ADJUDICATION, STANDARDS AND CONFLICTS

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SLIDE 1 – COVERING SLIDE

SLIDE 2 – COMMON LAW AND ADJUDICATION

1. Adjudication – not just about the Scheme for Construction Contracts, although that is where we can look at the cases for the recent interpretations of the law. Equally though, adjudication is available as a means of dispute resolution in different scenarios:
    a. pursuant to contracts which are outside the scope of the Construction Act Scheme, and
    b. to other commercial contracts, and
    c. on an ad hoc basis.

    It is a matter for agreement between the parties, in the same way as arbitration or any other form of ADR.

2. **Nordot Engineering Services Limited v Siemens [2000]** was ostensibly an adjudication brought under the Scheme, but in fact, the works were outside the statutory scheme. Nonetheless, Siemens was held to have agreed to refer the dispute about plant installed in a power station project to adjudication and to have agreed to the Adjudicator's jurisdiction.

3. In contract/ad hoc adjudications, the adjudicator's conduct is governed by the terms of the parties' contract and the rules of **natural justice**:

    a. Fairness/impartiality -The right to a fair hearing before an independent tribunal – i.e.
        i. No man should be a judge in his own cause
        ii. A party has the right to know the case against it and
        iii. To a fair opportunity to answer the opponent's case

4. To breach the rules of natural justice / fairness, is to act in excess of jurisdiction - wherever it is founded.

5. The right to a fair trial before an independent and impartial tribunal accords with Article 6 of the ECHR.

SLIDE 3 – STATUTORY REGULATION

6. STATUTORY REGULATION: PART II of the HGCRA: in force 1 May 1998, after the Regulations introducing the Scheme had also been enacted.
7. Background: Originally, adjudication was to be akin to fast track arbitration and the decisions were to be final and binding as in arbitration. That proposal was heavily criticised. Later – during the drafting of the Scheme, arbitration and adjudication were distinguished. In contrast to arbitration awards, adjudication decisions were not to be final and binding.
8. Adjudication is of temporary finality only, and this has had some impact on the Court's approach to the ethical standards and conflict of interest principles. For example, see:

   > Coulson on Adjudication, when considering natural justice says: *"One man's robust common sense, is another man's breach of natural justice…"*

   Quite so. There are moments when the court has applied the former, and others, the latter.

9. **The Act**: Under the Act parties have a right to refer a dispute from a construction contract to adjudication, if the contract does not comply with the procedure in s108 of the Act, then the Scheme applies.

10. As far as duties which impact on ethics and standards: SINGLE OVERRIDING DUTY IS TO ACT IMPARTIALLY…

11. The requirement of impartiality seeks to embody the rules of natural justice.

12. s108 of the Act provides:
    a. 108(2)(e) – duty on the adjudicator act **impartially**
    b. 108(4) grants the adjudicator immunity from suit as long as his act[s] or omission[s] are not in bad faith.

13. **The Scheme**: mirrors the Act.
    a. Para 12 - a duty to act **impartially** *in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract…*
    b. Other duties:
    Para 12 – *avoid incurring necessary expense.*
    Para 13 – *may take the initiative in ascertaining the facts and the law* – used sparingly so that such acts do not become a weapon for challenge under the guise of lack of neutrality.
    Para 18 – duty of confidentiality.
    Para 26 – immunity for suit as long as the Adjudicator is not acting in bad faith.

14. In terms of the ethical standards which adjudicators must apply – it is therefore clear that they, as with any other kind of tribunal tasked with deciding a dispute between two or more parties, are bound to act impartially and according to the rules of natural justice.

15. Impartiality is the embodiment of fairness. It is not the same thing as independence, but the rules of natural justice embrace the latter.

16. The Act and Scheme do not mention independence… if reinforcement is required, it has been supplied through the cases.

17. When we consider the present position of ethical standards and conflicts of interest in adjudication, it is easier to do so by reference to the cases on the statutory construction scheme, because that is where the principles have been most often discussed by the Court in recent years.

SLIDE 4 - WHAT THE REGULATORS SAY - ETHICS

18. **Using the Chartered Institute of Arbitrators and the RICS as examples.**

19. **The Chartered Institute of Arbitrators:**
    a. Part 1.2 comprises a single code applicable to all members when acting as Neutrals;
    Behaviour [duty]
    A member shall not behave in a manner which might reasonably be perceived as conduct unbecoming a member of the Institute.
    1.2- 1 – behaviour [*conduct unbecoming*]
    2.1 **Integrity and fairness**
    A member shall maintain the integrity and fairness of the dispute resolution process and shall withdraw if this is no longer possible.

    b. **Ethics:** Principles of integrity and fairness in conduct;
    para 8: trust and confidence – duty to keep information confidential…
    c. A significant breach of the code is professional misconduct under the Bye-Laws [15.2].

20. **THE RICS – PRINCIPLES BASED** – all firms/members must **at all times act with integrity and avoid conflicts of interest and avoid any actions or situations that are inconsistent with their professional obligations.**

    There are five standards [RICS Global Professional and Ethical Standards]:

    All members must demonstrate that they:
    - Act with integrity
    - Always provide a high standard of service
    - Act in a way that promotes trust in the profession
    - Treat others with respect
    - Take responsibility

SLIDE 5 - WHAT THE REGULATORS SAY - CONFLICT OF INTEREST

21. The Chartered Institute of Arbitrator's Code:

> 3.1
>
> **Conflicts of interest**
>
> *Both before and throughout the dispute resolution process a member shall disclose all interests, relationships and* ***matters likely to affect the member's independence or impartiality or which might reasonably be perceived as likely to do so****.*
>
> 3.2 [ongoing duty to disclose]
>
> *Where a member is or becomes aware that he or she is incapable of maintaining the required degree of independence or impartiality, the member shall promptly take such steps as may be required in the circumstances, which may include resignation or withdrawal from the process.*

SLIDE 6 – CONFLICTS – RICS STANDARDS

22. **The RICS: Global Professional and Ethical Standards:**

23. As part of the overriding obligation to act with integrity:
    a. *Not allowing bias, conflict of interest or undue influence… to override professional or business judgments and obligations;*
    b. *Making clear to all interested parties where a conflict of interest or potential conflict arises between member or employer and the client.*

24. RICS – has some "ask yourself" questions:

Some of the key questions that you could ask yourself include:

- *What would an independent person think of my actions?*
- *Would I be happy to read about my actions in the press?*
- *How would my actions look to RICS?*
- *How would my actions look to my peers?*
- *Do people trust me? If not, why not?... [and others]*

25. But at the end of the day, you will be judged by the standards of the "*fair-minded and informed observer…*" [See Coulson on Adjudication, 3rd edition, para 11.13 for some examples.]

SLIDE 7 – THE TEST FOR BIAS/APPARENT BIAS

26. Note the cases are not particular to adjudication.
27. Principally, **Re Medicaments and Related Classes of Goods (no. 2) [2001] 1 WLR 700 (CA):** *the fair-minded observer test…*
and
28. **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.*

29. NB The Courts tend to distinguish cases of alleged bias from pre-determination claims – i.e. where the decision maker has, or gives the impression that he has, already made up his mind.

30. Here – Coulson J's "robust common sense" seems to be the order:

    a. **National Assembly for Wales v Condron [2006] EWCA Civ 1573**: A case about an open cast mining application where a chairman of a planning committee told a protester that he was "*Going to go with the Inspector's report*" which favoured the application [and did so], the CA held that the fair-minded observer would not have apprehended bias on his part, so the decision was upheld.
    b. See also **Lanes V Galliford Try [2011] EWCA Civ 1617 Jackson LJ** on appeal was completely unmoved by a draft decision, called a "preliminary view" issued by the adjudicator before he had heard from Lanes. When the final decision arrived, it was almost identical in every way to the "Preliminary View" but the Court of Appeal firmly rejected any suggestion of apparent bias/pre-determination.

SLIDE 8 – THE CASES

31. The Statutory Scheme is not intended to afford any "appeal" as such and, as is well-known, the TCC has a short and speedy procedure to secure the enforcement of adjudicator's decisions. Resistance to enforcement primarily focusses on aspects of alleged unfairness or lack of independence. It is seldom successful. Here's a selection:

SLIDES 8-9-10 – LOCOBAIL (UK) LIMITED V BAYFIELDS PROPERTIES LIMITED [2000] 2 WLR 870 (CA):

32. Really for note, a decision of the court of appeal on what disqualifies judges on grounds of bias. The Court had 5 applications before it for hearing.

33. It contains a list of matters which ought not to result in grounds for an allegation of apparent bias. It refers to a Judge and the circumstances in which objection might be taken against him/her hearing a case.

34. Does it apply to adjudication – it is assumed so in principle.

35. In truth, these particular issues are not commonly relied upon in adjudication challenges.

SLIDES 11-12 – MAKERS (UK) LIMITED V LONDON BOROUGH OF CAMDEN [2008] EWHC 1836 (TCC):

The facts:

> *1.This claim is to seek to enforce an adjudicator's decision and it is challenged on the grounds that* ***the adjudicator was improperly appointed and thus had no jurisdiction and that there is apparent bias on the part of the adjudicator arising out of a telephone contact made before his appointment and some contact made several months after his decision.*** *It raises interesting issues as to how*

adjudicator appointing institutions should go about selecting the adjudicator to be appointed.

2. By a contract dated 21 June 2006 "), Makers agreed to carry out concrete repairs, window repairs and renewals, external repairs and decorations, repair and renewal of above and below ground drainage, and hard and soft landscaping ("the Works") at Whittington Estate, Highgate, New Town, London N19 ("the Site") for Camden. The Contract sum was £4,337,511.17 or such other sums as might be due under the Contract from time to time….

22. Essentially, Camden argue that there is ***an implied term of the Contract whereby "neither party may seek to influence unilaterally the nominator's determination regarding the identity of an adjudicator, by making unilateral representations to the nominator concerning whom he should nominate or otherwise"*** *(from Camden' Counsel's skeleton); I will call this the "Implied Term". That, it argues, was breached here so that any appointment is null and void leading to Mr Harris not having jurisdiction.* ***Secondly****, it argues in effect that* ***there is an appearance of bias such that the decision should not be enforceable, such bias arising primarily out of the telephone contact between Dr Critchlow and Mr Harris prior to his appointment.*** *Actual bias is not alleged. Makers reject all the arguments put forward by Camden.*

- Camden also relied on Maker's refusal to agree an adjudicator and its decision to make specific and unilateral representations about the identity of the adjudicator [which were not copied/forwarded to Camden].
- The failure either of Maker's solicitor or the adjudicator to tell the RIBA appointing body] about the telephone conversation.
- Complaint was also made when Maker's contacted the adjudicator several months after the decision was made, to ask him to put his version of the events to the Court.

Akenhead J rejected Camden's claim for an implied term prohibiting representations about the appointment of an adjudicator.

The judge emphasised that (despite the representation) it was the RIBA who selected the adjudicator, not the parties: Para 35 judgment. [cf the Cofely decision in 2016].

On the facts he also rejected Camden's contention that the adjudicator was infected by apparent bias – the exact conversation about availability was well documented and very limited. The adjudicator and solicitors were not otherwise well acquainted.

Following this case **RICS amended its form of application – to copy application forms and accompanying documents to the opposite party**¸which previously had not been its practise**.**

SLIDE 13 – FILETURN V ROYAL GARDEN; PAICE V HARDING

FILETURN LTD V ROYAL GARDEN HOTELS [2010] EWHC 1736

Royal Garden Hotel sought to resist enforcement of the adjudicator's decision on the basis of alleged apparent bias of the adjudicator, based on a pre-existing relationship between the Adjudicator, Mr. S, and the claims consultant (Always) representing Fileturn. Between 2001-2004 Mr. S was a director of Always, but based in a different office to the representative in the adjudication which representative had sought his nomination on 12 occasions previously [succeeding in 2, but the adjudicator did not know this]. However, via other nominations, Mr. S had acted in 10 other adjudications where Always represented one of the parties, but only two of them were with the same Always' representative.

The decision is very fact specific – but opens up the issue of the relevance of the party representative's acquaintance with the tribunal. This was a reasonably close professional relationship during 2001-2004 while Mr. S was a director of Always, but not subsequently. About 5-10% of the Adjudicator's practice was associated with Always – the judge held this was not material to his practice.

See paragraph 30 of the Judgment: refers to Taylor v Lawrence [2002] – confirming that there is no inherent objection to the fact that the legal advisers of one or more of the parties are well known to the

tribunal/judge. *Cf IBA Guidelines on conflicts in international arbitration; and Cofely.*

The Judge held that the allegation of apparent bias was no more than fanciful speculation.

PAICE AND ANR V HARDING [2015] EWHC 661

A decision of Coulson J, which includes a good summary of the cases and principles on this subject, concluded with a judgment in which the adjudicator's decision was quashed for apparent bias. No question of conflict, the decision is based on a perceived lack of impartiality.

The court was concerned with the fact that unilateral conversations took place at all (especially after the decision in Makers and the guidance given by Akenhead J there), and equally with the fact that they were not initially disclosed, and when revealed later, were explained on the basis that because they took place with his assistant (the adjudicator's wife), they were not disclosable. The court noted that the substance of the conversations had been communicated to the adjudicator by his wife. The conversations were material (as to the matters discussed). The adjudicator had denied the conversations had ever occurred in an email.

Coulson J was deeply unimpressed and refused to enforce the award.

SLIDE 14 – NB EUROCOM V SIEMENS PLC

In this case Knowles were representing Eurocom, and secured an award in favour of their client. Siemens resisted the enforcement application on the ground that the appointment was invalid.

The ground of challenge was that Eurocom, via Knowles, had wrongly listed as conflicted, a number of adjudicators it did not want to see appointed. They were not conflicted.

Knowles admitted that it was forum shopping and seeking to save the trouble of re-applying if they were given an adjudicator they did not like. [Effectively sanctioned by the Court of Appeal in the "Lanes" case. Judgment paragraph 50 refers.]

Siemens alleged that Knowles/Eurocom had effectively subverted the integrity of the nomination process to secure a nominee to their liking. Mr. Justice Ramsey agreed.

SLIDES 15 AND 16

Under the "old" cases: you were concerned with obvious and real issues of "interest" in the party or an associated party, or the subject matter of the dispute.

Professionally – the issue was whether the adjudicator had been instructed by a party or had been against a party – as lawyer or expert (especially as counsel), and especially if frequently so;

Prior appointments as adjudicator on connected dispute[s];

Prior appointments as adjudicator between the same parties;

Domestically – any family or social connections.

NO conflict arose if appointed by an ANB and the above were not issues.

NOW – No assumptions/security via ANB appointing process.

Risk if any sizable % of income arises from a party **or** via its representative not just before but after appointment – less of an issue for adjudications if short;

Risk if any sizable amount of appointments as adjudicator involve the same party representative even if parties are different;

Risk where Party has made representations to ANB seeking to influence nominations [need to ensure bona fides] either requesting nomination or seeking special attributes which are limited to a few adjudicators;

White and Black list considerations, i.e.

The adjudicator is at risk if he fails to appreciate even impressions of influence /loss of independence by adverse decisions which might result in him falling out of favour with party representatives.

WHAT HAPPENED TO PROFESSIONALISM AND COMMON SENSE?

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