ADJUDICATORS: COMMON SENSE OR CREEPING BUREAUCRACY

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Adjudication can arise:

- Pursuant to the terms of a contract.
- By reason of an ad hoc reference to adjudication.

Nordot Engineering Services Limited v Siemens [2000] HHJ Gilliland QC. Parties taken to have agreed to adjudicate.

Subject to specific contract terms and natural justice, the requirement of fairness.
From 1 May 1998

From 1 November 2011
ETHICS: WHAT THE REGULATORS SAY

  - Duty to act with integrity and fairness.

- The RICS: principles based regulation.
  - Firms and members – professional/ethical behaviour – duty to act with integrity and to avoid conflicts of interest;
  - 2012 Global Professional and Ethical Standards
CONFLICTS: WHAT THE REGULATORS SAY:

- Chartered Institute of Arbitrators
  - 3.1 A continuing duty to disclose all interests, relationships and matters likely to affect independence or impartiality, or perceived to do so.
  - A duty to advise the parties promptly if circumstances arise making the neutral incapable of maintaining the required degree of independence or impartiality.
CONFLICTS:
WHAT THE REGULATORS SAY:

- **The RICS**: Global Professional and Ethical Standards:
  - Not allowing bias, conflict of interest or undue influence… to override professional or business judgments and obligations;
  - Making clear to all interested parties where a conflict of interest or potential conflict arises…
Re Medicaments and Related Classes of Goods (no. 2) [2001] 1 WLR 700 (CA): *the fair-minded observer test*…

Porter v McGill [2001] UKHL 67:  
…whether [all the] circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased.
THE CASES: NO BIAS

- Locabail (UK) Limited v Bayfields Properties Limited [2000] 2 WLR 870 (CA) –

- No objection on grounds of:
  - Religion; ethnic or national origin, gender, age, class, means or sexual orientation of the judge;
THE CASES: NO BIAS

- Locabail ...
- Nor on judge’s educational, social, employment or service background; nor political associations, professional associations, membership of social or charitable bodies or the fact the judge had in the past received instructions from a party or a party’s legal representative.
THE CASES: NO BIAS

- Locabail ...
- Nor, in the ordinary way (somewhat fact dependent) on the judge’s prior decisions; or views expressed in textbooks or articles...
- Unless the judge has expressed him/herself in particularly strong terms on an issue[s] which later came before him.
THE CASES: WHERE ARE WE HEADED?

- Makers UK Ltd v London Borough of Camden [2008] EWHC 1836 (TCC), Akenhead J
- Camden claimed that the adjudicator was improperly appointed so had no jurisdiction, and was affected by apparent bias arising out of a telephone contact made before his appointment and some contact made several months after his decision.
Makers v Camden ...

**Held:** no implied term prohibiting a party from making representations to a nominating body;

No apparent bias arose as a result of telephone communication between solicitor for Makers and the adjudicator prior to appointment; or later.
THE CASES: FILETURN AND PAICE

- FILETURN LTD V ROYAL GARDEN HOTELS [2010] EWHC 1736 — allegation of apparent bias on basis of pre-existing relationship between adjudicator and claim consultant for Fileturn dismissed.

- PAICE AND ANR V HARDING [2015] EWHC 661, COULSON J, unilateral contact with adjudicator’s assistant [wife], not voluntarily disclosed amounted to apparent bias.
EUROCOM LTD SIEMENS PLC [2014] EWHC 3710 (TCC), Ramsey J, should be mentioned because it feeds into the Commercial Court decision in Cofely v Bingham & Knowles.

Adjudicator was not impugned, but award was not enforced because Court held that the Adjudicator’s appointment was tainted and invalid by a false representation from Knowles.
ISSUES TO WATCH OUT FOR NOW:

- Any unilateral contact with a party however innocuous it may seem;
- Frequent appointments by any ANB;
- Multiple appointments involving the same party [as before], or same legal representative [now] direct or via an ANB;
- A degree of dependence on one party; or party representative (black lists/white lists);
RISK AREAS

- To propose a particular individual or speciality – limiting the field of potential nominees;
- If the tribunal knows a party representative more than in a limited professional capacity;
- Where applicant supplies ANB with volume of work;
- To accept frequent appointments involving the same party representatives.
CONCLUSION: Creeping Bureaucracy

BON COURAGE!
AND THANK YOU FOR LISTENING