Sheridan Gold LLP
Solicitors

ADJUDICATORS USING THEIR OWN EXPERIENCE, EXPERTISE OR ARGUMENT

By Peter Sheridan[1]

Introduction

Although it is not a new issue, there has been a spate of recent Technology and Construction Court cases in which what has been at issue is an adjudicator reaching his decision, using or allegedly using his own experience, his own expertise or his own argument rather than basing the decision purely on the material presented by the parties to the dispute.

Under s.108(2)(f) of the Housing Grants, Construction and Regeneration Act 1996 ("the HGCR Act"), a construction contract must enable the adjudicator to take the initiative in ascertaining the facts and the law. It follows that adjudication is not a purely adversarial system, like the English court system. There is nothing wrong *per se* in an adjudicator formulating an argument of law, for example, that the parties have not made, or identifying as relevant to his or her decision a provision of the parties' contract that neither party has relied on or drawn to the adjudicator's attention.

The courts have from a relatively early stage determined that adjudication is subject to the rules of natural justice, a matter not addressed in the HGCR Act. The relevant limb of the rules of natural justice in this context is the *audi alteram partem* rule, which requires tribunals to give each party a reasonable opportunity of putting its case and dealing with that of its opponent. The rule is a development of adversarial dispute resolution systems. What is a reasonable opportunity in adjudication has to be judged in relation to the short time normally available for the adjudication.

Thus the courts have developed the rule in adjudication that it is legitimate for an adjudicator to formulate his or her own view or argument on the facts or the law, so long as the adjudicator provides to the parties an opportunity to comment on it before the adjudicator reaches a decision. This is an aspect of procedural fairness; the principle was already established for arbitration. It is in this area that adjudicators may get into difficulty. The argument is made relatively often by a party resisting enforcement of an adjudicator's decision, perhaps because so few other arguments are available. The argument may not succeed, either because there was no breach of the rules of natural justice, or because although there was a breach of the rules of natural justice, it was not sufficiently serious to render the adjudicator's decision invalid. However, what is striking about the writer's review below is that there are many cases, including many recent cases, where the argument has succeeded. It has, therefore, proved to be a fruitful area for parties seeking to resist enforcement of adjudicators' decisions and these cases are not as exceptional as the Court of Appeal predicted in the *Carillion* case.[2]

In cases where the Scheme for Construction Contract (the Scheme) applies, paragraph 17 is relevant and provides:

---

[1] Partner, Sheridan Gold LLP.

[2] *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358, CA; [2006] B.L.R. 15; 104 Con. L.R. 1. See the discussion of the *Farrelly* case below for the relevant passage.

> "The adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute and shall make available to them any information to be taken into account in reaching his decision."

In some of the cases, the judges have been drawn into dealing with the natural justice issue as a jurisdictional issue, wrongly in the writer's view.

Early cases

The applicable principles have been known for some time, because of the well-known relatively early case of *Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth*.[3] A dispute concerning damages for delay was referred to adjudication. The judge was critical of the way in which Balfour Beatty presented its case (for extension of time) in the adjudication; it apparently did not provide the basic materials needed for a delay analysis and certainly did not provide a critical path analysis. The adjudicator set about seeking basic factual information from Balfour Beatty, fairly and with the parties' knowledge. But he went a step further with this factual material, by undertaking himself a "collapsed as-built" delay analysis (or a variant of it), based on work he and/or his assistants had done to establish an as-built programme, without informing the parties. Judge LLoyd QC stated:

> "Thus, in my judgment, the adjudicator not only took the initiative in ascertaining the facts but also applied his own knowledge and experience to an appreciation of them and thus, in effect, did BB's work for it. Lambeth knew of course that Mr Richards [the adjudicator] intended first to verify the 'as-built programme' and it made submissions on it and on each of the Relevant Events. Mr Richards did not however inform Lambeth of what he then intended to do with the facts. He did not invite their comments on whether the 'as-built programme' or chart that he had drawn to depict the actual progress of the work was a suitable basis from which to derive a retrospective 'critical path'. Nor did Mr Richards inform either party of the methodology that he intended to adopt, or to seek observations from them as to the manner in which it or any other methodology might reasonably and properly be used in the circumstances to establish or to test BB's case. In my judgment he ought to have done so. BB had not presented its case on that basis. Lambeth had criticised BB both at the outset and in its final, if belated, submissions that it had failed to establish its case in any proper way. One would ordinarily expect the appropriate method of analysis to be agreed before it was used by an architect or other contract administrator. The adjudicator steps into the shoes of such a person. If an adjudicator intends to use a method which was not agreed and has not been put forward as appropriate by either party he ought to inform the parties and to obtain their views as it is his choice of how the dispute might be decided. An adjudicator is of course entitled to use the powers available to him but he may not of his own volition use them to make good fundamental deficiencies in the material presented by one party without first giving the other party a proper opportunity of dealing both with that intention and with the results. The principles of natural justice applied to an adjudication may not require a party to be aware of 'the case that it has to meet' in

[3] [2002] EWHC 597; [2002] B.L.R. 288; (2002) 84 Con. L.R. 1; [2002] C.I.L.L. 1873. For a detailed analysis of the case, see Sheridan and Helps, Adjudication and Natural Justice, (2003) 19 Const.L.J. 25.

Sheridan Gold LLP

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

> the fullest sense since adjudication may be 'inquisitorial' or investigative rather than 'adversarial'. That does not mean however that each party need not be confronted with the main points relevant to the dispute and to the decision."[4]

On the facts of this case, there was time for the adjudicator to have given to Lambeth the opportunity to respond to the matters identified by the judge; the judge made the following comment on the position where there is not enough time.

> "An adjudicator does not act impartially or fairly if he arrives at a decision without having given a party a reasonable opportunity of commenting upon the case that it has to meet (whether presented by the other party or thought to be important by the adjudicator) simply because there is not enough time available. An adjudicator, acting impartially and in accordance with the principles of natural justice, ought in such circumstances to inform the parties that a decision could not properly reasonably and fairly be arrived at within the time and invite the parties to agree further time. If the parties were not able to agree more time then an adjudicator ought not to make a decision at all and should resign."[5]

Another relatively early example is *Costain v Strathclyde*.[6] Towards the end of an adjudication, when he had received all the parties' submissions, an adjudicator asked the referring party for an extension of four days to the period within which he was to reach his decision, during which time he wished to confer with his legal adviser. The extension was given and the adjudicator made his decision. The adjudicator did not make known to the parties the terms of his discussion with his legal adviser or the result of the discussion; neither party requested to be told about these matters. Lord Drummond Young generally agreed with the approach taken by Judge Lloyd in the *Balfour Beatty* case. He gave a clear and helpful statement of the principles relevant to the matters under consideration here as follows.

> "1. The general principle…is that each party must be given a fair opportunity to present its case. That is the overriding principle, and everything else is subservient to it.
>
> 2. Subject to that overriding principle, together with any express provisions in the parties' contract, procedure is entirely under the control of the adjudicator.
>
> 3. In considering what is fair, it is important to bear in mind that adjudications are conducted according to strict time limits; consequently the time that is given to a party to comment on any particular matter may be severely restricted to ensure that overall time limits are met.
>
> 4. It is also important, in considering what is fair, to keep in mind that the procedure in adjudication is designed to be simple and informal. The

[4] *Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth*, above, at [33].
[5] *Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth*, above, at [36].
[6] *Costain Ltd v Strathclyde Builders Ltd* 2003 Scot. C.S. 316.

Sheridan Gold LLP

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

> requirement of fairness should not place any grievous burden on either the adjudicator or the parties; all that it will normally require is that each party should be given an opportunity to make comments at any relevant stage of the adjudication process.
>
> …
>
> 6. An adjudicator is normally given power to use his own knowledge and experience in deciding the question in dispute…If the adjudicator merely applies his own knowledge and experience in assessing the contentions, factual and legal, made by the parties, I do not think there is any requirement to obtain further comments. If, however, the adjudicator uses his own knowledge and experience in such a way as to advance and apply propositions of fact or law that have not been canvassed by the parties, it will normally be appropriate to make those propositions known to the parties and call for their comments. As I have indicated, the time scale may be very short.
>
> 7. An adjudicator may also be given power to require parties to give additional information or to carry out tests, or to carry out such tests himself…If such powers are exercised, it will normally be appropriate to make any additional information or the results of any tests known to the parties, and call for their comments. Once again, the time given may be very short.
>
> 8. An adjudicator may be given power to obtain from other persons such information and advice as he considers necessary on technical or legal matters…If such a power is exercised, the position is similar to that outlined in paragraph 6 above. If the information or advice raises any matter that has not been canvassed by the parties in their submissions or otherwise, it will normally be appropriate to make such matters known to the parties and call for their comments.
>
> 9. In this connection, I do not think that any distinction can be drawn between issues of fact and issues of law…"[7]

The judge found there was breach of the rules of natural justice in this case. It followed on the facts of this case that it was not known what impact the adjudicator's discussion with his legal adviser had on his decision, as the adjudicator had not divulged any information about the discussion (either before making his decision, or, seemingly, afterwards). The judge found that the possibility of prejudice or injustice to the losing party was sufficient in these circumstances (at least in Scotland); and that, again at least in Scotland, there is a presumption that breach of the rules of natural justice is material, so that for a breach to be non-material, there would have to be positive evidence of that.[8]

[7] *Costain v Strathclyde*, above, at [20].
[8] *Costain v Strathclyde*, above, at [16] and [22].

Sheridan Gold LLP

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

In *RSL v Stansell*,[9] RSL succeeded in an adjudication concerning valuation of its final account under a sub-contract with Stansell. Delay was in issue and the adjudicator notified the parties of his intention to employ a planning/programming consultant, Mr Adie (as the parties' contract permitted). RSL agreed; Stansell also agreed but added a request of sight of any report from Mr Adie and a reasonable time to comment on it. The adjudicator sent the parties an interim report from Mr Adie and invited their observations (giving them one day). RSL responded; Stansell did not. The adjudicator passed RSL's comments to Mr Adie. In his decision, the adjudicator decided RSL was entitled to extension of time and stated he had considered Mr Adie's final report; this final report had not been sent to the parties. Judge Seymour decided that, in relation to the final report, which had probably been significant in relation his decision, the adjudicator had acted in breach of the rules of natural justice and that he had also agreed to comply with Stansell's request. Judge Seymour stated:

> "If and in so far as [the adjudicator], 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."[10]

In *Cantillon v Urvasco*, Akenhead J reviewed some case law on natural justice, particularly the *Balfour Beatty* case and summarised or restated the relevant principles relating to natural justice as follows.

> "From this and other cases, I conclude as follows in relation to breaches of natural justice in adjudication cases.
>
> (a) It must first be established that the adjudicator failed to apply the rules of natural justice.
>
> (b) Any breach of the rules must be more than peripheral; they must be material breaches.
>
> (c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.

[9] *RSL (South West) Ltd v Stansell Ltd* [2003] EWHC 1390 (TCC); [2003] Adj. L.R. 06/16.
[10] *RSL*, above, at [32].

Sheridan Gold LLP

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

(d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this.

(e) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of *Balfour Beatty Construction Company Limited v The London Borough of Lambeth* was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto."[11]

Recent cases

Primus v Pompey

Primus v Pompey[12] is similar in relation to natural justice to *Balfour Beatty v London Borough of Lambeth*, but has its own points of interest in relation to jurisdiction. Primus was entitled to loss of profit on some omitted work and based its claim on the 3% construction and management fee percentage in the parties' contract. Pompey disputed this approach, taking various points, including that the 3% did not represent Primus's actual loss of profit. The adjudicator decided that Primus was entitled to loss of profit calculated at a rate of 1.3%, which was a figure that the adjudicator calculated from the profit to sales ratio in a set of accounts provided by Primus as part of its reply in the adjudication. It was not a percentage expressly stated in the accounts.

Pompey complained that the decision was made without jurisdiction and/or in breach of the rules of natural justice, because it was contrary to the way each side had puts its case; it was based on an approach which neither side had raised; and was a basis of claim with which they had been given no opportunity to deal by the adjudicator in advance of his decision.

Coulson J found that the parties were agreed that the profit figures in Primus's accounts were irrelevant and therefore the adjudicator did not have jurisdiction to consider them. He accepted that the position was analogous to that in *Shimizu Europe Ltd v LBJ Fabrications Ltd*,[13] where Judge Kirkham concluded that the parties had agreed that their contractual relationship was governed by a letter of intent (LOI). The adjudicator accordingly had exceeded his jurisdiction by deciding that the DOM/1 form had been incorporated instead.

In the *Shimizu* case, LBJ was engaged by Shimizu as a sub-contractor and the parties' dispute concerned LBJ's interim application for payment and set-off alleged by Shimizu.

[11] *Cantillon v Urvasco*, above, at [57].
[12] *Primus Build Ltd v Pompey Centre Ltd* [2009] EWHC 1487 (TCC); [2009] B.L.R. 437 [2009] C.I.L.L. 2739.
[13] *Shimizu Europe Ltd v LBJ Fabrications Ltd* [2003] EWHC 1229 (TCC); **[2003] All E.R**. (D) 60**;** [2003] B.L.R. 381.

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | **T** 01737 735088| **F** 01737 735001 | **E** info@sheridangold.co.uk | **W** www.sheridangold.co.uk

LBJ's adjudication notice and referral put the parties' contractual relationship on the basis of the LOI; so did Shimizu's response.

The basis on which the parties contracted was not in the *Shimizu* case a part of the dispute which was referred to adjudication. It was not part of the dispute described in the adjudication notice, which is the starting point for jurisdiction. Nor was it any part of the defence, which is the next port of call for jurisdiction, as any defence may normally be run, regardless of the terms of the notice of adjudication. It was also a separate concept from the dispute referred, as to entitlement to an amount of interim payment.

In *Primus v Pompey*, the position was not analogous, it is submitted. Here, the calculation of loss of profit was the dispute. So a way of calculating it by reference to Primus's accounts is not a separate concept, but a closely related one.

Further, when the judge states in *Primus v Pompey* that the parties "agreed" the accounts were irrelevant, this means that each submitted in the course of the adjudication that the accounts were irrelevant. The "agreement" is not about jurisdiction; it is merely an inference from submissions made to advance the parties' respective cases. This suggests a new approach to jurisdiction; instead of deriving from the adjudication notice (as stated earlier in the judgment),[14] it is now said to derive from or to be amendable by reference to the parties' submissions as they conduct the adjudication. It is doubted if this is correct. If the parties both submit that the accounts are irrelevant, it still remains the case that the accounts may be relevant. If the accounts assist with resolving the very issue that has been referred to adjudication, then in the writer's view the adjudicator has jurisdiction in respect of them.

To test the position further, take another example which arises regularly in adjudication. The parties have opposing positions on the correct construction of a provision in the parties' contract. The referring party contends for construction x and the responding party contends for construction y, but each contends that the provision is unambiguous. Is there an agreement that the provision is unambiguous, such that the adjudicator has no jurisdiction to consider or decide that the provision is ambiguous? The answer is no, it is submitted, because the adjudicator has jurisdiction to decide the dispute referred. If construing a term is part of that exercise, the adjudicator has jurisdiction in respect of it. The parties' submissions do not limit that jurisdiction. The parties' contentions, which show there to be common ground on a particular matter, are not an agreement about jurisdiction. They are merely contentions about matters within jurisdiction, which may be wrong. It is open to the adjudicator to say that the provision is ambiguous and it is to be construed accordingly. See in this connection the sixth principle quoted from the *Paton* case below.

In the writer's view, it may be inferred from the *Shimizu* case that the basis of the parties' contractual arrangement was not part of the dispute referred (nor any defence raised) so there was never jurisdiction in respect of it; this was merely confirmed by the parties' submissions. To the extent that *Shimizu* suggests that the parties' subsequent submissions limited the jurisdiction of the adjudicator which he otherwise would have had, it is not correct, it is submitted.

[14] *Primus v Pompey*, above, at [15].

Sheridan Gold LLP

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

Coulson J went on in *Primus v Pompey* to consider the position if he were wrong on jurisdiction (as the writer suggests) and held that if the adjudicator did have jurisdiction to look at the accounts, he was in breach of the rules of natural justice in not going back to the parties with his new calculation based on the accounts. On this point, the judge was correct, it is respectfully submitted, so that the result in the case is correct. The adjudicator was making one side's case for it in a manner that side had not put forward; he therefore needed to give notice of the approach under consideration and obtain submissions about it, particularly where he was basing his analysis on a document the parties had told him was not relevant.

Paton

A statement of the applicable principles relating to natural justice was given by Lord Bannatyne in the *Paton* case,[15] the relevant ones here being as follows.

> "Fourth, that an adjudicator may use his own knowledge and experience in deciding disputed matters before him.
>
> Fifth, that if the adjudicator uses such knowledge and experience to decide a contention placed before him by the parties he does not require to obtain their further comments thereon.
>
> Sixth, the mere fact that the adjudicator arrives at an intermediate position for which neither party was contending does not of itself mean that said conclusion must be referred to parties for their comments.
>
> Seventh, however, if he uses his own knowledge and experience to decide matters not advanced by parties then if these matters are of materiality in reaching his decision it would be his duty in order to comply with the rules of natural justice to revert to parties for their comments."[16]

In this case, the adjudicator awarded extension of time and prolongation costs to a contractor.
The contention that the adjudicator breached the rules of natural justice did not succeed on this occasion, with the judge finding on the facts that the adjudicator's conduct fell within the fifth and sixth points rather than the seventh; or in one case where the seventh principle may possibly have been engaged, the matter was not of materiality. The position on the facts was stated to be very different from that in *Balfour Beatty v London Borough of Lambeth*.

SGL Carbon Fibres v RBG[17]

RBG agreed to construct an additional production line at SGL's factory premises. A dispute arose over the cumulative amount due to date to RBG. The dispute was referred to adjudication by SGL, who contended there had been an overpayment of over £4m. The

[15] *Paton* [2011] CSOH 40.
[16] *Paton*, above, at [72].
[17] *SGL Carbon Fibres Ltd v RBG Ltd* [2011] CSOH 62.

Sheridan Gold LLP

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

adjudicator found that that RBG was liable to pay to SGL a sum of over £1m. RBG complained of breach of the rules of natural justice.

In respect of the applicable principles, principle 6 from the *Costain* case, quoted above, was approved by the judge, Lord Glennie, who added:

> "A distinction always has to be drawn between the case where the adjudicator uses his own knowledge and experience in order to inform his decision on the factual and legal arguments presented to him by the parties, in which case there may be no requirement on him to obtain any further comments from the parties – he is, after all, chosen in part because he has such experience to bring to bear on the matters in dispute in deciding the reference – and the case where an adjudicator uses his own knowledge and experience to introduce new matters which the parties have not raised and to decide the case, in part at least, on the basis of those matters, in which case he should make his intentions known to the parties and invite their comments.
>
> A related question, adverted to in *Costain*, is that of timing. In an adjudication the timescale is, from the start, very short. Time will often be extended by agreement, as it was here, but even then there is seldom the opportunity for a very long period for further comments or submissions, particularly if points are raised at a late stage. One consequence of this is that if the adjudicator intends to proceed on the basis of his own knowledge and experience, in circumstances where he is required to give the parties a reasonable opportunity of commenting on what he proposes to do, he should raise the issue with the parties as soon as he is aware of it and must do so in time to allow adequate opportunity for comment. If he does not raise the issue until just before the deadline for producing his decision, he is in great danger of not providing the parties with a proper opportunity to respond."[18]

There were two similar issues in respect of which particular complaint was made. The first was issue 18, concerning loss of productivity (inefficient working resulting from long shifts adopted by RBG). The adjudicator notified the parties he was intending to use his own knowledge, based on similar types of construction contracts and was considering a range of 10 to 20% reduction of the claimed value for labour hours. He gave the parties an opportunity to comment in just under 24 hours. After some correspondence he again gave the parties an opportunity to comment in just under 24 hours; he obtained the parties' submissions and later made his decision (which applied a 15% reduction). Similarly, on an issue relating to pipework labour productivity, he gave the parties an even shorter time in which to respond to what he proposed to do. RBG nevertheless did respond; the adjudicator issued his decision the same day.

Lord Glennie decided that the adjudicator had not complied with the rules of natural justice, primarily because of the failure to give the parties an adequate opportunity to comment on what he proposed to do. He stated that where an adjudicator intends to use his knowledge and experience to add to the evidence led by the parties,

> "…it is incumbent upon him to provide the parties with a full explanation of his intended approach, the nature of the experience he brings to bear relevant to the

[18] *SGL Carbon Fibres*, above, at [12-13].

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

> particular matters, and the conclusions of fact or law to which that experience drives him, all in sufficient detail and at a time which enables them to comment sensibly and on an informed basis."
>
> What that time is will, again, depend on the circumstances. In adjudications, time is short, and a party cannot expect to be indulged as he might be in arbitration or ordinary litigation. Equally, however, the imminence of the final date for reaching a decision cannot be an excuse for not providing adequate time for comment. That simply emphasises the importance of the adjudicator raising such issues promptly. In some cases, where there have been witnesses of fact who might have been able to give relevant evidence had they been asked, it may by a certain time simply be too late to open up a wholly new area of fact, however many days are given to the parties for comment on the proposed findings, without providing the opportunity for the parties to introduce further evidence as well as submissions. Even at a late stage, this may be possible, though further extension of time may be required…"[19]

In this case, the adjudicator sought to use his own knowledge and experience to arrive at conclusions on the basis of "facts" which went beyond those brought out in the evidence. That might have been legitimate if the parties had been given a full opportunity of responding, but they were not. They were not given enough time, and on the last occasion the time for responding ended on the morning the decision was due, which was by then presumably in draft, raising a question as to how much chance there was of the adjudicator changing his mind in light of any comments received. In addition, evidence had been given on these issues in a process started months earlier; the witnesses had been and gone and there was no adequate opportunity to go back to them. In addition, although asked about it, the adjudicator failed to identify what relevant experience of work in the applicable conditions he had, and whether he had any experience of constructing a carbon fibre production line in a live carbon fibre facility. All that RBG could do was protest. In indicating what led him to assess labour inefficiency at a certain percentage, he gave no sufficient detail to permit of a meaningful critique.

Lanes v Galliford Try[20]

A slightly different issue arose in this case, in which the adjudicator issued a document to the parties entitled "Preliminary Views and Findings of Fact" on 14 April 2011; his decision was issued on 17 May. The adjudicator does not appear from the judgment to have been raising a particular issue or argument of his own, not raised by the parties, in his preliminary views document. He did, however, direct the parties to make comments or submissions, and/or to submit evidence, argument or authorities. He stated in an email and in the document that he was not setting out decisions, but preliminary views. Jackson LJ in the Court of Appeal (overturning Judge Waksman's decision on this point) stated that there is nothing objectionable in a judge setting out his or her provisional view at an early stage of proceedings, so that the parties have an opportunity to correct any errors in the judge's thinking or to concentrate on matters which appear to be influencing the judge.

Carillion v SP Power[21]

[19] *SGL Carbon Fibres*, above, at [30-31].
[20] *Lanes Group plc v Galliford Try Infrastructure Ltd* [2012] B.L.R. 121; [2011] EWCA Civ 1617.

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

Carillion undertook cabling and related works for SP under contracts made pursuant to a framework agreement. A dispute arose in relation to Carillion's claim for payment for lamping and guarding of cable excavations during periods when it was waiting for SP personnel to carry out cable jointing operations. Carillion referred the dispute to adjudication; the adjudicator found that over £2.7m was due to Carillion. SP did not pay and Carillion sought to enforce the adjudicator's decision.

The adjudicator did not adopt the method of quantification Carillion had put forward. He used his own experience of what would constitute reasonable commercial rates for additional equipment. He did not give the parties an opportunity to consider and comment on his proposed methodology and the material on which it was based before reaching his decision.

Lord Hodge applied the principles derived from the cases described above.[22] Some complaints about the adjudicator's approach were not upheld but the judge found that the adjudicator had breached the rules of natural justice in relation to the rates. It was perfectly legitimate to depart from Carillion's method of quantification, but the adjudicator should have given the parties notice of the commercial rate which he proposed and the way in which he proposed to apply it.

With regard to paragraph 17 of the Scheme, Lord Hodge stated:

> "In my view paragraph 17 of the 1998 Regulations is not an absolute rule which would make a failure to disclose any information taken into account, however peripherally, a breach of natural justice. Rather, the information would have to be material to the adjudicator's decision."[23]

Herbosh-Kiere **and related cases**[24]

Dover Harbour Board (DHB) employed HKM to remove the remains of a sunken ship at the entrance to the harbour. A dispute, including substantial differences as to delay, arose in relation to the final account. HKM referred the dispute to adjudication, obtained a decision in its favour and sought to enforce it. DHB argued that the adjudicator had adopted a method of assessing the financial compensation due for delays which neither party had put forward.

Before and during the adjudication, the parties had quantified the money due for delays on the same basis, which was that for a given resource, for example a barge, quantum was calculated for a period of delay (as to which the parties tended to differ) relating to that resource. The parties never applied a composite overall rate to an overall delay. The adjudicator took the latter approach, but did not suggest it to the parties before his decision. It made a material difference to quantum.

---

[21] *Carillion Utility Services Ltd v SP Power Systems Ltd* [2011] CSOH 139.
[22] For a recent example where the adjudicator was found not to have gone on a frolic of his own, see *Bouygues E&S Contracting UK Ltd v Vital Energi Utilities Ltd* [2014] CSOH 115.
[23] *Carillion Utility Services*, above, at [23].
[24] *Herbosh-Kiere Marine Contractors Ltd v Dover Harbour Board* [2012] EWHC 84 (TCC).

Sheridan Gold LLP

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

On the applicable principles, Akenhead J quoted his summary of the considerations from *Cantillon v Urvasco* (set out above), adding the following observation:

> "Where there is an issue before the court as to what dispute has been referred to adjudication, one needs to bear in mind that in practice, particularly on developing disputes for instance on a final account, one will need to look at the dispute as it has developed. Thus if by the time that the adjudication process is started by way of the notice of adjudication the amount previously in issue has been reduced and the arguments on any given issue have been modified or limited, it will usually be the dispute as developed which is being referred to adjudication. As has been said on a number of occasions in the past, the scope of disputes can be 'as broad as it is long'. Disputes may be very wide and cover myriad issues; on the other hand, disputes may be very narrow and involve one or more limited and discrete issues. It simply depends on the relevant history between the two parties on any given construction contract."[25]

So the initial task was to identify what the dispute was, the first port of call being as always the notice of adjudication. The dispute was as to the value of the final account, identified in the notice of adjudication as having crystallised when DHB rejected HKM's assessment of the final account. The notice of adjudication referred to the relevant correspondence on this.

That, in the writer's view, is as far as the analysis of the identification of the dispute needed to go. The judges of the Technology and Construction Court made heavy weather of the question of the meaning of "dispute" many years ago when it came before them in the earlier days of adjudication enforcement.[26] Ultimately, they arrived at the (always obviously correct) consensus that "dispute" has its ordinary meaning, which had been explained by the Court of Appeal in the *Halki* case[27] in the context of arbitration (and was obviously binding on them). To put it very briefly, there is a dispute when the parties take up opposing positions or if a claim is made and not accepted or ignored. It should be remembered in this connection that the Arbitration Act and the HGCR Act went through Parliament in the same year and the notion that it meant something different in each Act by the word "dispute" was accordingly always untenable.[28]

It may be recalled that one of the heretical views in the earlier years of case law on this topic was Judge Seymour's view in *Nuttall v Carter*,[29] to the effect that the word "dispute" in the context of adjudication refers to the package of issues and arguments which would necessarily be rehearsed by the parties before the adjudication. This view was a policy-driven attempt to prevent the "ambush" of a referring party introducing new argument or evidence in support of its case during the adjudication. According to this view, a referring

[25] *Herbosh-Kiere*, above, at [23].
[26] A wide range of differing views expressed in the cases was reviewed in detail by Sheridan and Helps, The Meaning of the Word Dispute for the Purposes of s.108 of the HGCR Act (2003) 19 Const.L.J. 319.
[27] *Halki Shipping Corporation v Sopex Oils Ltd* [1982] 2 All E.R. 23.
[28] See *e.g.* Jackson J's (as he then was) seven propositions and the Court of Appeal's general acceptance of them in *AMEC Civil Engineering Ltd v The Secretary of State for Transport* [2005] Adj. L.R. 03/17.
[29] *Edmund Nuttall Ltd v R. G. Carter Ltd* [2002] B.L.R. 312; (2002) 82 Con. L.R. 24.

Sheridan Gold LLP

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

party could not in adjudication introduce an argument or evidence that had not featured in the parties' exchanges before the adjudication. It has never been adopted by other TCC judges (quite the opposite – they rowed back from it from the start) and does not represent the current law.[30]

Reverting to *Herbosh-Kiere*, the judge did not stop at the point recommended by the writer above, of identifying the dispute as being as to the value of the final account. He considered the content of the correspondence referred to in the notice of adjudication and established from it that the parties had the common, individual resource-driven, approach to the financial consequences of delay referred to above. The method of valuation of the financial consequences of delay was accordingly, the judge found, not part of the dispute.[31] The judge concluded that the adjudicator exceeded his jurisdiction by addressing a method of assessment which formed no part of the dispute referred to him.[32]

There are several difficulties with the judge's further analysis (which also apply to the analysis in *Primus v Pompey*). Firstly, there is a distinction between the dispute itself and the arguments marshalled by the parties in support of their respective cases on the dispute.[33] The dispute may not be adjusted after the adjudication notice, but the arguments need not have been rehearsed (post the abandonment of the *Nuttall v Carter* misconception). Typically they are not seen in full or in their final form until the exchange of submissions during the adjudication. As the parties are not confined to the arguments which may have been put forward before the adjudication, it is difficult to see how they can affect the adjudicator's jurisdiction.

Secondly, the analysis of the dispute is similar to the misguided approach of *Nuttall v Carter*, which has long been rightly abandoned and differs from that made clear in the Court of Appeal cases.

Thirdly, the judge's approach cuts down the adjudicator's scope to take the initiative in ascertaining the facts and the law (a power which in all HGCR Act adjudications the adjudicator will have), since the parties may have been adopting the wrong method of valuation. The adjudicator should not be fixed with the parties' method if it yields the wrong position on the facts and the law, in the adjudicator's view. The approach to the scope of the dispute of Coulson J in *Primus v Pompey* and Akenhead J in *Herbosh-Kiere* would be better suited to a purely adversarial system (which is the judges' background at the construction bar).

Fourthly, the *Primus v Pompey*/*Herbosh-Kiere* approach, although described by Akenhead J as "not an over-analytical approach",[34] is likely to encourage parties to comb through the background to the notice of adjudication to mount a case based on the arguments

[30] See fn 24 above.
[31] See *Herbosh-Kiere*, above, at [26].
[32] See *Herbosh-Kiere*, above, at [34].
[33] See *e.g. Benfield Construction Ltd v Trudson (Hatton) Ltd* [2008] EWHC 2333 (TCC); [2008] C.I.L.L. 2633.
[34] *Herbosh-Kiere*, above, at [27].

Sheridan Gold LLP

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

surrounding the dispute, which is the type of practice expressly discouraged by the Court of Appeal in the *Carillion* case.[35]

Subject to these four fundamental flaws, the two cases are satisfactory. In particular, the result is correct in each case because of the position on natural justice.

In *Primus v Pompey*, Coulson J went on to consider the applicable position on natural justice if he were wrong on jurisdiction. Akenhead J in *Herbosh-Kiere* stated that "the case can equally be considered as one involving a basic breach of the rules of natural justice."[36] Akenhead J found there was a breach of the rules of natural justice because the adjudicator did not give the parties the opportunity to address his method of valuation. Coulson J's approach on this is correct, it is submitted. There cannot, on analysis, be any breach of the rules of natural justice in the *Herbosh-Kiere* case unless it is first found that Akenhead J is wrong on jurisdiction. If the jurisdictional decision were correct, then it would never be open to the adjudicator to raise the point that he considers there is another, better method of valuation, nor to give the parties an opportunity to comment on his approach. The whole issue of that alternative approach would simply be one in respect of which the adjudicator had no jurisdiction.

A similar issue arose in the recent *Roe Brickwork* case,[37] where an adjudicator had decided a dispute as to delay and loss and expense claimed by a brickwork sub-contractor against a main contractor. One of the main contractor's grounds for resisting enforcement of the decision was jurisdictional. It was argued that there was no dispute between the parties that the contracted daywork rates were "all-inclusive" and in particular were inclusive of overhead and profit (OHP). The adjudicator therefore did not, so it was argued, have jurisdiction to apply the daywork rates to the number of hours and then add an allowance for OHP. The judgment seems to have proceeded on the basis that the jurisdictional argument was sound in principle (but not applicable as what the adjudicator did was to assess the hourly labour cost to the sub-contractor before adding the allowance for OHP. His assessment of the cost happened to equate to the daywork rates, but that had been thoroughly ventilated in the adjudication).

The dispute in *Roe Brickwork* was as to an alleged period of delay of about six months and loss and expense said to arise from it. So long as it was that dispute that the adjudicator decided (as clearly it was), then, it is submitted, he had jurisdiction. The sub-contractor's entitlement to OHP was part of the loss and expense dispute, so the adjudicator had jurisdiction in respect of it. It was accordingly open to the adjudicator jurisdictionally, it is submitted, to decide that the sub-contractor was entitled to be paid on daywork rates with an addition for OHP. Such a decision would be wrong in law and/or fact, as the daywork rates include OHP, but it would not be made without jurisdiction and would (subject to natural justice considerations, considered below) be enforceable.

[35] *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358, CA; [2006] B.L.R. 15; 104 Con. L.R. 1.
[36] *Herbosh-Kiere*, above, at [28].
[37] *Roe Brickwork Ltd v Wates Construction Ltd* [2013] EWHC 3417 (TCC).

Sheridan Gold LLP

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

The spectre of Judge Seymour's *Nuttall v Carter* approach seemed to re-appear in another recent decision of Akenhead J, in *Wales and West*,[38] in which the judge described the dispute as it had crystallised as including the "whole package" of arguments put forward by the responding party (PPS) in the adjudication.[39] In context, the judge's description of the dispute did not lead to any objectionable finding, as the judge found that the adjudicator did have jurisdiction in respect of the arguments run by the responding party. The problem with the *Nuttall v Carter* approach is finding (wrongly) that an adjudicator does not have jurisdiction where there is a dispute, but a new argument or evidence is introduced. The decision in *Wales and West* is correct, it is respectfully submitted, but it was not necessary, in order for the adjudicator to have jurisdiction over the dispute (as to whether there was a compensation event) for PPS to have put all its arguments as to why there was a compensation event prior to the adjudication. It would be enough that there was a dispute between the parties as to whether there was a compensation event and for Wales and West to have referred it to adjudication.

Farrelly v Byrne[40]

This case is an example of an adjudicator acting in accordance with the rules of natural justice. FBS was a mechanical and electrical sub-contractor to Byrne; the sub-contract was an NEC 3 form with bespoke amendments. A dispute arose as to interim payment, which FBS referred to adjudication; FBS then sought to enforce the adjudicator's decision in court.

The dispute between the parties was as to a rate to apply to value compensation events. The adjudicator wrote to the parties asking for their submissions on whether a compensation event should be assessed prospectively or retrospectively and if both apply, when the assessment changes from prospective to retrospective. Both parties responded. The adjudicator went on to decide that the assessment should be prospective and he determined the appropriate rate based on what had been submitted to him (without again referring to the parties). He had not gone off on a frolic of his own, nor was the position similar to that in the *Balfour Beatty* case. Ramsey J found that the adjudicator was not under an obligation to go back to the parties another time; it was not practicable for the adjudicator to go back to the parties with each of his provisional conclusions which represented some intermediate position for which neither party was contending. Ramsey J was applying a principle stated by Jackson J, as he then was, in *Carillion*, and endorced in the Court of Appeal:

> "It is often not practicable for an adjudicator to put to the parties his provisional conclusions for comment. Very often those provisional conclusions will represent some intermediate position for which neither party was contending. It will only be in an exceptional case such as *Balfour Beatty v Lambeth London Borough Council* that an adjudicator's failure to put his provisional conclusions to the parties will constitute such a serious breach of the rules of natural justice that the court will decline to enforce his decision."[41]

[38] *Wales and West Utilities Ltd v PPS Pipeline Systems GmbH* [2014] EWHC 54 (TCC).
[39] *Wales and West Utilities*, above, at [38].
[40] *Farrelly (M&E) Building Services Ltd v Byrne Brothers (Formwork) Ltd* [2013] EWHC 1186 (TCC).
[41] *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*, above, at [84].

Sheridan Gold LLP

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

ABB v BAM Nuttall[42]

BAM was sub-contractor to ABB for cabling works in connection with the London underground; the sub-contract form was NEC 3. BAM had a disputed compensation event claim for additional work and referred it to adjudication. An issue was an agreement the parties had made (but not recorded in writing) on a price of £1.5m for survey and design work in connection with the compensation event. BAM contended the price applied up to the end of January 2011 only; ABB contended there was to be further payment above the £1.5m only in respect of work for reasons beyond the control of BAM. BAM's alternative case was that no binding agreement was reached.

There was a provision in the sub-contract at sub-clause 11.1A that no alteration could be made to the sub-contract except expressly in writing. The adjudicator found, on the basis of this provision, that the sub-contract did not appear to provide a mechanism for the agreement alleged by either party and accepted BAM's alternative case that there was no binding agreement. Neither party had argued that sub-clause 11.1A was applicable and the adjudicator did not refer his view to the parties before reaching his decision. The adjudicator also found that ABB was to be treated pursuant to the contractual payment mechanism as having accepted BAM's assessment of the compensation event as ABB did not itself assess the compensation event. The adjudicator found for BAM and ABB took the point that there was a breach of the rules of natural justice as the adjudicator had referred to a provision neither party had argued and did not refer to the parties before issuing his decision.

Akenhead J referred to his summary in *Cantillon v Urvasco* and his decision in *Herbosh-Kiere*, adding the following on materiality:

> "The reference in the *Cantillon* case to a breach of the rules being material where the adjudicator has not, prior to his or her decision, identified to the parties a point or issue 'which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant' should not be treated as requiring statutory or contractual rules of interpretation to construe what was meant in the decision. If the adjudicator relies upon such a point or issue (either of fact or law) and his whole decision stems from his finding on that point or issue, it will be decisive. A point or issue might well be of considerable potential importance to the outcome if it not decisive of the whole decision but if it goes to important parts of the decision. Even if an adjudicator's breach of the rules of natural justice relates only to a material or actual or potentially important part of the decision, that can be enough to lead to the decision becoming wholly unenforceable, essentially because the parties (or at least the losing party) and the court can have no confidence in the fairness of the decision-making process."[43]

The judge found that there was a clear breach of the rules of natural justice in relation to sub-clause 11.1A. It was an important part of the adjudicator's finding that there was no agreement. It made a potentially major difference to the result, as that finding led the adjudicator not to consider much of what was put before him, including how much post-31 January work was necessary only for reasons beyond the control of BAM.

[42] *ABB Ltd v BAM Nuttall Ltd* [2013] EWHC 1983 (TCC).
[43] *ABB v BAM Nuttall*, above, at [5].

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

The judge noted that BAM's alternative case flew in the face of the evidence provided by BAM (and ABB) to the effect there was an agreement; the evidence was directed to its scope. However, this point is not really relevant to natural justice and goes to the irrelevant question as to whether the adjudicator's findings of fact and law were correct. The adjudicator was entitled to accept BAM's alternative argument that the parties were not ad idem. However, the real problem was that a significant part of his arriving at that conclusion was sub-clause 11.1A.

CC Group v Breyer[44]

Breyer sought to resist enforcement of an adjudicator's decision where it alleged the adjudicator had decided a dispute on a basis not argued before him, as a matter of jurisdiction, or as a matter of natural justice as Breyer had been given no opportunity to address a significant point in the adjudicator's decision.

CG was sub-contractor to Breyer for interior refurbishment work and submitted a draft final account with a gross valuation of £457,366.29. Breyer undertook its own valuation and concluded it had overpaid by £184,000. CG started an adjudication which described the dispute broadly as a dispute as to the final payment due. In the adjudication, CG argued that the payment terms of the Scheme applied; Breyer took the position that "the payment terms of the Sub-Contract Conditions would prevail". The adjudicator decided that the gross valuation was £457,366.29, in the course of which he found clause 8 of the sub-contract conditions to be applicable. The point that Breyer said was not argued and in respect of which the adjudicator did not have jurisdiction and it had had no opportunity to address was the application of clause 8.

Akenhead J decided the jurisdictional point against Breyer, quite correctly, it is submitted, on the basis that there was a broad dispute between the parties as to the final account. In passing, Akenhead J approved Coulson J's approach to jurisdiction in *Primus v Pompey*, which he distinguished. The judge regarded the real point as being one of natural justice, although he also rejected Breyer's case here, again correctly, it is submitted, as on the facts what the payment terms were was within the issues to be decided by the adjudicator and Breyer had rather directed the adjudicator towards the sub-contract conditions, which included clause 8.

Roe Brickwork v Wates[45]

In addition to the jurisdictional issue discussed above in connection with the *Primus v Pompey*/*Herbosh-Kiere* approach to jurisdiction, there was a natural justice argument. The adjudicator produced a calculation for overhead and profit (OHP) which differed in method from that put forward by the sub-contractor. He used a different percentage addition for OHP (13% instead of 22.5%), which he derived from material from the sub-contractor. Instead of applying that percentage to the number of weeks of extension of time (following the Hudson formula), he applied it to the amounts he found due for loss of productivity (*i.e.*

[44] *CC Group Ltd v Breyer Group plc* [2013] EWHC 2722 (TCC).
[45] *Roe Brickwork Ltd v Wates Construction Ltd* [2013] EWHC 3417 (TCC).

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

the amounts of loss he found). Edwards-Stuart J described this difference in method as minor.

In relation to the principles considered in other cases, the adjudicator's approach in this case may be considered as an intermediate position properly in relation to the parties' submissions, rather than a frolic of his own.

The judge also took the view that even if the adjudicator had acted in breach of the rules of natural justice (contrary to the judge's finding), it would not have been a material breach. If the adjudicator had consulted the parties and then adopted the sub-contractor's method, the judge considered result would probably have been the award of a greater amount for OHP.

The *Hillcrest* case[46]

B&C, a building contractor, gave notice of adjudication to Hillcrest, a property developer. One complaint was that a novation agreement between the parties and structural engineers HTA was void, because, as B&C alleged, HTA had executed the novation agreement as a result of improper pressure from Hillcrest.

The adjudicator found that the novation agreement was void, but for a different reason. The novation agreement had been executed by HTA long after the building contract was entered into by Hillcrest and B&C, although the Employer's Requirements in the building contract stated that the novation would occur on execution of the building contract. The basis of the adjudicator's decision was that because the actual appointment of HTA (by Hillcrest) did not include provision for novation at the time of execution of the building contract, the novation agreement executed by HTA did not accurately represent the appointment as envisaged pre-contract, *i.e.* an appointment including an agreement to novate on the execution of the building contract and was thus void.

The judge found this was not a contention that was raised by either party and Hillcrest had had no opportunity to address it. There was on the facts a material failure to comply with the rules of natural justice.

***Miller Construction*[47]**

An adjudicator found a designer and lead consultant liable, in part, for the performance failure of a ventilation system. On the enforcement action, the consultant argued that the adjudicator had determined the dispute on a basis not raised by either party and had gone on a frolic of his own.

The consultant argued that Miller had put its case to the adjudicator solely on the basis of professional negligence; the adjudicator had found professional negligence not proved. The adjudicator also found that Miller and not the consultant had chosen the ventilation units and the choice (which was causative of performance failure) was made to save costs. The

[46] *Hillcrest Homes Ltd v Beresford and Curbishley Ltd* [2014] EWHC 280 (TCC).
[47] *Miller Construction (UK) Ltd v Building Design Partnership Ltd* [2014] ScotCSOH 80.

Sheridan Gold LLP

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

consultant argued that that in these circumstances the adjudicator should have found in its favour.

However, Lord Malcolm found on the facts that the consultant had taken too narrow a view of the scope of the adjudicator's decision-making powers. The dispute referred was not limited to the professional negligence allegation; it also encompassed issues as to the consultant's accountability as lead consultant for the performance of the ventilation system as a whole and the consultant's contractual obligation to design a system which complied with the contract specification. The decision corresponded with the scope of the dispute referred and the adjudicator had not, on the facts of this case, embarked on the suggested frolic of his own.

Conclusions

(1) In any adjudication to which the HGCR Act applies and in any other adjudication where the contract so provides, the adjudicator may take the initiative in ascertaining the facts and the law. In these adjudications, an adjudicator may come up with his own argument, or analysis of the facts or the evidence, or attach significance to a contractual term not argued by the parties; the adjudicator is not confined to the material and arguments provided by the parties.[48]

(2) As this is a power and not a duty, an adjudicator may confine himself or herself to the material and arguments provided by the parties, *i.e*. the decision will not be invalid by reason of the adjudicator conducting the adjudication on a purely adversarial basis. Akenhead J stated in the *CC Group v Breyer* case:

> "The exchanged submissions (and evidence) set the agenda for an adjudicator's decision. Put another way, adjudicators need only address the factual and legal issues as adumbrated in the exchanged submissions and evidence. They can not be criticised on natural justice grounds if they do that."[49]

(3) The rules of natural justice apply in adjudication.[50]

(4) In addition to a reasonable opportunity of putting its case and dealing with that of its opponent, a party in an adjudication is entitled to be informed by the adjudicator of arguments or analysis which the adjudicator has come up with

[48] See s.108(2)(f) of the HGCR Act.
[49] *CC Group v Breyer*, above, at [27].
[50] See *e.g. AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWHC Civ 1418 (CA); 96 Con. L.R. 142; (2005) 21 Const. L.J. 249; *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358, CA; [2006] B.L.R. 15; 104 Con. L.R. 1.

Sheridan Gold LLP

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

beyond the submissions of the parties, and to a reasonable opportunity to comment on that material, before the adjudicator reaches a decision on the matter in question.[51]

(5) The time for that opportunity may be short, having regard to the timetable for the adjudication, but it must be adequate. It is important because of this that the adjudicator raise the matter promptly with the parties as soon as he is aware of it so as to allow that adequate opportunity. If this is feasible only if the time for the adjudicator's decision be extended, the adjudicator should seek that extension. If the extension is not granted and it is not feasible to provide the parties with the opportunity to comment to which they are entitled, the adjudicator should resign. The adjudicator may warn the parties of these matters when seeking an extension of the time for his decision.

(6) Where an adjudicator has come up with his own argument, analysis etc but does not afford the parties a reasonable opportunity to comment on that material before he reaches a decision, the adjudicator will have breached the rules of natural justice.[52]

(7) An adjudicator's decision thus made in breach of the rules of natural justice will still be enforced, unless the breach is material.[53]

(8) A breach is material if it decisive or of considerable potential importance to the outcome of the resolution of the dispute.[54] It will not always be known what the effect would have been if there had not been a breach of the rules of natural justice. The court must then use its judgment to assess whether the breach is such that the adjudicator's decision should not be enforced.[55]

(9) An adjudicator may properly appoint an assessor or expert who has relevant expertise the adjudicator does not possess. The adjudicator should inform the parties of the appointment and its purpose. It is normally also appropriate for the adjudicator to make available to the parties relevant material obtained from such third party and to call for comments.[56]

[51] See *Balfour Beatty v London Borough of Lambeth*, above, and the line of cases described above.
[52] See fn 47 above.
[53] See *e.g. Cantillon v Urvasco*, above.
[54] See *e.g. Cantillon v Urvasco*, above. See *e.g. Roe Brickwork*, above, for an example of non-materiality.
[55] See for examples the line taken by the judges in *Costain v Strathclyde Builders* and *ABB v BAM Nuttall*, described above.
[56] See *Costain v Strathclyde*; *RSL*.

Sheridan Gold LLP

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk

(10) The Scheme provision at paragraph 17 is not to be taken literally; not absolutely every failure to notify will amount to a breach of the rules of natural justice, just ones that materially affect the decision.[57]

(11) Where an adjudicator is deciding on submissions the parties *have* made, there is no need to confer with the parties as to the knowledge, experience or expertise the adjudicator brings to bear in deciding between the parties' respective cases.[58]

(12) Where an adjudicator is deciding on submissions the parties *have* made, and takes an intermediate position which is not the same position as either party, there is again no need to confer with the parties as to the knowledge, experience or expertise the adjudicator brings to bear in arriving at that intermediate position, nor to communicate the intermediate position the adjudicator is minded to take, for the parties' further comment.[59]

(13) It is important for adjudicators to use judgment on these matters and not to adopt a formulaic approach. Where an adjudicator is considering adopting an argument or approach of his own, it is important not to pre-judge the matter before giving the parties an adequate opportunity to comment. The objective here is to avoid pre-judging, not to follow steps aimed at avoiding the appearance of pre-judging.[60]

(14) The natural justice issue has been dealt with also as a jurisdiction issue in the *Primus v Pompey* and *Herbosh-Kiere* cases, wrongly in the writer's view.

[57] *Carillion v SP Power*, above.
[58] See *e.g. Costain v Strathclyde*, above.
[59] See *e.g. Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358, CA; [2006] B.L.R. 15; 104 Con. L.R. 1; *Farrelly v Byrne*, above.
[60] See the discussion of *SGL Fibres* and *Lanes Group*, above.

Sheridan Gold LLP

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088| F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk