

**ADJUDICATION**  
**under**  
**The Housing Grants, Construction & Regeneration Act 1996**

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**WALES BRANCH**

In association with

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### Speaker's Profile

Mr Gwyn Peredur Owen is a Chartered Arbitrator, Adjudicator, Consultant Civil Engineer. He has been appointed Arbitrator, Adjudicator and DAB and has acted as Project Manager, Engineer and Employers Agent. Panel member Adjudicator with FIDIC, ICE, RIBA, CI Arb, CIOB. Panel member Arbitrator with CI Arb, RCICA Nigeria, CAC in Argentina, Bolivia, Columbia, Peru. Listed Arbitrator with London Court of International Arbitration. Panel Arbitrator NAFTA US/Mexico Dispute Resolution Center, US. Dispute Resolution Board Foundation member US. Has been nominated DRB/DAB member on major civil engineering schemes in Europe and Latin America. Member of standing panel of arbitrators for UK Travel Industry. Occasional lecturer and workshop facilitator on matters relating to ADR / DAB / Adjudication / Arbitration.

An English, Spanish and Welsh speaker, his work has taken him as far afield as Angola, Argentina, Australia, Bolivia, Botswana, Brazil, China, Gibraltar, Morocco, Nigeria, Peru, South Africa, Spain, Venezuela, Zaire.

He has held the official posts of Chairman, Chartered Institute of Arbitrators (Wales); Adviser to the International Committee CI Arb.; Member of Editorial Board of Regional Arbitrator for Sub-Sahara countries

Mr Gwyn Peredur Owen received the Brunel Tunneling Prize for publication Underground Concreting. Commemorative Bronze Medal Award for Civil Engineering achievement in Cape Province, South Africa. Publications include Underground Concreting (1975), Project Management and the Control of Risk (1996), Official Translation of the Bolivian Law of Arbitration (1999), Arbitration in Latin America (1999), Arbitration in Latin America II (2000).

## **Adjudication under the Housing Grants Construction and Regeneration Act 1996**

### **What is the object of adjudication??**

To reach a fair, rapid and inexpensive determination of disputes arising under a contract. It is a judicial process to determine the rights and obligations of the parties, which will provide an impartial decision within a limited period.

### **What does the Act affect ??**

All parties of a construction contract, which includes consultancy contracts, (with some minor exceptions, particularly where one of the parties to the contract is a residential occupier). The parties to a contract may be Employers, Designers, Architects, Engineers, and Contractors or Sub Contractors.

### **What can be adjudicated ??**

Any dispute or difference arising under the contract.

Such disputes may be :

- ◆ A failure to pay a sum of money by the due date (or at all)
- ◆ Disagreement about a payment certificate, or its valuation or a valuation of an instruction
- ◆ Disagreement about the final account
- ◆ Disagreement about the quality of the design or workmanship
- ◆ Disagreement about whether an instruction should be given
- ◆ Disagreement as to whether the work is physically or legally impossible to perform

### **When can the dispute be Adjudicated ??**

At any time – either during the term of the contract or after its completion.

### **Pre Contract Considerations.**

The Act contains a “Scheme for Construction Contracts” which defines a “default” Adjudication Procedure. In order to avoid the use of the Scheme each contract must include its own procedure or include a reference to asset procedure (e.g. a Procedure published by such institutions as the JCT, ICE, CIC, ORSA etc.)

In order to comply with the Act each contract must contain provisions for the following:

- ◆ Adjudication provision for the resolution of disputes
- ◆ A definition of an adjudication procedure. This must contain eight essential features :
  1. A right to give notice of adjudication at any time.
  2. A Mechanism to enable an adjudicator to be appointed within 7 days of a notice of dispute.
  3. Require the Adjudicator to reach a decision within 28 days of referral of the dispute to him or such longer agreed period.
  4. Allow the Adjudicator to extend the 28 day adjudication period by 14 days with the consent of the Referring Party
  5. Impose a duty on the Adjudicator to act impartially
  6. Enable the Adjudicator to take the initiative to ascertain the facts and the law
  7. All decisions of the Adjudicator shall be binding unless the dispute is finally determined by Arbitration or legal proceedings. The parties may agree to accept the Adjudicator's Decision as final.
  8. The contract shall provide that the Adjudicator is not liable for anything done or omitted in the discharge of his functions.
- ◆ Definition of payment instalments
- ◆ A mechanism for determining the value of work done
- ◆ Dates when payments become due
- ◆ Dates when final payment become due

If any of the above provisions are not incorporated into the contract then the Scheme for Construction Contracts will apply either in full or in part as relevant as an implied term of the Contract.

Of special note in the Act are the following two provisions :

- ◆ Pay-when-paid clauses are banned
- ◆ A provision exists for a party to determine the contract of payments are not made by the due dates

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### Who can act as Adjudicator??

The Adjudicator must be a natural person acting in his personal capacity - i.e. an individual and not an employee of any of the parties and must be impartial. He may be named in the contract or agreed by the parties, if not then he may be nominated by an Adjudicator Nominating Body (ANB – e.g. RIBA, ICE, CI Arb., CIOB, RICS etc.) Any objection to the nomination will not invalidate the Adjudicator's decision. In order to avoid enforcement problems with the Adjudication Decision care must be taken to ensure that the person chosen as adjudicator is suitably qualified and accredited.

### How long will the Adjudication take ??

Normally 36 days. The time period is very short. The Act requires that an Adjudicator is both appointed and the Referral of the Dispute given to him within 7 days of the issue of a Notice of Dispute. He then has only 28 days to make a decision. The period of 28 days may be extended by 14 days by the Referring party only, or to any other period by the agreement of both parties.

### What is the Procedure ??

The procedure is determined by the Adjudicator, and has basically four stages.

2. The issue of a Notice of Dispute by the Referring Party
3. The Appointment of an Adjudicator and the Referral of the dispute to him
4. The process and procedure of the Adjudication
5. The issue of the Decision

#### 1. *The Notice of Dispute*

The procedure of adjudication is begun when the Referring Party sends a Notice Of Dispute to the Other Party which will be short and will normally contain four main elements :

- ◆ Description of the Dispute
- ◆ Where and when it has arisen
- ◆ Nature of the redress sought
- ◆ Names and addresses of the parties

#### 2. *Appointment of the Adjudicator and the Referral of the Dispute*

The Referring Party then proceeds with the appointment of an Adjudicator, either by using the named or agreed adjudicator, or by requesting a suitable adjudicator to act, or by asking an ANB to appoint a suitable person.

The Referring Party then presents to the Adjudicator his Referral Notice which should contain all the documents and statements upon which he intends to rely. Copies of the Contract Document indicating the agreed adjudication procedure should also be included. Copies of the Referral Notice must also be sent to the Other Party.

This entire procedure must be completed within 7 days of the Notice of Dispute.

The Other Party must immediately upon receipt of the Referral of the Dispute documentation, read the submission, ensure that they understand the points raised and proceed with their defence. There can be no counter claim – it is only the matters mentioned in the Notice of Dispute, which may be adjudicated. Any counter claim must be the subject of a further adjudication – which with the agreement of the parties may be taken into consideration. However any joining of disputes will complicate the adjudication and may be counter productive to what should normally be a simple, speedy procedure of resolution

#### 3. *The Process and Procedure of Adjudication*

The Adjudicator has completed control of the procedure, unless agreed otherwise by the parties and he will indicate to the parties who will do what and when. Normally upon receipt of the Referral of the Dispute the Adjudicator will issue directions as to the conduct of the adjudication.

The non-referring party will need time to respond to the Referral of the dispute, however this time will be short and normally limited to either 7 or 14 days. A site visit and a meeting of the parties will only be held if the Adjudicator considers it necessary. He may need to carry out some tests and may nominate others to undertake these tests on his behalf and he may require advice for some other party in order to ascertain the facts and the law.

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The parties shall comply with the instruction and requests of the Adjudicator, however the adjudicator will proceed with or without the requested information - silence or non-compliance with his instructions will not invalidate his decision.

The Adjudicator only has 28 days to complete the procedure and reach his decision.

Bearing this in mind all submissions to him must be limited in volume, concise and clear. He does not have time to wade through volumes of lever arch files, and if presented with a voluminous reference will make whatever observations he considers equitable in order to arrive at his decision. This may mean he will not be in a position to read any but the highlighted sections of the paperwork. If he considers he does not have enough data, he will always request further and better particulars prior to coming to his decision. He may ask the parties for a concise summary of the information provided.

#### 4. *The Decision*

The decision will be final and binding, unless the dispute is finally determined by legal proceedings, arbitration or by agreement. This does not mean that a party can ignore the decision and just apply to the court or opt for arbitration. An early judgement in the Technology and Construction Court between *Macob Civil Engineering Ltd. and Morrison Construction Ltd.* held that the decision of the Adjudicator is immediately binding and any non compliance with the decision will be default. This means that if the adjudicator has decided upon a payment of money, this must normally be done immediately. If he has granted an extension of time or required some instruction to be issued by the certifier, then if this is not done the Employer may be put in breach of contract, and the parties themselves in default of the adjudication decision.

The consequences of the Decision may be swift and severe and the insurers of the parties and those who may be affected are well advised to be made aware of the procedure and its progress.

#### How much does it cost ??

The parties are normally jointly and severally liable to the Adjudicator for his fees and reasonable expenses. The adjudicator may however direct in his decision that a Party shall pay all or part of the fees and expenses. His fees will normally be based on an hourly rate and his expenses at cost. An adjudication for a fairly straightforward dispute may take the adjudicator anything between 15 and 50 working hours to complete. In simple document only cases this may be reduced.

The parties themselves will normally be liable for their own costs and expenses (this may vary by agreement or from one procedure to another).

The simple nature of adjudication is such that the parties may elect to prepare their own submissions and defence. This will certainly reduce the costs of representation or legal advice to a minimum – if any. As there is a further final stage to the resolution procedure available (legal or arbitration) then there may be merit in reducing costs to a minimum in adjudication in order to obtain immediate relief to a problem, which may be further considered at a later point in time, if necessary.

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#### NOTES :

- The above is an extremely brief overview of the HGC&R Act and is given as an illustration only of the main elements of the Act and how simple it will be to utilise its provision to resolve disputes which may otherwise be protracted and expensive to bring to a conclusion.
- The Act is designed to give speedy and economic relief to the parties of a contract.
- Advice should be sought if contemplating utilising any adjudication procedure or utilising the implied terms which may be incorporated into your contract by default.
- Particular care should be taken prior to enacting the right of determining the contract due to then non payment of an amount due remaining unpaid by the due date.
- It should also be considered that Adjudication may become a useful and economic tool for the determination of a Final Account, particularly where traditional protracted negotiations may be time consuming and expensive.
- Various books and publications have appeared dealing with the Act and copies of the Act itself may be obtained from HMSO.