁶ A Labour life peer with a civil engineering background.

⁷⁷ This quotation and the quotations from the Lords debate which follow below all come from Hansard for the 23 July 1996, Cols 1343-44. The emphases are added.

⁷⁸ A Conservative hereditary peer and ex Minister under Mrs Thatcher and Mr. Major.

⁷⁹ A Conservative hereditary peer with a background in accountancy.

parties from seeking a permanent decision through arbitration or the courts.

As long as there is a possibility of a dispute arising under a contract, the right to seek adjudication will remain. There is no evidence that this will cause any particular difficulties in practice and on balance we feel that it is likely to be helpful. We should, of course, always be prepared to look again at the legislative framework if persistent problems emerged⁸⁰.

85. In the light of the assurances, Lord Howie withdrew his amendment and the matter was not in fact addressed when the Act was reviewed and amended by the Local Democracy, Economic Development and Construction Act 2009.
86. Accordingly the “at any time” provision stands. Nonetheless there are aspects which have caused Courts and observers concern in the way that many of the safeguards of normal dispute resolution have been set aside; and even where no specific concern has been expressed there are aspects to the process which do not make for a satisfactory dispute resolution process even on a temporary basis. The few cases set out above give the following examples:
- a. Parliament “may not have been entirely successful” in making adjudication “quick and (relatively) cheap”⁸¹.
 - b. “[Adjudication] has come to be used, as in this case, as a form of intense confrontational litigation which can be very costly”⁸².
 - c. “... it is common experience that the policy of the statute is sometimes not achieved – as when a large dispute unrelated to immediate cash flow and not suitable for speedy resolution is oppressively squeezed into the short timetable required by the Act;

⁸⁰ It is interesting that the underlined passages are wholly in tune with Lord Ackner while the amendment that they support is arguably the one that has had most to do with cases that do not fit within his definition and give rise to adverse judicial comment.

⁸¹ *Connex v MJ Builders cit sup* – see paragraph 25 above

⁸² *CIB Properties v Birse, cit sup* – see paragraph 26 above

- or when what was intended to be an inexpensive procedure generates very large costs⁸³.
- d. The procedure as exemplified in *Herschel v Breen*⁸⁴ and *Eurocom v Siemens*⁸⁵ illustrate the observations in *John Roberts* – with the latter case including the Christmas factor.
 - e. “[The purpose of adjudication is not to be thwarted “by an overly sensitive concern for procedural niceties”⁸⁶.
 - f. “...a Court has to approach an alleged breach of the rules of natural justice in an adjudication with a certain amount of scepticism”⁸⁷
 - g. In the event of a clash between the “...concepts of natural justice ... and ... the swift and summary nature of the adjudication process.... the starting point must be to give priority to the rough and ready adjudication process”⁸⁸
 - h. “I have concluded that the Defendant commenced these adjudication proceedings at a time and in a manner in order to obtain the greatest possible advantage from the summary adjudication procedure It is a matter of regret that the adjudication process, which was itself introduced as a method of dispute resolution which would avoid unnecessary legal disputes and procedural shenanigans, is now regularly exploited in the same way. I am confident that the enthusiasts for adjudication in and out of Parliament in 1996 did not envisage that the system would be used for the making of a claim of this type and in these circumstances” – ⁸⁹
 - i. “The statutory regime would be completely undermined if an employer, having failed to issue the necessary payment or pay less notice, could refer to adjudication the question of the value of the contractor’s work at the time of interim application [since] any such decision by an adjudicator would trump the contractor’s

⁸³ *John Roberts v Parkcare, cit sup* – see paragraph 27 above

⁸⁴ *Cit sup* – see paragraph 28

⁸⁵ *Cit sup* – see paragraphs 29-20

⁸⁶ *Balfour Beatty v Lambeth, cit sup* – see paragraph 35 above

⁸⁷ *The Dorchester v Vivid Interiors, cit sup* – see paragraph 33

⁸⁸ Ditto

⁸⁹ Ditto

interim application because the contractor would then be entitled to an amount representing the value of the work properly executed, and determined by the adjudicator, less the sums already paid”⁹⁰.

- j. “.……Accordingly, if either the contractor or the employer asserts that the contractor’s right to payment at any particular time in the contract is a sum equal to the value of the work properly executed up to that time, less any sums already paid, that in my view would be to assert an entitlement that does not arise under the contract. In fact it does not arise at all”⁹¹
- k. “The proposition that a claimant can allow an adjudication to lapse because it disapproves of the appointed adjudicator and then start a fresh adjudication before a different adjudicator is not an appealing one ….forum shopping is never attractive …[but the Claimant’s] conduct was permissible under the contract and the second adjudicator did indeed have jurisdiction”⁹².
- l. “A further potential anomaly is presented by the application of the principle in the Interserve case, in that the rights of the parties may be determined differently, albeit on a provisional basis only, depending on the order in which the adjudications take place”⁹³.

87. Given the aspects in which traditional safeguards have been eroded as the courts and observers have recognised, it has been a little difficult to understand why the Courts have continued so enthusiastically to give their fiat of approval by way of summary judgment and enforcement even where strong disapproval has been expressed.

88. However the tide may be turning. The Court in *Eurocom* refused judgment; and in *Galliford v Estura* while judgment was granted in the full sum, enforcement was limited and subject to conditions. In a case not mentioned above, namely *Paice v Harding (t/a MJ Harding Contractors)* [2015] EWHC 661 (TCC), a case that had seen a number of a adjudications and had been to court a number of times, the Court refused

⁹⁰ *ISG v Seevic, cit sup* – see paragraph 44

⁹¹ Ditto

⁹² *Lanes v Galliford, cit sup* – see paragraph 58 above – not the quote has excised a large part of the text.

⁹³ *Galliford v Estura, cit sup*

judgment where there had been a long conversation between one of the parties and the adjudicator's office two months before the particular adjudication that had led to the award that was sought to be enforced⁹⁴.

89. It is respectfully suggested that where the Court is apprised of the sort of events which have been criticised by Courts before in the sort of terms noted above, it should consider carefully whether it is appropriate to give judgment and if appropriate to give judgment whether it remains appropriate to enforce it in whole or in part. While it is clear that the Courts, as matters stand, have rejected the idea of "abuse of process" in the context of adjudication, where the actions of a claimant are such as to be describable as "intense confrontational litigation" or "oppressive" it is very close to what in litigation would at least arguably be treated as abuse and in any event should not receive the Court fiat of approval by way of judgment and an order for enforcement. It is respectfully suggested that the observations in *Herschel*⁹⁵ about circumstances that would or should lead a court to exercise its discretion and refuse enforcement have been given too little consideration and weight. The right to launch an adjudication "at any time" does not carry with it an obligation on the part of a court to assume that a procedurally correct adjudication decision must lead on to judgment and enforcement. Cases which do not fit the template that all of the members of the House of Lords whose words are quoted above subscribed to should be scrutinised with much care before an order for enforcement should issue.
90. It is also respectfully suggested that ANBs need to consider their role with much greater care. Realistically there is no time to have an effective discussion with a respondent where a claimant has made suggestions, positive or negative, about a suitable adjudicator; and in any event, an attempt to do so will merely provide the potential for another tactical manoeuvre, this time by the respondent. Realistically it may be the case that ANBs will have to make a decision without any reference at all to any

⁹⁴ Although leave to appeal was obtained in some of these recent cases, it is not clear if that leave is going to be exercised in any of them.

⁹⁵ See above at paragraph 29

suggestions. Certainly they will have to consider the recent cases very carefully to assess how they impact on the appointment procedures.

Ireland

91. Before leaving the topic it is to be noted that Ireland has passed adjudication into law but not yet brought it into force. When they do there is some doubt that it will catch on there as it has in the UK. Part of the reason for this is the existence of a popular 100 day arbitral process⁹⁶. Another is impact of the Irish Constitution. However, also seriously regarded is the potential impact of Human Rights. In the UK it has been the case that the temporary nature of the decision has been thought appropriate to keep the Human Rights lawyers at bay, despite the way that many of the normal safeguards to dispute resolution have been dispensed with in adjudication. But is that view correct? That was the topic of the second debate at the 39 Essex Seminar.

John Tackaberry Q.C.

Maundy Thursday 2015

London

⁹⁶ A like procedure is available in the UK under the auspices of the Society of Construction Arbitrators but is little used.