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*Construction adjudication:  
Current developments and  
a peep into the future*

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- This Seminar focuses on construction adjudication (statutory adjudication) under the HGCRA 1998. A mandatory scheme
- BUT: be aware! There is another contender lurking for professional negligence claims. The Professional Negligence Adjudication Scheme
- Not a rival, but another option for clients with a claim to resolve
- Not mandatory, and not mandated by statute – BUT endorsed and encouraged by the senior judiciary and the MoJ and recognised by the Court's Rules Cttee
- I will come back to it at the end

- Construction adjudication: note the contrast in positions of (1) a referring party and (2) a responding party
- But, of general application when involving a barrister (and at the risk of teaching you to suck eggs):
  - Check that the barrister will have capacity for the work required in the timeframe envisaged for the adjudication (eg 28 days – including the Award/Decision)
  - Work out who the team is going to be: clients, lawyers, witnesses, experts

- Be sure to have everyone on the team on a comprehensive email circulation
- Make sure everyone (so far as possible) is available at short notice
- Consider at the outset what meetings/calls will be needed to get the case in order in time – including allowing Counsel time to do what is needed!
- Consider at outset what material will be required to present your client's case and what form it is to take (witness evidence, expert evidence, documents etc)

- Witness statements will (perhaps obviously) be most persuasive if the important/contentious assertions are supported by documents / other evidence – so consider what to append or to refer to.
- Remember: the working presumption is usually that there will not be a hearing, so witnesses are unlikely to be “tested” and able to prove themselves in cross examination
- Team work – at all stages – to get over the line. Keep the division of labour under review throughout. (Best not to throw everything at Counsel and expect her/him to “do the business”.)

- If acting for a Referring Party:
  - You could spend 18 months secretly preparing your client's case – and then “ambush” the Responding Party with it (anyone had a Christmas Eve referral?)
  - Prepare detailed expert evidence (a 200-page report with appendices running to three lever arches anyone?)
  - Detailed spreadsheets setting out events and losses etc

- BUT: risk of a natural justice challenge if it cannot properly be responded to.
  - Referring Party may be wise to agree an extension to the timetable.
  - Even if the Court would not intervene or refuse to enforce, the Adjudicator is entitled to decide if the adjudication can be fairly determined in the timescale provided: see *Dorchester Hotel Ltd v Vivid Interiors Ltd* [2009] EWHC 70 (TCC) per Coulson J
  - Although Parliament has effectively endorsed ambush tactics, courts may show sympathy to a Responding Party: see conditions set by Waksman J in *Balfour Beatty v Astec* [2020] EWHC 796 (TCC) – 84 days minimum to be allowed for 3 adjudications to be completed

- If acting for a Responding Party:
  - All hands on deck!
  - Need to put the team together swiftly (if no notice that the adjudication was coming)
  - Programme work for the straitened timescale and consider seeking extension to timetable if necessary
  - Concentrate on the real issues, rather than diluting efforts/resources to try to raise every argument possible

- Natural justice considerations re timescales etc relate to the requirement for a **fair hearing**
- The other natural justice consideration to bear in mind is the requirement for an **unbiased tribunal** (ie a tribunal that will act in an impartial manner and independently of the parties)
- **Actual bias** or allegations of actual bias are rare
- **Apparent bias**: Well known test – would a “*fair-minded and informed observer*” consider that there was real possibility of bias?

- Disclosure of current/previous appointments
  - Adjudicating is a (relatively) small industry. A small group of adjudicators are on a number of panels. Therefore, an important issue is the extent of an adjudicator's duty to disclose any previous or ongoing appointments, and whether a failure to do so, amounts to apparent bias.
  - Imminent Supreme Court decision on an appeal from the Court of Appeal's decision in *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817)

# Some natural justice issues to consider (1)

- Raise these issues during the adjudication if possible. But most likely to be raised at enforcement stage
- Has the adjudicator had any prior involvement in the project?
- Has the adjudicator had unilateral communication with a party?
- Has the adjudicator treated the evidence fairly? (If she is to place particular weight on an issue (or its absence) would it be only fair to let the parties have an opportunity to comment on it?)

## Some natural justice issues to consider (2)

- Has the adjudicator obtained information from either party which she has not made available to the other party to comment on?
- Has the adjudicator obtained information from a third party which she has not made available to the parties to comment on?
- The sufficiency of the adjudicator's written reasons
- Has the adjudicator failed to inform the parties about an approach taken or methodology used?

- Summary procedure in the TCC (CPR Part 8):
  - Parties who have had an adjudicator's decision go against them and are seeking to resist enforcement by commencing Party 8 proceedings and seeking declarations **as to errors made by the adjudicator** have been warned by the TCC that such an approach will only be available in limited circumstances
  - See the guidance given by the TCC in *Hutton Construction v Wilson Properties* [2017] EWHC 517 (TCC)

The party seeking to raise the Part 8 proceedings needs to show:

- A short and self-contained issue which arose in the adjudication that the defendant continues to contest
- The issue must require no oral evidence or any other elaboration beyond that which is capable of being provided during the time allowed for the enforcement hearing (usually about 2 hours)
- The issue must be one which on a summary judgment application it would be unconscionable for the court to ignore

- TCC decision early in lockdown: *MillChris Developments Ltd v Waters* [2020] 4 WLUK 45
  - Lockdown = no reason to stop an adjudication proceeding
  - A site visit in the presence of only one party not necessarily a breach of natural justice – it just needs to be properly managed and the boundaries to be set
- *Bresco* and the impact of insolvency. We are bound to see an increase in these scenarios. Supreme Court decision awaited...

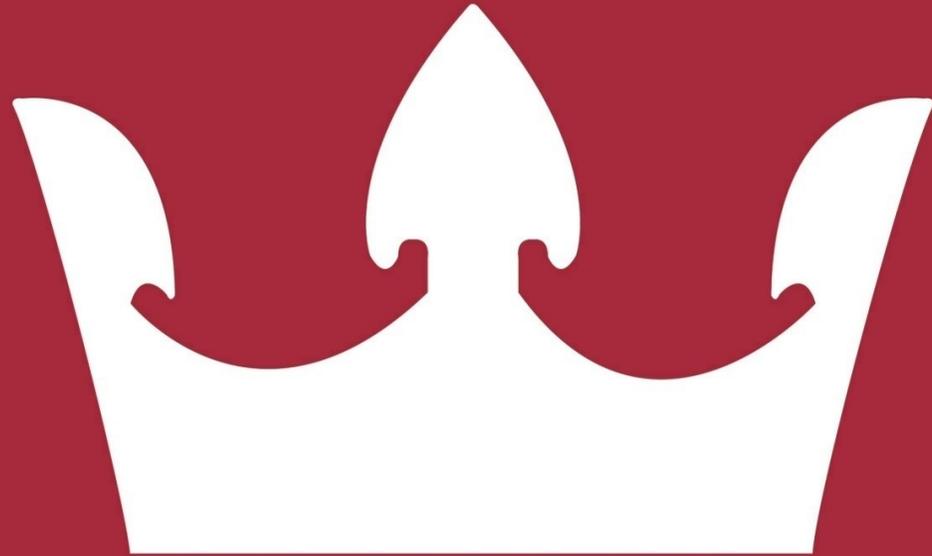
- A scheme piloted from 2015 with the encouragement of the senior judiciary and MoJ
- Since 2018 a fully endorsed scheme for professional negligence disputes, with a requirement in the Pre-action Protocol that its use be considered and any refusal be explained
- Any non-clinical profession – **including construction professionals**, no limit on quantum
- A panel of trained and accredited Adjudicators. PNBA is appointing body

- Loosely based on HGCRA adjudication, BUT:
  - Consensual – so no ambushes
  - Parties choose what issue(s) to send for determination
  - 56-day timescale (not 28)
  - Can be binding or temporarily binding (as the parties choose)
  - Can be confidential or not (as the parties choose)

- For the immediate future and longer term – what has adjudication got to offer?
- Even after lockdown and restrictions are lifted, the courts are now bound to suffer a substantial backlog of cases, with inevitable delays for even short management hearings, let alone more substantial ones
- CJC Report: *The impact of COVID-19 measures on the civil justice system*
  - Has a whole section on “Recommendations for recovery and managing the backlog of cases” – but nothing to inspire confidence that the backlog will be speedily tackled

- Adjudication can be seen as an **ideal alternative** to litigation in a time of crisis for the courts
  - By default, all on “the papers” with electronic communication
  - Ideally suited to remote working
  - Short phone or video hearings can be convened if necessary
  - Some site visits can be conducted electronically by video, drone etc
  - Quick, relatively informal and inexpensive
  - Need not be binding
  - Use at any stage
  - Tailored to such issues as you want determined

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