Chapter 3
The Act: The Adjudication Provisions Section 108

The statutory right to adjudication applies only to construction contracts as defined in sections 104 to 107 inclusive. Section 108 sets the parameters for the provisions which must be included in construction contracts to allow resolution of disputes by adjudication. These are the minimum compliance points to meet requirements of the Act. There is nothing to prevent the parties contracting on the basis of more than the Act requires, providing this does not lead to conflict with the compliance points.

Section 108: Right to refer disputes to adjudication

Section 108(1)

(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.
For this purpose 'dispute' includes any difference.

Section 108 provides that any party to a construction contract has the right to refer a dispute arising under the contract to adjudication. It should be noted that this is a statutory right but it is not mandatory that disputes be referred to adjudication. The contract may contain clauses which offer other means of dispute resolution. The parties may therefore have a number of methods and forums available in which to resolve their disputes.

The terms dispute or difference have become extremely important as they go to the basis of the adjudicator's jurisdiction. If there is no dispute there can be no adjudication. This point has been considered in many of the recent cases relating to the enforcement of adjudicators' decisions that have reached the court. For a wider discussion see Chapter 9.

It is common practice in the industry that parties contract on amended standard forms or on hybrid forms of contract and it is not unusual for the party offering the contract to make its own terms that might, among other matters, intend to exclude the right to adjudication. Can a party do this?

The commentary in *Chitty on Contracts*[1] on this point is as follows:

> 'Although there is a general principle that a person may waive any right conferred on him by statute (*quilibet protest renunciare juri pro se introducto*) difficulties arise in determining whether the right is exclusively personal or is designed to serve other more broad public purposes. In the latter situation, public policy would require that the right be treated as mandatory and not be waivable by the party

[1] See *Chitty on Contracts*, 28th edn at p.845.

for whose benefit it operates. Whether a statutory right is waivable depends on the overall purpose of the statute and whether this purpose would be frustrated by permitting waiver.

Thus in *Johnson* v. *Moreton* [1980] AC 37 the House of Lords held that a tenant could not contract out of the protection afforded by s.24 of the Agricultural Holdings Act 1948 (c. 63) as this would undermine the overall purpose of the Act in prompting efficient farming in the national interest:

> ''The principle which, in my view, emerges . . . is as follows. Where it appears that the mischief which Parliament is seeking to remedy is that a situation exists in which the relations of parties cannot properly be left to private contractual regulation, a party cannot contract out of such statutory regulation (albeit exclusively in its own favour) because so to permit would be to reinstate the mischief which the statute was designed to remedy and to render the statutory provision a dead letter''.'[2]

It is almost inconceivable therefore that any attempt to contract out of the statutory right to adjudication would be binding. See also the comments in sub-section 108(5) which would override any such provision in a contract.

The right to refer a dispute to adjudication only applies to disputes arising under the contract. There are a number of cases in the law relating to arbitration which deal with disputes arising under the contract as opposed to disputes which arise under more widely drafted arbitration clauses.

> 'There is, I suggest, a broad distinction which may be drawn between those clauses which refer to arbitration only, those disputes which may arise regarding the rights and obligations which are created by the contract itself, and other clauses which show an intention to refer some wider class or classes of disputes. This distinction is obviously clear and justined as a matter of law. It may also be one which would be recognised by the parties whose contract it is, for at the very least, by making the contract, they demonstrate their agreement to create a new category of legal rights and obligations, legally enforceable between themselves. Disputes regarding this category may well be described, as a matter of language, as ones arising ''under'' the contract, and this meaning of that phrase has been authoritatively recognised and established, e.g. by the House of Lords in *Heyman* v. *Darwins* ([1942] 1 All ER 337, [1942] AC 356) and by the Court of Appeal in Ashville. Conversely, if the parties agree to refer disputes arising ''in relation to'' or ''in connection with'' their contract, a fortiori if the clause covers disputes arising ''during the execution of this contract'' (*Astro Vencedor Cia Naviera SA* v. *Mabanaft GmbH, The Damianos* [1971] 2 All ER 1301, [1971] 2 QB 588) or in relation to ''the work to be carried out hereunder'' a common form in construction contracts, then both as a matter of language and of authority some wider category may be intended'[3]

> 'Such a dispute (about mistake leading to rectification) is not as to any matter or thing ... arising under the contract … Similarly, a dispute between the parties as to whether an innocent mis-representation, or negligent mis-statement, which led Ashville to enter into the contract . . . [is not] a dispute as to any matter arising under the contract.'[4]

> 'In my judgment, on the ordinary and natural meaning of words, the phrase ''disputes arising under a contract'' is not wide enough to include disputes which do not concern obligations created by or incorporated in that contract.'[5]

> 'Taking into account previous authorities, the court considered that the meaning of ''arising out of'', and ''arising in connection with'' were synonymous. It must be presumed that the parties had intended to refer all disputes arising from the transaction to arbitration and this must include rec-

[2] *Johnson* v. *Moreton* [1980] AC 37, Lord Simon of Glaisdale at p.69.
[3] *Overseas Union Insurance* v. *AA Mutual International Insurance* [1988] 2 Lloyd's Rep 63, Evans J.
[4] *Ashville Investments* v. *Elmer Contractors* (1987) 10 Con LR 72, Balcombe LJ.
[5] *Fillite (Runcorn)* v. *Aqua-Lift* (1989) 26 Con LR 66.

> tification. This was emphasised by the provisions of the sub-clause in the GAFTA agreement. Following the decision in *Fillite (Runcorn) Ltd* v. *Aqua-Lift* (1989) 45 BLR 27, ''arising under'' alone would probably not cover rectification. However, ''arising out of'' in this context should be given a wide interpretation so as to cover all disputes. Rectification therefore being within the scope of the clause, the stay of proceedings would be granted.'[6]

The debate on the various phrases used in such clauses is almost interminable. The cases point to the phrase 'arising under the contract' being of narrower application than phrases such as 'arising out of the contract'.[7] 'In connection with the contract' has a much wider meaning. This could include matters such as misrepresentation and tort.

This is a matter that the adjudicator must determine in deciding whether or not he has jurisdiction. The only real guidance is the current case law on arbitration clauses.

In the case of *Christiani & Neilsen* v. *The Lowry Centre*[8] a question relating to claims that are wider than 'under' the contract was touched on briefly.

Under a heading of 'The Fifth Issue – Is the decision unenforceable because it decides a question concerning the rectification of the deed which the adjudicator had no power to decide?' Judge Anthony Thornton QC made the following comments:

> 'It follows that the adjudicator had full jurisdiction to decide the dispute in the way he did. It also follows that I do not have to decide whether an adjudicator appointed under the provisions of the HGCRA has the power to decide a claim for rectification. Such a claim would have arisen, for example, had The Lowry sought the appointment of an adjudicator to decide its entitlement to rectification. It was contended by The Lowry that since the adjudicator was appointed, by virtue of section 108(1) of the HGCRA, to decide disputes ''under the contract'', he could not have decided disputes that were merely connected with the contract. This argument is dependent on the line of authorities which are concerned with the limited jurisdiction of arbitrators whose jurisdiction is derived from an arbitration clause which refers only to disputes arising ''under the contract''. Such a clause has been held not to extend to disputes involving misrepresentation or rectification claims or claims as to the ambit and content of the contract. Interesting and important as this question is, it does not arise in this case and I express no view about it.
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> The ambit of this doctrine is explored in such cases as *Heyman* v. *Darwins* [1942] AC 356, HL(B); *Ashville Investments Ltd* v. *Elmer Contractors* (1987) 37 BLR 55, CA; *Overseas Union Insurance* v. *AA Mutual International Insurance Co Ltd* [1998] 2 Lloyd's Rep 62, Evans J; *Fillite (Runcorn) Ltd* v. *Aqua – Lift (a firm)* (1989) 45 BLR 32, CA.'

The important point is the distinction between 'under the contract' and 'in connection with the contract'. It is clear that an adjudicator cannot deal with rectification of the contract. Here correctly he did not do so.

It is unlikely that the phrase 'arising under the contract' is sufficiently wide to permit an adjudicator to open up, review and revise certificates of architects or engineers although there may be a specific provision in the contract that this may be done. Adjudication provisions, if they follow the minimum requirements of the Act, will simply not give the wide authority that the arbitration clause gives. An adjudicator would not therefore be in a position to open up, review and revise an architect's certificate and to substitute figures of his own.

Adjudicators can be faced with main contract disputes that concern dissatisfaction with either the amount certified or the extensions of time granted. This is less of a problem under

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[6] *Ethiopian Oil Seed & Pulses Export* v. *Rio Del Mar Foods Inc* [1990] 1 Lloyd's Rep 86.
[7] *Arbitration*, May 1994, S K Chatterjee, 'Do Disputes Arise ''out of'' or ''under'' or ''out of and under'' a Contract?.'
[8] *Christiani & Neilsen Limited* v. *The Lowry Centre Development Company Limited* (16 June 2000).

domestic sub-contract arrangements because there is no certifier as such. It would remain a problem under a nominated sub-contract where certification is involved in the payment process and to an extent in the extension of time process.

It was thought to have been clear since the *Crouch* case[9] that the powers of the courts are not the same as those of an arbitrator.

> SIR JOHN DONALDSON MR: 'Despite the fact that the architect is subject to a duty to act fairly, these powers might be regarded as Draconian and unacceptable if they were not subject to review and revision by a more independent individual. That process is provided for by the arbitration clause. It is however, a rather special clause. Arbitration is usually no more and no less than litigation in the private sector. The arbitrator is called upon to find the facts, apply the law and grant relief to one or other or both parties. Under a JCT arbitration clause (clause 35), the arbitrator has these powers but he also has the power to ''open up, review and revise any certificate, opinion, decision, requirement or notice''. This goes far further than merely entitling him to treat the architect's certificates, opinions, decisions, requirements and notices as inclusive in determining the rights of the parties. It enables, and in appropriate cases requires, him to vary them and so create new rights, obligations and liabilities in the parties. This is not a power normally possessed by any court and again it has a strong element of personal judgement by an individual nominated in accordance with the agreement of the parties.'[10]

It is this judgment which gave both the courts and arbitrators difficulty without express powers such as those found in the JCT arbitration clause. A certificate could not be opened up, reviewed or revised without express terms to do so. Arbitrators found this power in the arbitration clauses in construction contracts. The courts have had some relief in this situation. Section 43A of the Supreme Court Act 1981 (inserted by section 100 of the Courts and Legal Services Act 1990) allows the courts to take on the powers of an arbitrator under the arbitration agreement provided both parties consent. The *Crouch* case has now been overruled by the House of Lords, in *Beaufort Developments* v. *Gilbert-Ash*[11]. The courts do have an inherent jurisdiction to open up, review and revise certificates under construction contracts. Without express terms in the contract an arbitrator or adjudicator would not have such powers. Most of the standard forms of contract and the Scheme do however give adjudicators such powers.

There are no cases since *Crouch* that would provide such powers without an express provision. There is some relief in this situation. There is no doubt that without the express power under the contract, there is no basis on which an adjudicator can open up and review certificates. The effect of this decision was examined in detail by Mr Recorder Roger Toulson QC in *John Barker Construction Limited* v. *London Portman Hotels Limited*[12]. This particular contract did not have the usual arbitration clause that would have given the right to open up, review and revise. The judge defined the essential points of the *Crouch* decision, reading the judgments as a whole as follows:

> '1. The contractual machinery established by the parties provided in the first instance for determination of what was a fair and reasonable extension of time by the architect.
> 2. That agreed allocation of responsibility to the architect was subject to two safeguards:

[9] *Northern Regional Health Authority* v. *Derek Crouch Construction Co* [1984] QB 644.
[10] Sir John Donaldson MR at p.670 in *Crouch*.
[11] *Beaufort Developments (NI) Ltd* v. *Gilbert-Ash NI Ltd and Another* [1998] 2 All ER 778.
[12] *John Barker Construction Ltd* v. *London Portman Hotels Ltd* 50 Con LR.

(a) implicitly, an obligation on the architect to act lawfully and fairly, and
(b) explicitly, the power of review by an arbitrator or, who was entitled to substitute his opinion for that of the architect.
3. If safeguard (a) failed, the court could declare the architect's decision invalid, but it could not substitute its decision for that of the architect solely because it would have reached a different decision, for that would be to usurp the role of the arbitrator.
4. If safeguard (b) failed because the arbitration machinery broke down, the court could substitute its own machinery to ensure enforcement of the parties' substantive rights and obligations that a fair and reasonable extension should be given.'

He concluded:

'It seems to me that this is a case in which the contractual machinery established by the parties has become frustrated or, put in other words, has broken down to such an extent that it would not now be practicable or just for the matter to be remitted to the architect for re-determination; and that in those circumstances the court must determine on the present evidence what was a fair and reasonable extension of time.'

The decision in *Balfour Beatty* v. *Docklands Light Railway*[13] is also of assistance, although the judgement is more limited in that it only gave jurisdiction where there was a breach on the part of the employer. In that particular case it was the employer's representative who took the place of the engineer in making engineer's decisions.

'We would be greatly concerned at the implication of accepting Mr Ramsey's argument [for DLR] if to do so would leave the contractor without any effective means of challenging partial, self-interested or unreasonable decisions (if such were shown to have been made) by the employer. We would then have wished to consider whether an employer invested (albeit by contract) with the power to rule on his own and a contractor's rights and obligations, was not subject to a duty of good faith substantially more demanding than that customarily recognised in English contract law. Mr Ramsey has, however, accepted without reservation that the employer was not only bound to act honestly but also bound by contract to act fairly and reasonably, even where no such obligation was expressed in the contract (as in some clauses, for example clause 31.5, it was). Even on a more expansive approach to good faith, it may be that no more is required in the performance of the contract. . . . If the contractor cannot prove a breach of duty, he will not be entitled to a remedy. If it cannot, and cannot establish any other breach of contract, it will be under this contract entitled to none.'

The court concluded that the Official Referee had been correct in finding that the court did not possess the power to open up, review and revise the employer's decisions, opinions, instructions, directions, certificates or valuations, but that the court could grant appropriate relief where the contractor could prove breaches of contract on the employer's part.

In *Tarmac Construction* v. *Esso*[14] a further consideration was given to the jurisdiction of the courts where a dispute was referred to litigation. Again there was no arbitration clause in the contract.

'8. Esso's formulation would inevitably lead to a trial within a trial since the unreasonableness of the engineer's decision, or any other grounds upon which the decision was to be revised would have to be demonstrated by showing the reasonableness of the case rejected. There is no obviously useful purpose to be served in such a course.
9. The clause also contemplates that the engineer may also fail to give a decision. In such an event, what is to happen? If the dispute were about some earlier expression of opinion by the engineer,

[13] *Balfour Beatty Civil Engineering Ltd* v. *Docklands Light Railway* [1996] 78 BLR 42, CA.
[14] *Tarmac Construction Ltd* v. *Esso Petroleum Co Ltd* [1996] 83 BLR 65.

> then, even though the engineer might under clause 66 have considered it de novo. . . , a failure by the engineer to decide could hardly be a breakdown of the machinery, since the clause contemplates such an eventuality. On Esso's formulation, the opinion, even though arrived at as a preliminary view, would stand. This is not a reasonable interpretation of the contract.
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> If it is to be assumed that there was a breakdown of the machinery whereby the court may act in default to enforce the contractual rights, then the position of the party who has referred the dispute for decision might depend entirely upon whether the engineer decided to give a decision. This too is not a reasonable result compared with the certainty (and fairness) of Tarmac's submissions, which are to be preferred.
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> 10. Lastly, as Mr Blackburn forcefully submitted, if clause 66 were to be construed as meaning that decisions can be impeached only in the limited circumstances identified in *Balfour Beatty* [*Civil Engineering Ltd* v. *Docklands Light Railway Ltd* [1996] 49 Con LR 1] the parts relating to the reference to litigation become otiose, for the same right existed without any such clause in *Balfour Beatty*. The parties would not gain anything, apart from the time limit on the reference to litigation, which could as well be achieved in simpler form.
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> For all these reasons, clause 66 clearly expresses an intention that the engineer's decision is not final and may be revised by the court. This would ensure that, if the engineer's decision were influenced (albeit unconsciously) by self-interest, the party affected would have the opportunity of an impartial decision and the mechanism chosen should enable any imbalance in the preceding provisions to be redressed. The court will be enforcing the parties' rights and will not be doing anything for which it does not have jurisdiction, or which it does not regularly do. Accordingly, Issue 1 will be answered ''yes''.'

The importance of these cases is that they deal with the situation where there is no right to open up, review or revise certificates. Where a decision is in breach of contract it is not insurmountable simply because there are no powers to open up, review or revise. The breach itself can be remedied. The power to open up, review and revise the certificates must be viewed as an automatic right of appeal. The power is there to change the content of the certificate by virtue of an express term in the contract. Where no such power exists the fact that the certificate may be viewed to be wrong is not enough. The decisions that form the contents of the certificate should have been procured as a result of a breach if there are to be any grounds to modify that certificate. The burden of proof is on the claiming party to establish that the certificate was procured in breach of the contract. This is obviously more difficult than an automatic power that permits a review of the certificate under the contract. It can be seen from the two cases above that the courts give effect to contracts. This obviously includes providing remedies for any breach of the contract. Adjudicators must remember that unless the contract so provides they have no absolute power to open up, review and revise certificates. Where no such power exists they would have authority to remedy any breaches which procured the content of the certificates, if those breaches are brought before them.

Sub-section (2) gives the minimum criteria that all construction contracts should contain in respect of adjudication provisions. The emphasis here is that the Act is importing terms into contracts. The Act is not providing statutory rights per se; it is providing contractual rights. These contractual rights must be contained in the construction contract because the Act requires so.

Section 108(2)(a)

(2) The contract shall–

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

A party has the right to give notice at any time of its intention to refer a dispute to adjudication. It was often the case in standard forms of contract that arbitration could not be commenced until after practical completion of the works or that arbitration could only be commenced in respect of limited issues. (In most instances this has now been amended in the latest editions of the standard forms.) This is not to be the case in respect of adjudication. The Act gives the party wishing to serve a notice an unrestricted right to do so at any time. There is nothing to prevent such a notice being issued after litigation or arbitration has commenced. This was dealt with in *Herschel* v. *Breen*[15]:

> '14. Mr Brannigan's submissions on behalf of the claimant are short and simple. He emphasises the fact that section 108(2) provides that the contract provides that a party can give notice at any time of his intention to refer a dispute to adjudication. Adjudication is a special creature of statute, and the jurisprudence relied on by Mr Davies in support of his first argument has no application. The 1996 Act clearly contemplates that there may be two sets of proceedings in respect of the same cause of action, and there is nothing in the Act which indicates that they may not proceed concurrently. As for Mr Davies' second argument, Mr Brannigan submits that the commencement of proceedings in court does not amount to a waiver or repudiation of the right to refer the subject of those proceedings to adjudication. Here too he relies on the fact that the 1996 Act permits a party to refer a dispute to adjudication at any time. He also raises a doubt as to whether it is correct to regard the right to refer a dispute to adjudication as a contractual right which is capable of being waived or repudiated. This is because the right to refer a dispute to adjudication is imposed on the parties by the 1996 Act.
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> 20. In my view, there is no obvious reason why Parliament should have intended to draw a distinction between cases where litigation or arbitration proceedings have been started before a dispute is referred to an adjudicator, and those where the proceedings have been started only after an adjudication has been completed. The mischief at which the Act is aimed is the delays in achieving finality in arbitration or litigation. Why should a claimant have to wait until the adjudication process has been completed before he embarks on litigation or arbitration? If he is in a position to start proceedings, it is difficult to see why he should have to wait until a provisional decision has been made by an adjudicator. The normal rule that concurrent proceedings in respect of the same issue or cause of action will not be countenanced is justified on the grounds that (a) it is oppressive to require a party to defend the same claim before different tribunals, and (b) it is necessary to avoid the risk of inconsistent findings of fact. But it is inherent in the adjudication scheme that a defendant will or may have to defend the same claim first in an adjudication, and later in court or in an arbitration. It is not self-evident that it is more oppressive for a party to be faced with both proceedings at the same time, rather than sequentially. As for the risk of inconsistent findings of fact, on any view this is inherent in the adjudication scheme. The answer to Mr Davies' first submission has been provided clearly and unequivocally by section 108(2)(a). Parliament has decided that a reference to adjudication may be made ''at any time''. I see no reason not to give those words their plain and natural meaning.
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> 21. Mr Davies points out that, if his first submission is wrong, it is possible to conceive of absurd situations arising. For example, he suggests that the hearing in the county court may be adjourned part heard for several weeks. The judge may have made adverse comment on the claimant's case. The claimant might decide to use the period of the adjournment to refer the dispute to adjudication in the hope of obtaining a favourable provisional decision from the adjudicator. As I said in the course of argument, if an extreme case of this kind were to occur and the claimant were to succeed before the adjudicator, the most likely outcome would be that the defendant would not comply with the adjudicator's decision. If the claimant then issued proceedings and sought summary judgment,

[15] *Herschel Engineering Ltd* v. *Breen Property Ltd* (14 April 2000), Dyson J.

> the court would almost certainly exercise its discretion to stay execution of the judgment until a final decision was given in the county court proceedings. In any event, the fact that it is possible to conceive of far-fetched examples like this does not deflect me from the view that I have already expressed.'

The adjudicator's decision was enforced in *Herschel* v. *Breen*. The comments of Dyson J regarding those circumstances where a decision might not be enforced, particularly where a judgment from the court was imminent, are worth attention but they are likely to be considered 'obiter' and thus each case needs to be reviewed on its merits.

What if a party issues the adjudication notice after the issue of a final certificate and outside the period for commencement of any arbitration? There does not seem to be any time bar, save for the limitation period.

Where the contract is brought to an end by a breach, the contract is not at an end; it is only performance which ceases. Does adjudication survive repudiation or termination? This point was dealt with in *A & D Maintenance* v. *Pagehurst*[16]:

> '18. Even if the contract had been terminated, the matters referred to the Adjudicator remain disputes under the contract. Where there is a contract to which the Act applies, as in this case, and there are disputes arising out of the contract to be adjudicated, the adjudication provisions clearly remain operative just as much as an arbitration clause would remain operative.'

Most of the standard forms make provision for the determination of employment rather than a termination of the contract itself. The contract itself clearly remains live and has provisions to deal with the effects of the termination of employment. The adjudicator would therefore have jurisdiction to deal with any dispute, which arose over the determination of the employment itself, as it arises under the contract.

Section 108(2)(b)

> (2) (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

The timetable of seven days is for both the appointment of the adjudicator and the referral of the dispute to him. The contract must provide a timetable with the object of securing the appointment within seven days. This is an objective; the period is not mandatory. If the contract provides that objective, the responding party could not object to the validity of the appointment and therefore claim that there was no jurisdiction on the grounds that the appointment and the referral took more than the seven days. This is not a mandatory provision of any kind; the Act requires the inclusion of a 'timetable with the object of securing the appointment and referral to the adjudicator within seven days' and any attempt to resist enforcement on the grounds of a referral outside this limit is unlikely to be received very favourably by the courts. The authors have examples of referrals outside the seven-day period in their own experience in respect of which jurisdictional objections have been made vociferously by the responding party. When the adjudication is completed in these cases there has been no attempt to resist enforcement on the grounds of referral out of time. If the adjudicator is named in the contract the selection of the adjudicator will already be in place. The act of making the referral could be sufficient to perfect the appointment for that particular dispute. Where the adjudicator is not named the selection process cannot consume all of the seven days of this period. The institutions who are likely to be named in contracts as

[16] *A & D Maintenance & Construction Limited* v. *Pagehurst Construction Services Limited* (23 June 1999).

appointees and the adjudicator nominating bodies have already considered the timetable as part of their structure to meet the needs of the Act and most of them operate on the basis that they must nominate within the five days set out in paragraph 5(1) of the Scheme (see Chapter 5). The Act refers to the adjudicator as 'him' but this expression also includes 'her' by virtue of the Interpretation Act 1978.

Section 108(2)(c)

(2) (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

The intention has always been that adjudication will be a fast track process. The requirement that the adjudicator reach a decision within 28 days is a contractual matter and not a statutory one. The Act only requires that the contract make this provision. The reckoning of periods of time is dealt with in section 116. There has been much argument that the period may lead to a situation of the unadjudicatable dispute. This is where the responding party and the adjudicator consider that the dispute cannot be adjudicated within 28 days but the referring party insists on its right to having a decision within that time. The parties may agree a longer period for the adjudicator to reach his decision. The emphasis here is that mutual agreement of the parties is required for the period to be extended. If one party objects, the period cannot be extended. It is likely that the referring party will wish the process to be concluded as quickly as possible and there will therefore be a reluctance to permit the extension of the period. It is here that the adjudicator's managerial and persuasive skills will need to be applied.

The Act does not stipulate what form the decision should take or whether or not reasons should be given.

There is no distinction between the reaching of the decision and its publication. Until very recently the court had not considered the question of a decision which was made but not delivered to the parties while the adjudicator awaited payment of fees, and we expressed the opinion in the first edition that there was no reason why an adjudicator should not announce that his decision had been made and would be sent on the payment of his fees.

The Scottish court considered this in *St Andrews Bay* v. *HBG Management*[17] in which St Andrews Bay claimed that the adjudicator had no power to reach her decision after 5 March 2003 and the decision sent to the parties on 7 March 2003 was thus not a valid decision. Lord Wheatley concluded that a decision cannot be said to be made until it has been actually provided to the parties. Further, in the circumstances of this case, the adjudicator was not entitled to delay communication or intimation of the decision until the fees were paid. There was nothing in the Scheme or contract to allow this. No alternative arrangement had been made. However, the judge held that the failure of the adjudicator to produce the decision within the time limits, while serious, was not of sufficient significance to render the decision a nullity. It was not such a fundamental error or impropriety to render the entire decision invalid.

Section 108(2)(d)

(2) (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;

[17] *St Andrews Bay Development Limited* v. *HBG Management Limited* (20 March 2003).

This gives the power for the adjudicator to extend time for up to 14 days. The power is granted by consent of the party who made the referral (the referring party or applicant). There is nothing to require the applicant to give such consent. This could place the adjudicator and the responding party in difficulty. There is however no requirement of reasonableness on the part of the applicant, but if the adjudicator as a result is unable to meet the time period for making his decision it appears likely that it will be unenforceable unless the delay is of a very short period.

Section 108(2)(e)

(2) (e) impose a duty on the adjudicator to act impartially; and

This imposes a duty on the adjudicator, which is similar to the duty imposed on an arbitrator under section 33 of the Arbitration Act 1996. This duty has to be set out in the contract and should be in the express terms and conditions of appointment or any adjudication rules. Although there is a duty of impartiality there is no requirement in the Act that the adjudicator be independent. It is conceivable therefore that an adjudicator could be appointed who in some way is connected with the parties or the work in question.

The duty to act impartially does require the adjudicator to apply the rules of natural justice. These however will be interpreted having regard to the time restraint of the adjudication process. It is arguable that simply to apply the rules of natural justice is too narrow a concept. It is more appropriate to describe the duty as to not act unfairly or in bad faith. The courts will not readily imply a procedure which would lead to an unfair result[18]. The term 'procedural fairness' has been coined by Forbes J, the judge in charge of the Technology and Construction Court when describing an adjudicator's obligations.

The adjudicator should declare any interest that could mean that he has any bias towards one of the parties. He should ensure that each party has the opportunity to present its case and to answer the case submitted by the other within the time restraints of the Act.

If there is a breach of the duty to act impartially the decision will be void. It will therefore be unenforceable. For a more detailed discussion on natural justice, procedural fairness and bias see Chapter 9.

Section 108(2)(f)

(2) (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

This gives the adjudicator similar powers to those of an arbitrator in section 34(2)(g) of the Arbitration Act 1996.

> 'It is of course unlikely that many arbitrators will opt for the inquisitorial approach, as it remains an unfamiliar procedure in England.'[19]

That may be so in arbitration, although perhaps less so now than when Professor Merkin wrote his comment a few years ago, but it is essential in our view that adjudicators do not fear the inquisitorial approach if adjudication is to work under this Act.

This sub-section gives the adjudicator wide powers. He may visit the site, talk to the appropriate personnel on site, make his own enquiries by telephone. There is nothing to

[18] See *London Export Corporation Ltd* v. *Jubilee Coffee Roasting Company Ltd* [1958] 1 All ER 494; *Wiseman and Another* v. *Borneman and Others* [1971] AC 297; *Norwest Holst Ltd* v. *Secretary of State for Trade* [1978] Ch 201.
[19] Robert Merkin commentary on section 34(2)(g) Arbitration Act 1996, An Annotated Guide.

prevent the adjudicator seeking legal advice or technical advice in pursuit of his inquiries. In fact in every respect the adjudicator is 'master in his own house' provided he does not ignore the duty to act impartially. This would necessarily require the adjudicator to tell the parties what he has discovered and allow the parties to respond. This situation has been examined by Judge Richard Seymour in *RSL (South West)* v. *Stansell*[20]:

> 'It is elementary that the rules of natural justice require that a party to a dispute resolution procedure should know what is the case against him and should have an opportunity to meet it. In *paragraph 17* of *The Scheme for Construction Contracts* it is provided in terms that *''The adjudicator . . . shall make available to* [the parties] *any information to be taken into account in reaching his decision''*. At one point in her oral submissions Miss Hannaford seemed to come close to relying upon the absence of an equivalent provision in clause 38A of the sub-contract as an indication that there was no similar requirement in relation to an adjudication governed by terms similar to those of the sub-contract. If and insofar as Mr Hinchcliffe, or anyone else, may have thought that the effect of clause 38A.5.7 was that an adjudicator could, subject only to giving the parties to the relevant adjudication advance notice that he was going to seek technical or legal advice, obtain that advice and keep it to himself, not sharing the substance of it with the parties and affording them an opportunity to address it, it seems to me that he or she has fallen into fundamental error. It is absolutely essential, in my judgment, for an adjudicator, if he is to observe the rules of natural justice, to give the parties to the adjudication the chance to comment upon any material, from whatever source, including the knowledge or experience of the adjudicator himself, to which the adjudicator is minded to attribute significance in reaching his decision.'

If the rules for adjudication or the provisions in the contract seek to be too prescriptive or to detail the procedures to be followed too strictly, the flexibility of this sub-section will be lost and it is encouraging that this appears not to have been a route generally followed.

Section 108(3)

> (3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement. The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

The concept of adjudication under this Act was to provide 'the short . . . the dirty fix that the industry asked for'[21]. In the short term, at least, an adjudicator's decision is binding on the parties. It remains binding unless the parties do something that will replace that decision with some form of permanent decision.

The options are provided in the sub-section. The dispute can be finally determined by legal proceedings. Alternatively the dispute can be finally determined by arbitration where the contract provides for arbitration or the parties otherwise agree to arbitration. The particular clauses in contracts need to be examined for the timing to commence arbitration or litigation. In many instances there are specific issues where formal action is not permitted until after the practical completion of the works. The parties may agree to accept the adjudicator's decision as final and binding at any time. It is conceivable that it may be implied that the adjudicator's decision is final and binding where the parties have conducted their relationship on the basis that the adjudicator's decision is final. The parties may

[20] *RSL (South West) Ltd* v. *Stansell Ltd* (16 June 2003).
[21] R. Jones, *Hansard*, 8 July 1996, col. 84.

make it a term of their contract that the adjudicator's decision is final or they may agree at any time that the decision is final.

The parties may also substitute a new agreement which is final and binding for the decision made by the adjudicator and it has been noted that parties often use an adjudicator's decision as a basis of negotiations to finally resolve the dispute.

Section 108(4)

(4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.

This sub-section has similar wording to section 29 of the Arbitration Act 1996. The Arbitration Act 1996 provides the arbitrator with statutory immunity. However this Act does not provide such immunity for adjudicators. The Act only requires that the immunity is provided in the contract and it is therefore a contractual immunity and not a statutory one. The immunity extends to the adjudicator's employees or agents. This does not of itself imply that the adjudicator will be a firm rather than an individual. It simply covers those who may be connected with the adjudication through the adjudicator.

The immunity would not extend to a body who appoints an adjudicator. This is dealt with in section 74 of the Arbitration Act 1996 but is not dealt with at all by this Act. It is conceivable that a body appointing an adjudicator, which has acted negligently in the appointment or has otherwise failed to exercise its supervisory or other powers with reasonable care, is liable in contract or tort to the parties.

> 'There is a question as to whether or not the adjudicator could face actions in tort from third parties affected by the decision. If the decision is regular in terms of the Act this is unlikely. There is nothing to prevent the Adjudicator's terms of appointment requiring that the parties indemnify him for actions in tort as well as in contract.
> Where the adjudicator acts in bad faith there is no immunity in any event. Bad faith is difficult to define. It has been held to be ''malice or knowledge of absence of power to make the decision in question''.'[22]

> 'There have been few cases in which actual bad faith has even been alleged, but in the numerous cases where misuses of power have been alleged judges have been careful to point out that no question of bad faith was involved and that bad faith stands in a class of its own.'[23]

With these provisions in the Arbitration Act 1996 and this Act, it is likely that this will be an area of the law which will develop.

Section 108(5)

(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.

Sub-sections 108(1) to (4) inclusive give the 'bare bones' requirements for adjudication under the Act. If the contract does not wholly comply with the requirements of these sub-sections

[22] *Melton Medes Ltd and Another* v. *Securities & Investment Board* [1995] 3 All ER 881.
[23] *Smith* v. *East Elloe District Council* [1956] 2 WLR 888.

the Scheme will apply (see Chapter 5). This gives the default position under the Act. It should be noted that if the contract refers to adjudication rules and these do not comply with the Act, the Scheme would still apply.

Section 108(6)

(6) For England and Wales, the Scheme may apply the provisions of the Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate.
For Scotland, the Scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator's decision.

The references to the Arbitration Act 1996 caused an outcry in the industry press at the time that the first draft of the Scheme was published. The criticisms, among others, were that it followed arbitration too closely. It is worth noting that the extracts from the Arbitration Act 1996 that are incorporated into the Scheme have never been utilised as the problem seems to have been avoided totally by the positive attitude of the court to the enforcement of adjudicators' decisions from *Macob* v. *Morrison* onwards.