

# **ADJUDICATION IN THE CONSTRUCTION INDUSTRY**

**A Panel discussion with**  
**Tony Francis of Fenwick Elliott**  
**Delia Dumaresq of Atkin Chambers**  
**Simon Hargreaves of Keating Chambers**

**A Report on the Meeting of the Society of Construction Law on  
7th September 1999 at the Lloyd George Room, National Liberal Club, London**

*Report by John Denis-Smith of Keating Chambers*

A packed meeting of the Society of Construction Law on 7th September 1999 underlined the topicality of the subject of the panel discussion chaired by Jonathan Hosie. Tony Francis of Fenwick Elliott and Lead Editor of the Construction Industry Law Letter, Ms Delia Dumaresq of Atkin Chambers and Simon Hargreaves of Keating Chambers, gave their views on the challenges and opportunities of adjudication from the perspective of legal practitioners.

Mr Francis described his experience of adjudication under the Housing Grants and Regeneration Act 1996. Since it came into force on 1st May last year, the pace of references has quickened, with the IRCS recording 45 new appointments this July compared with 15 in February. Many Sub-Contractors remain ignorant of their rights under the Act: nonetheless references typically involve claims by Sub-Contractors against Main Contractors or Main Contractors against Employers, most adjudications concerning payment during works or Final Account disputes.

Mr Francis emphasised that, although there is currently little evidence of "adjudication by ambush", the timetable under the Statutory Scheme for responding to a claim is tight. A party seeking to resist a claim must ensure it has efficient personnel, I.T. and experts and well-organised documentation. The overriding benefit is financial: in his experience costs tend to be no more than 10% of the sum in dispute, enabling adjudication to provide a forum for disputes involving relatively small sums. The future of adjudication depends on its provision of cost effectiveness, procedural fairness and balanced reasoning.

Ms Dumaresq explored potential problem areas in the field of adjudication:

## **Enforcement of adjudication awards**

It had been suggested after *Macob v Morrison* (1999 BLR 93) that summary judgment under CPR 24 was the correct method of enforcement. However, that had been doubted earlier in *Wescol v Galliford* and, in *Project Consultancy v Gray Trust* (16 July 1999), the Court made it clear that it would consider whether there was a defence to the claim based on the adjudication award. The provision under CPR 24 that

summary judgment may be refused where there is "some other reason" to do so may offer further scope to the party resisting a claim.

## **The procedure in adjudication**

Ms Dumaresq considered that the rules of natural justice apply to adjudications although the Courts would be less likely to intervene where a decision involved the declaration of existing rights than when an adjudicator effectively creates rights by his decision. The Scheme itself requires only that an adjudicator be impartial, not that he be fair.

## **Dealing with Jurisdiction Issues**

In the Project Consultancy case and *Palmer v ABB* Mr Justice Dyson and His Honour Judge Thornton QC considered that an adjudicator could not decide whether he had jurisdiction. In *Mercury v Director General of Telecommunications* (1994 138 S.J.L.B. 183) the then Lord Justice Hoffmann had suggested that the adjudicator should decide other issues; jurisdiction could then be decided in court. In *British Shipbuilders v VSEL* ([1997] 1 Lloyd's Rep 106) Mr Justice Lightman had suggested the same course: His Honour Judge Thornton QC had however suggested otherwise.

## **Costs**

Ms Dumaresq questioned whether the recent decision in *John Cothliff v Allen Build* (29th July 1999) that the Act empowered adjudicator to award costs was correct; it implied such power in an Act which already spelled out terms to be implied into adjudication schemes.

Ms Dumaresq suggested other problem areas:

- (i) determining whether a contract is covered by the Act;
- (ii) whether or not an adjudicator can consider matters other than those referred to him - paragraph 20 refers to the power to determine other matters arising under the contract;
- (iii) whether an adjudicator can take account of future events and in effect give interim decisions
- (iv) conflicts between rules of adjudication provider bodies and those under the Statutory Scheme. TeCSA suggests the adjudicator can decide on the extent of his jurisdiction: the Scheme suggests not;
- (v) where a contract does not fulfil the Scheme's requirements, does an adjudicator appointed under the Scheme follow the Scheme's procedure or those of the body to whom he is affiliated?

Mr Hargreaves compared the two means of contesting an adjudicator's jurisdiction which had appeared in two recent cases: either to reserve one's rights and leave jurisdictional issues to be deployed as a defence to enforcement proceedings; or (consensually or otherwise) take pre-emptive proceedings in Court or arbitration for declaration or award on the issue. The Claimant pursued the former route in the Project Consultancy case, the result being that the Court refused summary judgment on the grounds that there was a serious issue as to whether there was a contract at all. In the ABB case, the parties agreed to take the latter route and were able to obtain a decision on the jurisdictional issues very quickly. Mr Hargreaves suggested the latter as an attractive option to take, given the readiness and ability of the Courts to hear such issues quickly and that this option might well appeal also to adjudicators themselves. A further option might be to consent to an ad hoc appointment of a lawyer as assessor whose decision on jurisdiction issues would be treated as final by the parties.

As to enforcement of an award by the Courts, Mr Hargreaves suggested that it would be preferable to seek a declaration in Court rather than risk failing on an application for summary judgment.

The question and answer session which followed canvassed issues such as whether adjudicators should give reasons for their awards; the "stakeholder option" and the possibility of Courts enforcing awards by injunctions. While agreeing that in general adjudicators should give their reasons, Mr Francis considered that this might not be necessary in the case of a straightforward claim for payment; Mr Hargreaves pointed out that small Sub-Contractors may want reasons more than a large scale Contractor. The panellists agreed that the "stakeholder option" contravened the spirit of the Act and may not comply with it. Ms Dumaresq suggested that the Court's grant of an injunction in *Drake & Skull v McLaughlin* (60 BLR 102) was flawed; Mr Hargreaves however questioned whether it was right (as Mr Justice Dyson reasoned in *Macob*) that decisions should not be enforced by adjudication. Parliament's remarkable intervention into the field of construction contracts was surely reason enough to justify the use of injunctions.

***JOHN DENIS-SMITH***