

RESOLUTION

The Newsletter of ARBICON ADR Ltd

Volume 2 Issue 1

May 2008

**Professional Quantity Surveying Services &
Alternative Dispute Resolution Services**

How Impartial is the Naming of an Adjudicator Within a Contract?

Inside this issue:

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- End Court Proceedings Early by Adjudication
- Current Opportunities with Arbicon

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Do you name adjudicators in your contract forms or see them named in documentation received from your client? Either way the question of impartiality should cross your mind at some stage and may even result in 'pen being applied to paper'.

Section 108(2)(e) states that the contract 'shall impose a duty on the adjudicator to act impartially'. A decision which has not been arrived at impartially is not binding. Lack of impartiality is evidenced by bias, which is an attitude of mind preventing the person from making an objective determination of the issues that have to be resolved.

"Actual bias" is where the tribunal is shown to be actually prejudiced for or against one party. "Apparent bias" is where a fair-minded and informed observer would conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.

The requirement that the tribunal should be independent and impartial is one that has long been recognized by English common law. It is rightly not in dispute that the rule against bias applies to adjudicators appointed to determine disputes under the 1996 Act. Therefore irrespective of Judge Lloyd's views that the parties may contract away their right to an impartial tribunal, it would appear that an adjudicator's decision tainted by bias will not be enforced by the Court.

Many organizations entering into construction contracts have a practice of naming one particular individual as Adjudicator in all their contracts. The "naming party" clearly considers there is some advantage in so doing. That intended advantage may be one of attempting to abridge time to bring the adjudicator into play. Those more cynical would say that the intention is to obtain an Adjudicator more likely to favour their case; that the adjudicator might want to keep "in" with the "naming party" for future appointments. The other party is certainly likely to see it that way. Surely that comes within the definition of "apparent bias" as propounded by the Courts.

Regulated by RICS



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ADJUDICATION – A VIABLE ALTERNATIVE TO LITIGATION?

Of course no adjudicator of any standing would allow themselves to be so influenced. However bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect. The RICS is not in favour of naming adjudicators in the contract. Amongst their reasons they say is the fact that the naming of the same adjudicator in a number of contracts may lead to accusations of possible bias. They, however, stop short of prevailing upon their membership not to accept such nominations.

His Honour Judge Havery QC, although this was not the issue before him, saw no wrong in one party insisting upon the adjudicator named in the contract. The other party would suffer prejudice in that he would be deprived of having the adjudication carried out by the person of his (and the other party's) first choice. It seems likely therefore that a defence to enforcement of an Adjudicator's Decision of apparent bias because the same adjudicator was named successively in a series of a company's contracts would not succeed.



The chance of any legislative changes addressing this issue appears to be extremely low. It also appears based upon Judge Havery's view, that the Courts are unlikely to provide a solution. The ANB's such as the RICS should perhaps be clearer on this issue and recommend to their members that to accept such appointments is not compatible with the principles of the Institution.

END COURT PROCEEDINGS EARLY BY ADJUDICATION

If a case is the subject of ongoing court or arbitration proceedings can the matter be referred to adjudication?

Litigation, particularly of construction contracts, can be a very slow complex process. Claimants easily become frustrated at the delay tactics of the Respondent and spiraling costs of the proceedings, which have to be paid for often years before a final decision is made. So can the fast-track 28 day justice metered out by adjudication be implemented when one is already in court? It is a well known fact that two forums of proceedings under English Law (eg. court or arbitration) cannot be heard at the same time.



In *Herschel Engineering Ltd v Breen Properties (2000)* court proceedings were underway, the Claimant was frustrated and faced with lengthy and costly action. Adjudication was commenced despite the active court case. The adjudicator made an award for the Claimant and the Respondent refused to pay leading to summary judgment proceedings in court. The defence argued that the adjudication was void on the grounds that two forums are prohibited.

The court held that the multiple forum rule does not apply to adjudication under the Construction Act (HGCR Act 1996). Indeed the intention of Parliament was to provide an interim enforceable decision on disputes,

which can be overturned by final court or arbitration proceedings.

There is no express statement in the statute prohibiting adjudication once litigation or arbitration has commenced. On the contrary, Section 108 of the Construction Act, which stipulates party rights says under 108(2)(a) that a party shall have the right to refer a dispute to adjudication "at any time". The Claimant thus obtained payment and costs from the Respondent and the court proceedings were dispensed with.

In summary, if you have a construction contract and you are engaged in court or arbitration proceedings, frustrated by the costs and delays, you can adjudicate, obtain payment at a low cost and most probably dispense with your court or arbitration proceedings.

Arbicon ADR Ltd are adjudicators and experts in all forms of ADR. Call us to assist you in helping to end your court or arbitration proceedings and obtaining swifter justice in a matter of days.

ARBICON DIRECTOR GAINS FELLOWSHIP OF THE RICS

We are delighted to announce that Mr Jonathan Nugent, Director of Arbicon ADR Ltd, has been accepted as a Fellow of the Royal Institution of Chartered Surveyors.

The award of this Fellowship recognises Mr Nugent's considerable experience as a Chartered Quantity Surveyor and in the field of Alternative Dispute Resolution.

If you feel that you, or your company, could benefit from Mr Nugent's skills and experience, or that of anyone else within Arbicon, please do not hesitate to call us.

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Arbicon ADR is now regulated by the Royal Institution of Chartered Surveyors (RICS)

Arbicon is a leading provider of Professional Quantity Surveying and Cost Management Services and Alternative Dispute Resolution Services including the following:

Pre-Contract Services

- Cost planning
- Estimating & tendering (including audits)
- Bills of quantities preparation and production
- Commercial audits and reports
- Budget and cash flow forecasts
- Quantity and procurement checks
- Material scheduling
- Contract procurement
- Drafting of Employer's Requirements

Post-Contract Services

- Preparation of final accounts
- Contractual procedures advice
- Re-measurement
- Cost reconciliation reports
- Sub-contract account management
- Valuations for interim payments
- Variation and day work account valuation and control
- Extension of time claims
- Loss and expense claims
- Dispute resolution, mediation, adjudication and arbitration
- Support in litigation
- Risk management and dispute prevention
- Expert witness

ARBICON PROVIDE PROFESSIONAL QS SERVICES TO SECURE A SAFE DELIVERY FOR KIDDICARE

Arbicon are pleased to announce the safe arrival of the new Kiddicare megastore in Peterborough. The megastore opened on 14th April 2008 weighing in at 60,000 sq ft over three floors. The new megastore will carry £6M of stock, boasts a 100-seater restaurant and car parking for up to 200 cars.



Arbicon are proud to have been involved with the project and to have provided the Professional Quantity Surveying services which helped secure the safe delivery of this landmark building.

CURRENT OPPORTUNITIES

Arbicon currently has the following opportunities:

- Quantity Surveyors
- Personal Assistant to the Directors

Arbicon are actively seeking to recruit high caliber staff to join their expanding team. If you are interested and would like to be considered for any of our vacancies please send a copy of your latest CV to us at advice@arbicon.co.uk, or for more information please call the Directors on 01480 426560.

CALL US NOW ON 01480 426560 or email us at advice@arbicon.co.uk

TO SEE HOW WE CAN HELP YOU



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