Paper Number

Mission Drift in Statutory Adjudication

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ABSTRACT

Statutory adjudication systems started in the UK in 1998. At the outset they had specific purposes in mind (which were to speed up the payments system and to remove unfair contract conditions) and they had a quick and cheap form of justice (adjudication) to ensure that this purpose was achieved. This paper deals with the extent to which the initial purposes have been achieved, how the adjudications which have been dealt with in the UK have changed in nature over time, to what extent the intentions of the legislature have been inhibited or encouraged by the courts and it questions the way in which adjudication is being used as a substitute for more appropriate dispute resolution techniques.

Apart from reviewing the literature appropriate to the field in the UK and elsewhere, the paper uses data collected by the authors through the Adjudication Reporting Centre over eight years and includes references to case law.

The paper also draws on experience of statutory adjudication systems elsewhere to compare the extent of drift they have experienced from their original intentions.

KEYWORDS: adjudication, statutory adjudication, alternative dispute resolution, construction disputes, mission drift.

INTRODUCTION

Mission drift is a phrase, often used in the military, used to describe a tendency for the apparatus set up to tackle a specific task, to change over time to expand the range of tasks being addressed or indeed to address related but different tasks. This paper seeks to address the extent to which the statutes set up to address the endemic but universal problem in construction of slow or non-payment and the need for speedy and effective resolution of disputes. The UK adjudication system[1] is the longest established and arguably the most complex and it will comprise the greater part of the study. Reference will be made for the purposes of comparison to the adjudication processes in New South Wales and New Zealand as they have been established for some time and have had some opportunity for signs of mission drift to become evident. The paper does not address the adjudication systems set up in the other jurisdictions of Australia or in Singapore as they are considered to be at an early stage in their evolution.

Many practitioners would confidently claim that the Housing Grant Construction and Regeneration Act 1996 (the Act), with its associated Scheme for Constriction Contracts (the Scheme)[2] has been the most important piece of legislation in the UK construction industry in the last century. The industry certainly needed change. Prior to the Act coming into force the only way to resolve a dispute was through litigation or arbitration; both of which were lengthy, costly and uncertain procedures. Lack of funding and resources often prevented those with an arguable legal entitlement from entering the litigation/arbitration arena.

The Act provided bold and refreshing aims permitting enforceable decisions to be made during the progress of the works – resolving problems as they arose - thus maintaining relationships, reducing litigation, reducing disruption to the progress of work on site and encouraging productivity. The intention was to improve cash flow in the industry and the 'quick-fix' nature of adjudication, without huge associated costs, would prevent the more powerful players abusing their positions. Perceived benefits of the process have included; speed, facts fresh in mind, proactive inquisitional approach, reduced cost, private procedure and maintaining relations.

Changes within the adjudication process itself

The source of data for this part of the discussion is the Adjudication Reporting Centre. This was established in 1998 to collect data from Adjudicator Nominating Bodies and from a sample of adjudicators. The Centre reports on various aspects of adjudication in the UK and seeks to establish trends etc. in the use of adjudication (Kennedy and Milligan, 2005).

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[1] Housing Grants, Construction and Rehabilitation Act 1996

[2] Scheme for Construction Contracts 1998

As Table 1 shows, the use of adjudication by parties in the early years was rapid. At the beginning, where parties were cautious about this new process (only 187 adjudications were reported in the first year) the growth rate of increase was outstanding. The number of adjudications grew from 187 to 1309 (an increase of 600%) and this was followed by a further rise, which although slower was still increasing by 50%. This period was then followed by a plateau with a maximum being reached in the fourth year of its operation at 2027. Since then the picture appears to have been one of decline, as illustrated in Figure 1.

Table 3.1 Numbers of adjudications being referred to Adjudicating Nominating Bodies (Source Adjudication Reporting Centre)

Time Periods	All ANBs Reporting	Percentage Growth/ Decline
Year 1 - May 1998 - April 1999	187	
Year 2 - May 1999 - April 2000	1309	600%
Year 3 - May 2000 - April 2001	1999	50%
Year 4 - May 2001 - April 2002	2027	1%
Year 5 - May 2002 - April 2003	2008	-1%
Year 6 - May 2003 - April 2004	1861	-7%
Year 7 - May 2004 - April 2005	1685	-9%
Year 8 - May 2005 - April 2006 *	1416	-16%

* This figure excludes one major ANB which has not reported at the date of preparation of this paper. If this body experienced no change the rate of decline would be only 14%

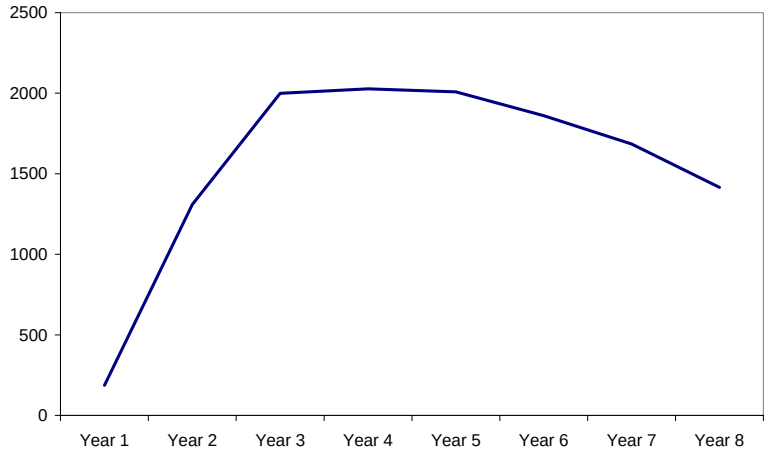

Figure 1.1 Growth/decline rate in adjudication referrals in the UK

These developments appear to be the result of a number of factors. The Act allows for adjudicators to be; named in the contract, agreed by the parties or appointed through an Adjudicator Nominating Body (ANB). The ANB might be named in the contract such that reference will be made to them if there is a need for an adjudicator to be appointed. If no mention has been made of this in the contract and a dispute arises, the parties can agree an adjudicator themselves or, failing this, the referring party can ask an (ANB) of his choice for a nomination. There is movement away from appointment through ANBs towards direct appointment of adjudicators by agreement between the parties. The most likely cause of this is the desire of the parties to ensure that the 'correct' adjudicator is appointed. There has been some apprehension evident in the technical and legal press about the quality of adjudicators and direct appointment avoids the risk that an ANB will nominate someone who may not be sufficiently experienced or suited to the dispute in question.

Another reason for this apparent reduction is that there has been a substantial reduction in the most basic type of dispute, that of failure to comply with payment conditions. When the Act was introduced, contract terms which were considered to be unfair such as 'pay-when-paid' were outlawed and measures were also introduced to ensure that payment practises like withholding money without justification were prohibited. At the outset of the implementation of the Act, disputes were mainly about payment and the parties in dispute were principally domestic subcontractors pursuing main contractors. This should have been no surprise as it was the *raison d'etre* of the Act and of the Latham Report (Latham, 1994) which preceded it. In 2000 when adjudication was approaching its peak, data collected from adjudicators showed that 42.5% of adjudications were primarily concerned with payments and the failure of parties to abide by the strict payment conditions imposed by the Act. Two years later this figure had dropped to 19% and it appeared that contractors had adjusted their payment practices to comply with the Act.

There has been some change in the type of disputes in terms of their value, complexity and how the various parties have been accessing adjudication. Over the same period as indicated above, disputes between subcontractor and main contractors reduced from 65.5% of the total disputes to 47.8%. Meanwhile those involving main contractor and clients increased from 27% of the disputes to 34.7%. At the same time the sums of money in dispute rose.

Influence of the courts

Supportive decisions

Ten years down the line the Act's popularity and success is widely acknowledged by the statistical evidence and the industry generally on an anecdotal basis. When adjudication was initiated, the courts were very

supportive. The intention was to introduce a speedy form of resolving disputes, on an interim basis, which would allow cash to flow in the industry. Adjudication decisions are temporarily binding and can be changed by subsequent litigation, arbitration of by agreement between the parties. The first major court decision which set the scene in the UK, was by the Hon Mr Justice Dyson in *Macob Civil Engineering Ltd v Morrison Construction Ltd*[3];

"The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement."

The primary intention of the Act was to solve the endemic problem of cash flow, described by Lord Denning[4] as "the lifeblood of the construction industry". It was this view which predominated following the introduction of the Act and procedural or technical obstacles to the enforcement of payments were quashed if they were seen as an attempt to frustrate the will of Parliament. The courts continued to be very supportive for some time and in many cases where surprising results have been endorsed. This is illustrated in cases where the Courts have enforced decisions where it has been accepted that the Adjudicator has erred in matters of fact or law or has indeed made a mistake which has been timeously corrected.

One of the most surprising of these has been: -

Bouygues v Dahl Jensen[5]

'Where the adjudicator has gone outside his terms of reference, the court will not enforce his purported decision. This is not because it is unjust to enforce such a decision. It is because such a decision is of no effect in law. In deciding whether a decision has been made outside an adjudicator's terms of reference, the court should give a fair, natural and sensible interpretation to the decision in the light of the disputes that are the subject of the reference. There will be some cases where it is clear that the adjudicator has decided an issue that was not referred to him or her. But in deciding whether the adjudicator has decided the wrong question rather than given a wrong answer to the right question, the court should bear in mind that the speedy nature of the adjudication process means that mistakes will inevitably occur, and, in my view, it should guard against characterising a mistaken answer to an issue that lies within the scope of the reference as an excess of jurisdiction.'

Other examples of support by the courts are illustrated by the following cases;

- William Verry Ltd v North West London Communal Mikvah (2004 EWHC 1300 TCC). An adjudicator wrongly failed to take into account the value of defects in the works. The court held that the adjudicator's

[3] Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93, 97

[4] Modern Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93, 97Engineering v Gilbert Ash [1974] AC689.

[5] Bouygues (UK) Ltd v. Dahl-Jensen (UK) Ltd [1999] EWHC 182

error was within his jurisdiction. Despite the fundamental nature of the error, the adjudicator's decision would therefore be enforced. However, applying an innovative solution, the court directed that the judgement for enforcement be delayed for 6 weeks, in order that any subsequent adjudication decision could be set off against the first.

- C & B Scene Concept Design Ltd v Isobars Ltd (2003 EWCA Civ 46). The judgement considerably reinforces the authority of adjudicators decisions. The only question, which the Court of Appeal believed, it was necessary to consider was whether the error on the part of the adjudicator, who had failed to appreciate that the contractual provisions had been superseded by the Scheme, went to his jurisdiction or was merely an erroneous decision of law on a matter within his jurisdiction.
- 'It is only when the adjudicator decides matters beyond the dispute referred that he has no jurisdiction. Here the scope of the dispute was agreed, namely the employer's obligations to make payment or otherwise. Thus the adjudicator had to resolve as a matter of law whether certain contractual clauses applied or not and if they did what the effect was of the failure to serve a timeous notice. Whilst the adjudicator was as a matter of law incorrect, that error was within the scope of the dispute agreed between the parties. The adjudicator therefore answered the right question but in the wrong way and the claimant was therefore entitled to enforcement of the adjudicator's decision by means of summary judgment.'
- Joinery Plus v Laing Limited (2003 A11 ER (D) 201 TCC). An Adjudicator did not decide the dispute that had arisen under the relevant construction contract nor did he decide it in accordance with the provisions of that contract. It was found that the Decision in its entirety is a nullity arid made without jurisdiction. The question referred was not answered and the errors were fundamental, went to the root of his jurisdiction and were incapable of correction. The Court directed for the purpose of paragraph 20 of the Scheme for Construction Contracts, and for all other purposes, Joinery Ltd is entitled to serve a Notice of Adjudication hereafter in connection with the subcontract with Laing on the basis that the Decision had never been given.
- Homer Burgess Ltd v Chirex (Annan) Ltd (1999 CA137/99). An Adjudicator made an error regarding the scope of his jurisdiction. It was open to the Court to regard the Adjudicator's error as to the scope of his jurisdiction as undermining the validity of his decision as a whole, despite there being parts of it that might have been made to the same effect if he had not erred as to his jurisdiction or ask to what extent the decision was intra vires and grant decree for payment enforcing that part of the decision that was valid and could properly be given the statutory temporary binding effect.
- Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Limited (2000). An Adjudicator made an error in his original Decision and issued a revised Decision. The Judge decided that there was no implied term to the effect that the parties had given to the adjudicator a power to correct manifest errors. Under this power, an adjudicator could, of his own motion or on application by one or both parties,

correct an accidental error or omission or clarify or remove an ambiguity in his decision, provided he does so reasonably quickly and that no prejudice would be caused to the other party. The Court does not have power to correct a slip in an adjudicator's Decision.

- Edmund Nuttall Ltd v Sevenoaks District Council (2000). An Adjudicator has the power to correct a Decision after it was delivered, providing that correction was made within a reasonable time of giving his Decision. It was not an implied term of the contract between the parties that liquidated and ascertained damages could be deducted from a payment following a decision of an adjudicator where a claim to deduct those damages had not been made at the relevant time in accordance with the contractual machinery.
- Tim Butler Contractors Limited v Merewood Homes Limited (2000 10/00 TCC). 'It was submitted that an Adjudicator was clearly wrong and that the error was an error of law. The Court states this was a dispute where he was asked to decide what were the terms of the contract. He made a decision and that is the end of the matter. The Adjudicator may be right, he may be wrong, but it is within his jurisdiction. The failure of the statute could give rise to an error in jurisdiction. This is not what we have under the 1996 Act. It makes provision for adjudication and construction contracts. Maybe the Adjudicator was in error but it seems this was an error not going to the limits of his power nor without a construction contract. The Adjudicator may have got it wrong but it is still within his power and it does not necessarily reach the conclusion that he acted outside of his jurisdiction. I have not formed a view whether the Adjudicator was correct or not in his interpretation of the contract.'
- LPL Electrical Services Ltd v Kershaw Mechanical Services (2001 HT00-427). 'The adjudicator did not have jurisdiction to decide how much was due for anything other than one specific application for payment. It was held that the adjudicator was construing the meaning of the contract when deciding what was payable, and whether he was right or wrong, the court must give effect to his decision until a trial or arbitration on the amounts due under the specific application was fully heard out. An error of law or interpretation was not outside jurisdiction.'
- SL Timber Systems Ltd v Carillion Construction Ltd (2001). An adjudicator erred in holding that the pursuers were relieved, by the defenders' failure to give a timeous notice of intention to withhold payment, of the need to show that the sums claimed were due under the contract. The Court stated that error of fact or law on the part of the adjudicator will not afford ground for refusal of enforcement, unless the error was of such a nature that the adjudicator's decision was, as a result, one which he had no jurisdiction to make. The Adjudicator's error did not take him out of the proper scope of his jurisdiction. He made an *intra vires* error rather than one which rendered his decision *ultra vires*. His decision was wrong, but not in such a way as to be invalid and reducible.

As a result of this support from the Courts there has been a tendency for parties to bring more complex issues to adjudication and there are mixed

views in the industry whether or not adjudication is appropriate for that. Examples of these are large value contracts, contracts with many issues of a valuation, loss and expense and extension of time and perhaps the most controversial being professional indemnity claims arising out of construction contracts. In the past, high value cases covering these important matters could take months if not years in arbitration and court procedures as a variety of experts would review the cases and report to the tribunal accordingly until a decision was made. In simple terms has Parliament's intended process drifted into areas not envisaged? Has the industry embraced a process and applied it to disputes not envisaged by Parliament?

A common feature with complex adjudications is volume of material. Given the opportunity for a party to prepare its case over a considerable period of time, then launch the adjudication at a time of it's choosing (the Act uses the phrase 'at any time'), it is possible for them to develop an extensive case with large numbers of documents. The adjudicator is required to take this into account in reaching a decision (together with the respondent's case) and while this is perfectly feasible for the majority of payment type disputes, this burden can become considerable when more complex disputes involving delay's disruption, extensions of time and detailed examination of the law. This in turn puts pressure on the adjudicator's time, especially if the referring party is unwilling to extend the 28 day period.

Non-supportive decisions

There are a number of situations in which the decisions of the courts have not supported the adjudicator, or in some cases, have made decisions which many in the industry consider to be counter to the intentions of the Act. Many of these result from procedural errors and issues of natural justice. One of the most important of these was that with regard to extent to which a contract required to be evidenced in writing.

Evidenced in writing

The Act states;
"107. - (1) The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.

The expressions "agreement", "agree" and "agreed" shall be construed accordingly.

(2) There is an agreement in writing-

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means."

A widely held view within the industry was that as long as there was some evidence in writing that there was a contract between the parties then that was sufficient for the Act to apply. Evidence in writing was thought to constitute such artefacts as invoices, minutes of meetings, contract drawings, etc. This was assumed to be a form of protection for subcontractors where the main contractor might deny the existence of a contractual agreement between the parties. However this changed with an extremely important judgement by the Court of Appeal, *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd*[6] . This case concluded (by a majority of 2:1) that;

"On the point of construction of section 107, what has to be evidenced in writing is, literally, the agreement, which means all of it, not part of it. A record of the agreement also suggests a complete agreement, not a partial one." (emphasis added)

The dissenting judge held the view that only the 'material terms of the agreement' should be in writing. The unfortunate effect of this decision could be that more powerful parties, wishing to evade the considerable protection given to weaker parties by the Act, just steer clear of written contracts and go for oral contracts as an alternative. They might even use what may be termed partly written, partly oral contracts. This could provide a means of circumventing the obligations of the Act and evading the will of Parliament. The adjudication provisions in New South Wales do allow for oral or partly written/partly oral contracts to be as well as written.

Allocation of costs of adjudication

This is the practice where the more powerful party (usually the main contractor) places an obligation on the other party requiring them to pay all the costs of any adjudication (including the legal costs of both parties and the cost of the ANB's fee) if that party should refer a dispute to adjudication. This obligation to pay would apply regardless of the outcome of the adjudication. Many in the industry consider this to be an unfair impediment to the intentions of the Act and consequently to the will of

[6] RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd [2002] 1WLR 2344, CA.

Parliament. However, it came as something of a surprise to the industry when the court held, in the case of *Bridgeway Construction Ltd v Tolent Construction Ltd*[7], that there was nothing in the Act to nullify such a condition.

Deterring party's participation in adjudication

One of the many means of discouraging a party referring disputes to adjudication is to make it responsible for all the costs of the adjudication (as outlined above) or alternatively to include a provision within the contract that parties' costs will be a matter that the adjudicator can allocate. This is a matter which was not intended by the original Act. Another method of deterring a party going to adjudication is to make a contract provision that, regardless of what the adjudicator decides, any funds that are payable from one party to the other will be placed in to a stakeholder fund until such time as the matter is resolved completely or some event occurs e.g. making good defects. This is not in line with the original intent of the Act.

The parties to a contract can agree on an adjudication procedure that, provided it complies with the provisions of the Act, will be applicable in the event that a dispute is referred to adjudication. If no adjudication procedure is included or if the procedure agreed fails to comply with any of the provisions of section 108(2) of the Act then the whole of the procedures set out in the Scheme for Construction Contracts 1998 (the Scheme) will apply.

The Scheme provides that the Adjudicator may by direction determine the apportionment between the parties of liability for his or her fees and expenses, but does not include any provision about the power of the adjudicator to order that one party be responsible for reimbursing part or all of the other party's costs. Case law[8] has determined that this power is not implied. It is however possible to give the adjudicator acting under the Scheme the power to deal with costs, provided that the adjudicator can conclude from the submissions that both parties agree that the adjudicator can do so, or the parties expressly agree that he may do so[9].

A number of such concerns are the subject of review by government and industry at the time of writing. The situation as it currently stands, however, is that contracting parties can include onerous terms requiring the referring party to be responsible for all costs, fees and expenses where the Scheme applies or as a matter of contract, providing the adjudication clause is Act-compliant, can include such one-sided terms. The 2005 version of the most commonly used standard form of contract in the UK, the Joint Contracts Tribunal (JCT) form, incorporates the Scheme so a similar position would apply. The Centre for Effective Dispute Resolution (CEDR) Adjudication Procedure similarly provides that the

[7] Bridgeway Construction Ltd v Tolent Construction Ltd (2000) CILL 1662.
[8] Northern Developments (Cumbria) Ltd v J&J Nichol [2000]BLR 158 and Total M & E Services Ltd v ABB Building Technologies Ltd. (2002) CILL 1857
[9] John Cothcliff Ltd v Allen Build (North West) Ltd

Adjudicator determines the apportionment between the parties of liability for his or her fees and expenses but expressly states that both parties shall bear their own costs and that the adjudicator cannot decide on the apportionment unless the parties agree otherwise. The Technology and Construction Solicitors Association (TeCSA) Rules (unamended) follow suit in relation to the adjudicators fees and expenses but allow the adjudicator to require either party to pay or make a contribution to the others legal costs provided that the parties agree that the adjudicator has the jurisdiction to do so. It was this provision that was examined in *Deko Scotland v ERJV*[10] and the court held that this restricts the adjudicator to making an award of legal and judicial expenses only. The Institution of Civil Engineers (ICE) Adjudication Procedure again provides that the adjudicator determines the apportionment of liability for fees and expenses and states that the parties should bear their own costs as do the Construction Industry Council (CIC).

Examples of clause drafting in relation to costs

The following clauses have been taken from actual contracts used in the UK in recent months;

- "The sub-contractor hereby agrees that the costs of adjudication including fees, etc shall be borne by the referring party."
- "Notwithstanding anything to the contrary elsewhere in this Sub-Contract the Adjudicator's fees and expenses are to be borne by the party which refers the dispute to adjudication."
- On appointment of an Adjudicator "the Referring Party shall pay to the Adjudicator the Referral Fee", "the Referral fee shall mean a sum to be paid in accordance with these Rules on account of the Adjudicator's fee and his reasonable expenses", "the Referral Fee shall be … £2,000.00."
- "The Referring Party shall pay the Adjudicators Fees"
- "Parties are to share the Adjudicator's fees and expenses equally"
- "The Referring Party is to pay the Adjudicator's costs, the Responding Party's Costs and its own costs"
- "Both Parties are equally liable for the Adjudicator's Fees and expenses"
- "If the complainant is unsuccessful in his application to the Adjudicator he shall pay the Adjudicator's fees and disbursements and the legal and consultant costs and disbursements of the other party or parties to the Adjudication"
- "In all cases the Referring Party shall be liable for the Adjudicator's fees and expenses and the Responding Party shall have no liability there for."
- "The Subcontractor is to indemnify the Contractor for any claims, actions, costs, charges, expenses, damages or other losses resulting

[10] Deko Scotland Ltd v Edinburgh Royal Joint Venture 2003 SLT 727 2003 GWD 13-396 OH

from or in connection with compliance with an Adjudicator's Decision by the Contractor which is subsequently changed, revised or amended by a Decision of an Arbitrator or the Court"

- "The Referring Party shall bear all of the costs and expenses incurred by both parties to the adjudication and shall be liable for the adjudicator's fees and expenses."
- "The Adjudicator's fees and expenses shall be paid by the Referring Party in any event and each party shall bear their own costs arising out of the Adjudication."
- "The Referring Party is liable for the Adjudicator's fees and expenses unless the Adjudicator gives a decision to the contrary"
- "the party referring a dispute to adjudication will be solely liable to the Adjudicator for his fees and for all expenses reasonably incurred by the Adjudicator.", "any sum awarded by the Adjudicator shall not be paid to the successful party (unless both the Contractor and the Sub-Contractor agree to accept the decision as final) but shall instead be paid into a Trustee – Stakeholder Account pending final determination of the dispute by arbitration."
- "In any adjudication the referring party will be required to pay the other party's legal costs if, despite being successful in the adjudication, it is awarded less than 50% of its claim"

Perhaps not surprisingly as a result of the success of adjudication and the tendency for more complex cases to come to adjudication, there has been criticism that adjudicators do not have the required skills and experience to deal with these complex matters and that the "quick fix" intention of adjudication is not appropriate. It is arguable whether adjudication was intended to give a quick fix, certainly without doubt adjudication is meant to be a quick procedure but the intention has always been to get the right answer. Of course, the strategy of how one party presents a case can, on occasion, only allow an adjudicator to go down one route and thus give an answer which he is obliged to do by answering the question put to him but in his heart of hearts, he knows is not consistent with the full picture and facts that have occurred given that they have only been given selective information and a very narrow question to answer. This is endorsed by the principal outlined above of answering the right question. As a result of this there is a tendency for some parties to discourage adjudication.

Discussion on UK Mission Drift

The original mission, that of dealing with payment disputes to allow cash to flow, has drifted to the extent that this 28 day process has now been used for large and complex disputes involving claims for extensions of time coupled with additional costs for delay and disruption. The process is also being used to give a speedy answer to complex legal questions. The effect of this drift, together with the increasing propensity for appeals based on procedural error, lack of jurisdiction and natural justice, has been that the role of lawyers has increased (both as adjudicators and as advisors). With

this increased need for the adjudicator to be increasingly skilled in the law, there is an increasing professionalism attached to the role of the adjudicator and the need for them to be qualified in the law. This also represents a drift away from the original concept of the adjudicator being a construction professional towards a professional dominated by lawyers.

Situation in New South Wales

The situation in New South Wales has to be considered with respect to two periods of time; that under the first act, the Building and Construction Industry Security of payments Act 1999 and the amended form, the Building and Construction Industry Security of Payment Amendment Act 2002. In terms of mission drift, there was a considerable amount of drift as a result of judicial hostility (Uher and Brand 2007) as the courts found it radically different from anything they had experienced previously. According to Uher and Brand (2007) the judges could not come to terms with a judgement being final in one sense (that the debt had to be paid) and yet not final in the sense that in subsequent proceedings the debt might have to be repaid. Similarly they could not understand why no cross-claims could be made. It was clear that the aim of the Act was being denied by the courts. The case which brought this to a head was *Baulderstone Hornibrook Pty Limited v HBO+DC Pty Limited*[11] in which the courts refused to enter summary judgement for a statutory debt on the basis that a Practice Note of the Court of 1990 forbade such an action. Even when the amended Act was introduced, the adjudicators' decision continued to be challenged. This was initially because they considered the adjudicator to be a 'judicial tribunal' and as such his decision was open to judicial review. The Court of Appeal decision in the case of *Brodyn v Davenport*[12] confirmed that the adjudicator is not a 'judicial tribunal' and that the Supreme Court did not have the authority to review these decision unless under very special circumstances, including denial of natural justice and failure on the part of the adjudicator to act in good faith.

The NSW provisions have, from the start, differed from the UK in being restricted to payment claims (unlike the UK where any dispute may be referred) and access to the system is only open to claimants (unlike the UK when either party may initiate proceedings). The statutory process in NSW is highly structured and little leeway is allowed to adjudicators. The Adjudicator Nominating Authorities (ANAs) play a much more significant role than the ANBs in the UK, such that much of the process is controlled by them. The adjudicator works on documents alone and is less exposed to claims of bias or procedural error.

The process according to Justice McDougall (2005) in a speech said that the revised act was working well, particularly with regard to smaller claims. McDougall has expressed some concern that the Act was

[11] Baulderstone Hornibrook Pty Limited v HBO+DC Pty Limited [2001] NSWSC821.

[12] Brodyn v Davenport [2004] NSWCA 394

"less efficacious" at dealing with larger claims due to the restricted time frames.

On the whole it appears that the amended Act has brought the NSW adjudication practice back on track with the original intentions of the legislature and that of its mission. It is appreciated that there are a number of states in Australia which have their own adjudication provisions but there is insufficient space to consider them all in this paper.

Situation in New Zealand

The New Zealand Construction Contract Act which came into force on 1st April 2003 is closer to the UK provisions than to the NSW Act. Here the adjudications claims have become more technically complex and increasingly involve legal questions. It is relatively common here for adjudications to involve several parties (up to 3 or 4) and involve claims and counterclaims. A recent example of these multi-party adjudications was *Willis Trust and Anor v Green and Anor*[13]. One aspect of the drift which has been reported by New Zealand adjudicators is the movement towards final account disputes and away from interim disputes as the construction project progresses. Another dimension of this drift has been into claims relating to the personal liability of individual directors in residual funding of contracts.

CONCLUSIONS

The first question which must be asked of the UK system is 'does it do what it was set up to do?' The answer to that would have to be that it has certainly dealt with the problem of payment. The evidence shows that there are now fewer adjudications which involve poor payment practices. However there are signs from the recent case law that a number of potential loopholes are appearing which could be used to frustrate the aims of the provisions. There appears to be some drift with regard to the types of disputes being referred to adjudications away from simple payment disputes and towards complex disputes. This complexity can be divided into two forms; technical and legal. The first comprises claims which involve large sums of money through extensions of time, delay, disruption, etc. they may also involve issues which are complex in engineering terms. These have traditionally been dealt with by arbitration which allows time for experts to be heard and for the forensic examination of the evidence. The other form of complexity involves adjudicators being asked to decide legal issues which would challenge a learned judge, acting on a more generous time frame. Both of these represent drift from the original mission to

[13] Willis Trust Company Ltd and Ian Laywood and Gary James Rees v. Robert John Green and Holmes Construction Wellington Ltd., HC AK CIV-2006-404-809 [25 May 2006]

replace forms of dispute resolution – arbitration and litigation – which have their rightful place in the dispute resolution spectrum.

The process in New Zealand, which if fairly close in its scope to the UK system, appears to be moving in the same direction as the UK although the evidence is a bit patchy at present there are signs that the 'speedy and inexpensive' form of payment protection and dispute resolution may be drifting from its original path.

The situation in New South Wales is interesting in that before the Act was amended, the process was being frustrated from within the legal establishment. The process was being opened to challenge when that had not been the will of the legislature, so there was not so much 'mission drift' as 'mission frustration'. After the amended legislation took effect the process was able to undertake its mission. The legal profession has a lower level of participation at present than is evident in the UK and the process is highly regulated and mechanistic. It involves much more proactive adjudication authorities (ANAs) that are seen in UK. The process seems to be subject to less (if any) drift from the original mission.

It would appear at present that the more tightly-drawn provisions of New South Wales have demonstrated less drift than the other jurisdictions. The lesson would appear to be clear for those who may wish to develop statutory adjudication systems, perhaps in developing parts of the world, that the more closely the procedure is drafted the less it is prone to drifting into areas for which it was not designed and ultimately unsuitable.

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