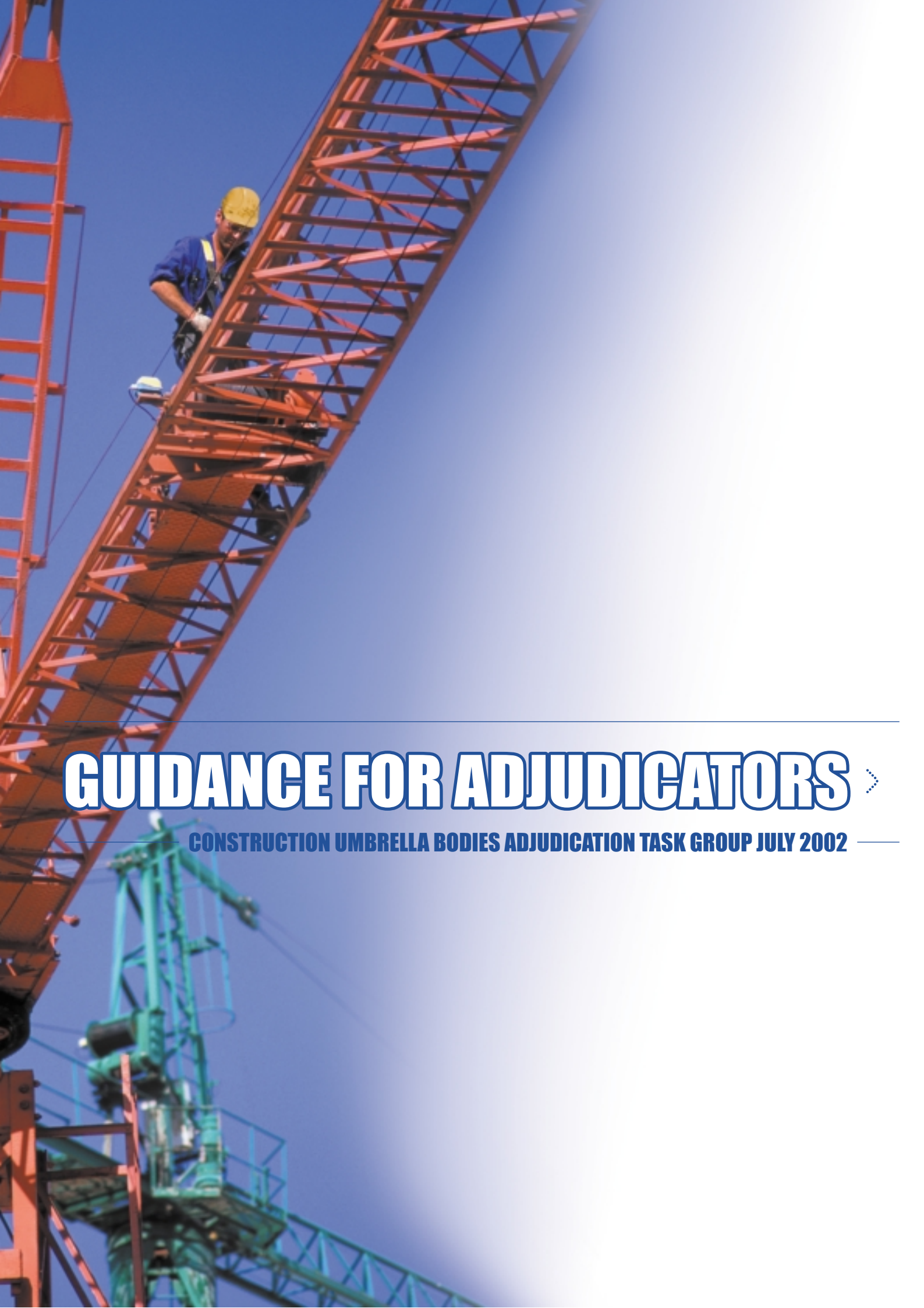

GUIDANCE FOR ADJUDICATORS

CONSTRUCTION UMBRELLA BODIES ADJUDICATION TASK GROUP JULY 2002

GUIDANCE FOR ADJUDICATORS

Guidance for adjudicators in adjudications conducted under Part II of the Housing Grants, Construction and Regeneration Act 1996

CONSTRUCTION UMBRELLA BODIES ADJUDICATION TASK GROUP

JULY 2002

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All parties must rely exclusively upon their own skill and judgment when making use of this document. This *Guidance for Adjudicators* is intended merely to highlight issues which arise in adjudications under the Construction Act and not to be comprehensive, nor to provide legal advice. Neither the bodies listed above nor any other contributor assumes any liability to anyone for any loss or damage caused by any error or omission whether such error or omission is the result of negligence or any other cause. Any and all such liability is disclaimed.

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INTRODUCTION

This *Guidance for Adjudicators* arises out of the Construction Industry Board's review[1] of the first two years' operation of the Scheme[2] under the Construction Act.[3] It covers a number of specific issues raised in that report, and is not comprehensive.

Circumstances alter cases, and the guidance should be treated as suggestions to adjudicators rather than rules. It is couched in lay terms and is not intended as a legal interpretation of the provisions of the Act or the Scheme, but as helpful guidance. **The guidance is advisory not binding.**

This *Guidance for Adjudicators* primarily refers to adjudication conducted under the Scheme in England and Wales but much of it will be applicable elsewhere or when a contractual adjudication procedure is used.

1 *Review of the Scheme for Construction Contracts:* A CIB Report to the Construction Minister, December 2000: available (together with the DETR Response) on www.cic.org.uk.
2 The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Statutory Instrument 1998 No 649).
3 Part II of the Housing Grants, Construction and Regeneration Act 1996 which came into force on 1 May 1998.

1. NATURAL JUSTICE (PROCEDURAL FAIRNESS)

The issue

An adjudicator must conduct the proceedings in accordance with the requirements of natural justice or procedural fairness. In a small number of cases, the courts have not enforced the adjudicator's decision on the grounds that the adjudicator did not act fairly, and it is evident that adjudicators do not always know exactly what it means to act in accordance with natural justice.

The law

Natural justice is not a defined term. As one judge put it: 'Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be very sorry to see this fundamental principle degenerated into hard-and-fast rules'.[4]

There are two main aspects to the need for procedural fairness: 'no bias' and 'fair hearing'.

No bias: the adjudicator must be impartial and act independently. For there to be a breach of natural justice it is not necessary for there to be actual bias – apparent bias is sufficient. The test is whether there is a real possibility, not probability, that the adjudicator is biased, based on how the reasonable observer would interpret the situation. Bias may occur in a number of ways; for example, if the adjudicator:

- has, or appears to have, a personal relationship with one of the parties;
- has, or appears to have, an interest in the outcome of the adjudication (a conflict of interests);
- conducts the adjudication in a manner which favours, or seems to favour, one party;
- acts in a manner which is seen, or might be seen, as supporting one party to the detriment of the other.

Fair hearing: this means ensuring that each party:

- has a reasonable opportunity of presenting its case;
- knows what the case against it is;
- is in possession of all the evidence and information that is adduced against it or obtained by the adjudicator.

The words do not imply that an oral hearing or meeting is necessary. These requirements have to be measured in the context of the time within which the adjudicator has to reach his decision, and the fact that the decision is provisional, pending final resolution of the dispute by arbitration, litigation or agreement. As one judge put it: 'It is accepted that the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit'.[5]

4 *Wiseman v Borneman* [1971] AC 297 HL, per Lord Reid at 308B.

5 *Glencot Development & Design Company Ltd* v *Ben Barrett & Son (Contractors) Ltd* [2001] BLR 207, TCC, at p 218, per Judge Humphrey LLoyd; see too *Discain Project Services Ltd* v *Opecprime Development Ltd* [2001] BLR 285, TCC, Judge Bowsher.

1. If you are aware of any connection, however remote, that you have or have had with either party, or of any matter which either party might see as being a conflict of interests, notify the parties and consider refusing the appointment. If anything comes to light after you have been appointed, ask the parties if they wish you to continue; if necessary, resign.[6]

2. Ensure that all your actions are, and are seen to be, fair. Before taking any action, (for example, declining to accept late information[7]) ask yourself: 'Am I acting fairly? Does it appear that I am acting unfairly?'

3. Although the Scheme does not make express provision for the submission of a response to the referral notice, give the responding party a reasonable opportunity to respond, and consider any response that is served.[8] You may also instruct that a response is served, and specify the timetable for this to be done.[9]

4. Use great care if you communicate with one party (or its representatives, experts or witnesses) in the absence of the other, either in a meeting or over the telephone. If contact with one party alone is necessary or unavoidable, keep a detailed record of what is said and send it to both parties as soon as practicable. If you receive unsolicited telephone calls, consider requiring that the information is conveyed in a form which can be sent to the other party and yourself, for example by fax or email. Ensure that both parties know what is happening at all times.

5. In the case of necessary telephone calls, consider using telephone conferencing.

6. Consider obtaining the views of the parties before making directions other than those you consider routine.

7. Notify as early as possible final deadlines for the supply of information and dates for meetings.

8. Although your role is investigatory and inquisitorial, when undertaking investigations ask yourself whether you are attempting to make or supplement one party's case; do not argue the case for one of the parties, either before or when giving your decision, or in setting out your reasons.

9. Consider carefully before indicating disapproval of the way in which one party conducts his case.

10. Guard against seeming to have made up your mind as to the merits of the case before having heard or seen all the evidence.

11. Ensure that any information on which you intend to rely in reaching your decision is known to both parties, so that they both have an opportunity of responding.

6 The Scheme, paragraph 9(1).
7 The Scheme, paragraph 15.
8 The Scheme, paragraph 17.
9 The Scheme, paragraph 13(a).

2. CHALLENGES TO JURISDICTION

The issue

Almost the only way that a party can stop an adjudication proceeding is by alleging that the adjudicator lacks the jurisdiction – that is, the authority – to deal with the issues raised. If an adjudicator proceeds without the necessary jurisdiction his decision will not be enforceable. On the other hand if he fails to proceed when he does have jurisdiction, that is unjust to the referring party.

Examples of grounds on which jurisdictional challenges may be made are:

- the contract is not a 'construction contract' within the Act;[10]
- the relevant activities are not 'construction operations' within the Act;[11]
- the adjudicator was not properly appointed, for example because he is not the adjudicator named in the contract, the wrong Adjudicator Nominating Body made the appointment, the appointment was too late, or the adjudicator has a conflict of interests;
- it is asserted that there is no dispute.

The law

Unless the parties otherwise agree, an adjudicator does not have the power to make a final decision as to whether he has jurisdiction to act as an adjudicator under the Scheme; only the courts can do that. However, as one judge put it: 'It is clearly prudent, indeed desirable, for an adjudicator faced with a jurisdictional challenge which is not a frivolous one to investigate his own jurisdiction and to reach his own non-binding conclusion as to that challenge. An adjudicator would find it hard to comply with the statutory duty of impartiality if he or she ignored such a challenge.'[12]

Guidance for adjudicators

1. If you are faced with a jurisdictional challenge, you should investigate, seek the views of the parties and reach your own conclusion on the merits of the challenge. If you fail to do so, it may seem that you are not impartial.

2. If you conclude that you do have jurisdiction, you should tell the parties immediately and continue with the adjudication.

3. If you conclude that you do not have jurisdiction, you should tell the parties immediately and give notice in writing of your intention to resign.[13]

4. If you are unsure whether you have jurisdiction, nevertheless make a judgment as to whether to proceed or resign. If you proceed, consider obtaining confirmation from the referring party that it wishes you to continue.

5. If you proceed, consider obtaining confirmation from the referring party that it wishes you to continue.

10 The Act, sections 104 to 107.
11 The Act, section 105.
12 *Christiani & Nielsen Ltd v The Lowry Centre Development Company Ltd* unreported, 29 June 2000, TCC, per Judge Thornton.
13 The Scheme, paragraph 9(1).

3. INTIMIDATORY TACTICS

The issue

There is growing evidence that some adjudicators are experiencing intimidatory or 'bullying' tactics from the parties or their representatives during the course of an adjudication.

For example, undue pressure may be put on the adjudicator to adopt a course of action desired by one of the parties. This may be by means of aggressive threats or other actions designed to reduce the control that the adjudicator has over the process. It may involve:

- making spurious challenges to the adjudicator's jurisdiction;
- causing delay with the intention of obtaining an extension of time;
- deliberately confusing the adjudicator through the use of technical or esoteric legal arguments;
- threatening to take no further part in the adjudication or to take legal action against the adjudicator, or to report him to his professional institution.

The law

Paragraph 13 of the Scheme lists some of the steps that an adjudicator can take in order to determine the dispute, and paragraph 14 requires the parties to comply with any request or direction of the adjudicator.

Guidance for adjudicators

1. Recognise such tactics early and counter them firmly but fairly. Remember that you are in control of the procedure.

2. Where necessary, require that all arguments are put in writing with a copy sent to the other party.

3. Follow the advice regarding telephone calls in section 1 (page 3, paragraph 4), that a detailed record be kept. Consider refusing to discuss any matter over the telephone.

4. Respond politely but firmly if a party is behaving in an intimidatory manner; it may be appropriate, where arguments are being put forward aggressively or at undue length, to limit the length of submissions that may be made.

5. Always remember that while issues raised by the parties should be taken into account, they or their representatives should not deflect you from the duties placed upon you.

6. If one party goes to court, for example to challenge jurisdiction, continue the adjudication unless both parties agree otherwise or the court so directs.

7. Remember that adjudication is a rapid procedure leading to a provisional decision and that, if need be, the complexities of the underlying dispute can be resolved in arbitration or litigation.

8. Do not lose your temper!

4. UNMANAGEABLE DOCUMENTATION

The issue

Sometimes one party submits unmanageable and disproportionate quantities of documentation to the adjudicator, making it difficult for the other party to respond and for the adjudicator to reach his decision within the time limit.

Some adjudicators express concern that if they seek to limit the amount of paperwork that they receive or consider, they will be vulnerable to challenge either on the grounds of natural justice or because it would be a breach of paragraph 17 of the Scheme (which requires the adjudicator to consider any relevant information). They (wrongly) believe that they must take into account *all* information submitted to them in the course of the adjudication.

The law

As explained, natural justice requires (amongst other things) that the adjudicator must give each party a reasonable opportunity to present its case and act fairly between the parties. However, 'fairness' must be set within the context of adjudication as a fast and interim procedure.

Paragraph 17 of the Scheme requires the adjudicator to consider 'any *relevant* information submitted to him'. Paragraph 13(g) gives the adjudicator power to limit the length of written documents submitted to him.

Guidance for adjudicators

1. The responsibility for judging what is or is not 'relevant information' lies with you but in principle it is information that is evidential of the issues or events that a party has to prove in order to further its case.

2. The duty in paragraph 17 also needs to be considered in the light of the extensive powers given to you by paragraph 13. In particular consider giving directions as to the timetable, any deadlines, or limits as to the length or quantity of written documents.

3. Consider seeking consent to an extension of time in order to give you a proper opportunity to consider the papers and the other party's response.[14]

4. Remember that you are in control of the procedure. Consider limiting **at the outset** the amount of material to be submitted, taking into account the nature and value of the dispute. To prevent documents being 'drip-fed', you can stipulate that all submissions and all documents must be received by a certain date.[15]

5. Consider requiring a party to provide a concise statement of its case, cross referenced to a bundle of back-up documentation, and a chronology (although an extension of time may also be needed).

14 The Scheme, paragraph 19(1).
15 The Scheme, paragraph 13(g).

Guidance for adjudicators

6. Consider whether the documentation properly relates to the dispute being adjudicated or to another issue (which may or may not be a dispute between the parties). The introduction of matters that have not been canvassed by the referring party at or before the referral may point to there not yet being a dispute within your jurisdiction.[16]

7. Consider your powers under paragraph 15 of the Scheme where a party declines to comply with a request without showing sufficient cause.

16 *Edmund Nuttall Ltd v RG Carter Ltd* [2002] EWHC 400, TCC, Judge Seymour (available on www2.bailii.org), and *Fastrack Contractors Ltd v Morrison Construction Ltd* [2000] BLR 168, TCC, Judge Thornton.

5. REASONS FOR THE DECISION

The issue

The adjudicator is obliged to give reasons for his decision if requested by one of the parties. The possibility of receiving a request at a late stage during the adjudication, or even after the decision has been given, has caused concern amongst adjudicators.

The law

Paragraph 22 of the Scheme provides: 'If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision'. The adjudicator also has a wide discretion, under paragraph 13(g) and (h) to 'give directions as to the timetable for the adjudication, any deadlines ...' and 'issue other directions relating to the conduct of the adjudication'.

Guidance for adjudicators

1. Consider setting a date at the outset by which any request to give reasons must be made.

6. ACCIDENTAL ERRORS OR OMISSIONS

The issue

Uncertainty has arisen regarding the extent to which an adjudicator may correct accidental errors or omissions (errors) in his decision once it has been delivered to the parties.

The law

Once the adjudicator has delivered his decision, his jurisdiction over the dispute is ended. However, where there is an error on the face of the decision, it seems that the adjudicator retains a power to make corrections. As one judge put it:

'... in the absence of a specific agreement by the parties to the contrary, there is to be implied into the agreement for adjudication the power of the adjudicator to correct an error arising **from an accidental error or omission or to clarify or remove any ambiguity in the decision** which he has reached, provided this is done within a reasonable time and without prejudicing the other party.'[17]

- The power is contractual, so the parties are at liberty either to exclude the power or to limit it as they see fit (for example, in a contractual adjudication procedure). Alternatively, the adjudicator or Adjudicator Nominating Body may set out the terms of the power in the appointment agreement.
- It is for the adjudicator to decide whether there is an error or not.
- The following types of error are covered, according to *Bloor*:
  accidental error;
  omission;
  clarification;
  removal of ambiguity.

This generally reflects section 57 of the Arbitration Act 1996. By analogy with arbitration, an adjudicator may correct his award to give true effect to his first thoughts and intentions, but would not be able to change the substantive decision because he has second thoughts or intentions.

Correction of the error must take place within a reasonable time bearing in mind the speed of the adjudication procedure. In the case of *Bloor*, this was within two and a half hours of publication of the decision; however in another case, Mr Justice Dyson, as he then was, found it at least arguable that the adjudicator had the right to correct a mistake after more than a week.[18]

17 *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd* [2000] BLR 314, TCC, at p 320, per Judge Toulmin.
18 *Edmund Nuttall Ltd v Sevenoaks District Council* unreported, 14 April 2000, TCC.

Guidance for adjudicators

1. Always check whether the parties have made an agreement excluding or limiting your right to make corrections. If they have, comply strictly with such agreement.

2. You may become aware that you have made an error, or one of the parties may raise the matter with you. In either case, consider inviting the parties (or other party) to make submissions to you.

3. If you are satisfied that you have made an error, correct it as soon as possible and notify the parties.

4. Bear in mind how much time has elapsed since you delivered the decision, and any action that the parties may have taken.

5. Remember that you have the right to decide that you have not made an error.

6. It may be appropriate (for example, in the case of decisions involving complex arithmetical calculations) to consider issuing a draft decision (in whole or part) a short time before delivering your final decision, inviting the parties to scrutinise it for possible accidental errors.

7. Never forget your primary duty to act fairly as between the parties.

7. THE PARTIES' COSTS

The issue

There has been some uncertainty as to whether or not the adjudicator has power to decide that one party pay another party's costs.

The law

The Scheme is silent on the question of the parties' (as opposed to the adjudicator's) costs. It was generally understood by the industry that, in the absence of any express provision in the Act or the Scheme, the adjudicator did not have the power to order one party to pay another's costs.

Some doubt was thrown on this when in one case it was decided that the Scheme gave the adjudicator the power to award costs as part of his case management powers.[19] In a subsequent case, the judge expressly disagreed with this view and this has been reinforced by a further case. In both instances, the judges clearly say that neither the Act nor the Scheme gives the adjudicator power to award costs.[20] Indeed, the second case goes further and says that a party's costs of an adjudication cannot be recovered as damages in a subsequent court action. In all the cases the judges acknowledge that the parties are free to give the power to an adjudicator by contract.

Guidance for adjudicators

1. It now appears clear that, in adjudications under the Scheme, each party is responsible for its own costs and you do not have the power to order one party to pay another's costs. It may be possible for you to be given that power by the parties, either by the terms of the adjudication procedure, or by the parties so agreeing after the dispute has arisen.

19 *John Cothliff Ltd v Allen Build (North West) Ltd* unreported 29th July 1999, Liverpool CC, Judge Marshall Evans, [1999] CILL 1530; the Scheme, paragraph 13(h).

20 *Northern Developments (Cumbria) Ltd v J & J Nichol* [2000] BLR 158, TCC, Judge Bowsher and *Total M and E Services Ltd v ABB Building Technologies Ltd* [2002] EWHC 248, TCC, Judge Wilcox (available on www.bailii.org/ew/cases).

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