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evolving to resolve

ADJUDICATORS: COMMON SENSE OR CREEPING BUREAUCRACY

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THE PRINCIPLES: ADJUDICATION



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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.

STATUTORY ADJUDICATION – CONSTRUCTION CONTRACTS



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- From 1 May 1998
- The Housing Grants, Construction And Regeneration Act 1996, s.108 : **impartiality**.
- Scheme For The Construction Contracts (England And Wales) Regulations 1998, ss12: **impartiality**, 13, 18.
- From 1 November 2011
 - Local Democracy, Economic Development And Construction Act 2009.
 - The Scheme For Construction Contracts...(amendment) Regulations, SI 2011/2333, SI 2011/1715.

ETHICS: WHAT THE REGULATORS SAY



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- **The Chartered Institute of Arbitrators Code of Professional and Ethical conduct, Guidance 2015, Part 1.2.**
 - 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:



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- **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:



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- **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...

THE CASES: THE TEST FOR BIAS



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- **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



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- **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



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- 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



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- 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?



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- **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.

THE CASES: MAKERS UK LTD



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- 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



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- **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.

THE CASES: THE IMPACT OF EUROCOM



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- **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:



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- 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



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- 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

