

**The glass is half full, Rupert
Rachel Barnes, February 2008**

I would like to comment this week on Rupert Choat's article on adjudication in Building two weeks ago. Looking back on the last year it does indeed seem remarkable how many court cases there are which still challenge the enforceability of an adjudicator's decision, and how many of those challenges are successful; and this notwithstanding strong judicial support for adjudication generally over the years, notably in the Court of Appeal.

However, I draw a slightly different inference from all these cases than Rupert. I do not, for example, think that it can be said that the Construction Act, or those parts of it dealing with adjudication are unclear, and therefore need frequent court decisions to clarify their meaning. On the contrary they seem to me for the most part to be admirably clear. The problem with the system of adjudication set up by the act lies not with its complexity but with its radicalism.

The system was recommended specifically for dealing with the cash-flow problems that could arise for contractors and subcontractors during building projects; however, as we all know, in the event it was applied to any dispute arising out of a construction contract (including professional engagements), at any time, even if the contract was over. The main limitation was that the contract had to be in writing, and that limitation may now be removed.

The system therefore became a potentially remarkable answer to the well-known problems of delay, cost and complexity in resolving disputes in the courts, which Lord Woolf's reforms have not in any fundamental sense removed. It was a brilliantly simple concept, providing a form of speedy rough justice while not doing away with the right of the parties to pursue the conventional route in court. It may seem obvious in retrospect, but the most original ideas often do.

The adjudication process is straightforward but in order for it to work properly it must be adhered to rigidly. In contrast the court process is founded on the principle that non-adherence with the rules does not invalidate the whole process, or any part of it. If adjudicators were to be given the sort of discretion that judges have in relation to the procedure, the adjudication process would in fact lose much of the simplicity and clarity, not to mention speed, that are its justification. This means that the system, while being straightforward, is also vulnerable to challenges on technical grounds that Rupert has mentioned.

Another fertile source of challenges to adjudicators' decisions has been that the rules of natural justice have been infringed. Giving both parties a reasonable opportunity to comment on all matters that are before the tribunal is an essential feature of an adversarial system. However, adjudication was intended to be more of an inquisitorial process, enabling the adjudicator to take the initiative in ascertaining the facts and the law. The Court of Appeal has indicated that natural justice challenges should only be pursued in the plainest of cases, or where the adjudicator has been obviously unfair.

Then there is the requirement that the contract must have been in writing or sufficiently evidenced in writing for the act to apply, a problem that accounts for a large number of court challenges. Removing this requirement, as now proposed, may not make a great deal of difference. The real issue in many cases where this point arises is whether there is a contract at all. Maybe the act should apply to any dispute, whether it arises out of a contract or not, although the mechanism employed by the act of making the adjudication process part of a contract would, of course, have to be changed.

Adjudication has, without doubt, been a success, judging it by the amount it is used. Rupert refers to 150 or so that are running at any one time and most of these will be completed within four to six weeks. Against that 300 court cases over the first 10 years of such a radical reform does not seem that many. The real question should be why confine this process to the construction industry? Maybe the industry will one day celebrate having been the (sometimes reluctant) pioneers of one of the most significant reforms in legal history.

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