AN OCCASIONAL COMMENTARY
FOR THE ADJUDICATION SOCIETY

# BLUE STANDARDS FOR ADJUDICATORS

Edition 1 – April 2004[*]

By Tony Bingham

It has been a remarkable six years. Adjudication under the *Housing Grants Construction & Regeneration Act* ("HGCRA") began *1 May 1998* (Northern Ireland – 1 June 1999). I do not conduct my adjudications now, (qua adjudicator) like I did then. Today's model is very much simpler. It confines itself to refereeing someone else's dispute. My Model tries to reflect the fundamental concept of fairness because I know that anything less will embarrass enforcement in the High Court.

These **"Blue Standards"** are a private memo to myself. It is a sort of crib sheet. But your help would be welcome: -

- Which ones do you disagree with?
- How would you change them?
- Have you got any to add?
- Notice how there are 10 categories. Are there any more?
    - Taking the Appointment
    - Unequal Representation
    - Threshold Jurisdiction
    - Taking Points
    - Internal Jurisdiction
    - Finding the Rules
    - Due Process/Procedure
    - Decision Making
    - Decision Writing
    - Being an Adjudicator

[*] Check for later editions

## 1 TAKING THE APPOINTMENT

- ➢ Am I available?
  - 24/7 task
  - 42 days and more besides
  - Too busy

- ➢ Do I have the expertise
  - Familiar
    - Technically
    - Legally

- ➢ Is there any conflict?
  - Recuse
    - Bias actual
    - Bias apparent
    - Independence
    - Prejudice
    - Impartial

Discussion: Bias

The test as to bias was stated by Lord Hope in *Porter v. Magill* [2002] 2AC 375 @ paragraph 103: -

> "The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

That is the test, which an adjudicator is required to apply when deciding whether the adjudicator should recuse himself for bias.

**BLUE STANDARD: IF IN DOUBT RECUSE**

For a detailed exploration of bias and adjudication, read *Glencot v. Ben Barrett & Son*. Note the cases therein especially *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 CA (Lord Chief Justice, the Master of the Rolls and the Vice-Chancellor) said at pages 471-472 (paragraphs 2-3): -

"2. In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affections or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.

3. Any judge (for convenience, we shall in this judgment use the term 'judge' to embrace every judicial decision-maker, whether judge, lay justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgement given. Such objections and applications based on what, in the case law, is called 'actual bias' are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists."

These observations, although directed to impartiality, would apply equally to independence[*]

*AND* Lord Prosser in *Starrs v. Ruxton* [2000] JC 208: -

"As regards the actual words 'independent' and 'impartial', the latter appears to me to be of the essence of the judicial process. I would regard the concept of a partial

[*] Lord Bingham in *Miller v. Procurator Fiscal* [July 2001] Privy Council

judge as a contradiction in terms. But I am inclined to see independence – the need for a judge not to be dependent on others – as an additional substantive requirement, rather than simply a means of achieving impartiality or a perception of impartiality. Independence will guarantee not only that the judge is disinterested in relation to the parties and the cause, but also that in fulfilling his judicial function, generally as well as in individual cases, he is and can be seen to be free of links with others (whether in the executive, or indeed in the judiciary, or in outside life) which might, or might be thought to, affect his assessment of the matters entrusted to him. The requirement of independence seems to me to have an importance, which runs even wider than that of impartiality. The two concepts appear to me to be inextricably interlinked, and I do no myself find it useful to try to separate the one from the other (page 232)."

**BLUE STANDARD:** **The Adjudicator must have complete independence. If in doubt recuse.**

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## 2 UNEQUAL REPRESENTATION

The Adjudicator must always remain independent of the Parties. Helping the unrepresented Party may easily create the impression of bias. The limit of assistance is in the matter of not allowing one party to take advantage of the weaker party.

**BLUE STANDARD**: **Do not make a case for an unrepresented party. Safeguard the party from unfair advantage only.**

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## 3 THRESHOLD JURISDICTION

A Respondent may contend: -

- No right for the Referring Party to adjudicate at all;
- No right for you to be the Adjudicator: -
  - Wrong appointing body;
  - Procedurally improper appointment.

**<u>BLUE STANDARD</u>: Treat a Jurisdictional challenge by way of full analysis (**Whether binding or not**): -**

- Consider facts and law;
- Consider own self interest;
- Consider risk of wasted resource by pressing on;
- Consider disadvantage/prejudice suffered by pressing on;
- Consider "balance of convenience" in stopping;
- If in doubt stop.

**4 <u>TAKING POINTS</u>**

Beware temptation to "take a point" of your own. Unless there is gross unfairness *avoid* taking a point to assist one party. Retain independence. Remember, if the parties continue with the adjudication without making an objection forthwith it may not raise that objection later before a court unless he shows that at the time he took part or continued to take part in the proceedings he did not know and could not with reasonable diligence have discovered the grounds for objection.

Read Dyson J. in *<u>Project Consulting v. Trustees of the Grey Group</u>* (Case No 7 Adjudication Decisions) and read too Devlin J. in *<u>Westminster v. Eicholz</u> WLR [1954].*

**<u>BLUE STANDARD</u>: Do no take points yourself unless a serious injustice might arise.**

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**5 <u>INTERNAL JURISDICTION</u>**

Essentially this is to do with what the Adjudicator is empowered to do. An example is to ask: "What dispute is the Adjudicator seized?"

*<u>Carter v, Nuttall</u>* [April 2002] H H Judge Bowsher: -

> "It was accepted before me that the jurisdiction of an adjudicator derives, at least in a case like the present, from the Notice of Adjudication. Put simply, the

adjudicator has jurisdiction to decide a "dispute" which is the subject of a Notice of Adjudication, but he has no jurisdiction to decide something, which is not covered by the relevant Notice of Adjudication. It seems to me that what is or is not the subject of a Notice of Adjudication depends upon proper construction of the relevant notice in accordance with the principles of construction enunciated by Lord Hoffman in *Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998]* 1 WLR 896 at pages 912H to 913F."

Sometimes a Respondent will respond with a defence to which the Referring Party will object, saying that all or part is outwith the "dispute" in the Notice of Intention: -

*Fastrack*

"Thus the "dispute" which may be referred to adjudication is all or part of whatever is in dispute at the moment the Referring party first intimates an adjudication reference. In other words, the "dispute" is whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the Referring Party has chosen to crystallise into an adjudication reference. A vital and necessary question to be answered, when a jurisdictional challenge is mounted, is: what was actually referred? That requires a careful characterisation of the dispute referred to be made. This exercise will not necessarily be determined solely by the wording of the notice of adjudication since this document, like any commercial document having contractual force, must be construed against the background from which it springs and which will be known to both parties."

**AND**

*KNS v. Sindall* [17 July 2000] H H J Humphrey Lloyd Q.C.

"As Judge Thornton said in Fastrack, "*the "dispute" is whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference."* A party to a dispute who identifies the dispute in simple or general terms has to accept that any ground that exists which might justify the action complained of is comprehended within the dispute for which adjudication is sought. It takes the

risk that its bluff may be called in an unexpected manner*. The further documents which come into existence following the notice of adjudication (such as "the referral" which is defined in clause 38A.4.1 of DOM/1) do not cut down or, indeed enlarge, the dispute (unless they contain an agreement to do so). The adjudicator is appointed to decide the dispute, which is the subject of the notice and that notice determines his jurisdiction. The adjudicator's jurisdiction does not therefore derive from the further documents, although those documents are likely to help the adjudicator to find out what needs to be decided in order to arrive at a conclusion on the dispute."

In *Griffin v, Midas* [21 July 2000] H H Judge Humphrey Lloyd, Q.C. explains: -

"That means that not only has there to be time to consider the claim or assertion but also, in an appropriate case, time to discuss and to resolve it by agreement, for only if that fails will there be a dispute, as I set out at the beginning of this judgment. Adjudication is not a substitute for discussion and negotiation nor is it to be used to provide the agenda for discussion and negotiation where no dispute had truly existed. The Defendant had obviously not time properly to consider the invoices before 3 May and it had no means of investigating the general claim. It was not in a position at that date to state what its position was. Moreover even if it had had the opportunity of doing so and had done so no dispute would have arisen until the Claimants had responded. A dispute will not exist if the claiming party accepts or has no real answer to a justified criticism of the whole or part of a claim. Only when the stages of discussion or negotiation are at an end may there be a dispute which could be referred to adjudication."

It is humbly submitted that what is good for the (Claimant) goose is good for the (Respondent) gander. Adjudication is a Decision about the discussions and negotiations which are all done but not resolved and are now before an Adjudicator to adjudicate upon that now closed container (the sack tied at the neck and handed over) and subject only to the adjudicator seeking clarification about facts and matters *already in* the container.

And if the Respondent advances a defence to which the Referring Party cries foul (inadmissible) then the adjudicator has to now decide whether the

* It must be doubted that the learned Judge was indicating that it was open to the Responding Party to reverse ambush the Referring Party. It is the timescale of 28-days, which precludes "trying-out" brand new substantive issues in the Defence.

Defence is new/not previously discussed/ not an addition to the closed agenda. If it is new and substantial then it must be outwith the current adjudication and brought as a new and separate adjudication by the Respondent once crystallised. If on the other hand it is not new at all then the Referral was defective since it only referred the Claimant's side of the dispute. In this latter circumstance, the Referral was flawed from the outset.

**BLUE STANDARD**: **Interpret the Notice of Adjudication (in the context set by the Referral) to identify the issues.**

**BLUE STANDARD**: **The Referral is intended to refer the whole dispute as previously rehearsed. It cannot be an ambush.**

**BLUE STANDARD**: **The Response is not a vehicle for a substantive surprise defence. It cannot contain an ambush.**

*NOTE:* Buxton Building v. Durand School [March 2004] H H Judge Thornton Q.C. is instructive.

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## 6 RULES FOR THE ADJUDICATION

**BLUE STANDARD**: **At the outset search for the Rules applicable to the Adjudication: -**

- **Contractual Express Terms (*e.g.* JCT/ ICE or ANB Rules: *e.g.* TeCSA)**

- **Implied *i.e.* "The Scheme"**

*NOTE:* It will be the contract, which indicates the Rules for Adjudication. An appointment by any particular ANB does not indicate the Rules of that ANB apply to the Adjudication, absent express agreement.

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## 7 DUE PROCESS

**BLUE STANDARD:** **Within the constraints of the 28-day process**
**AND**
**Having regard to the Contractual Rules**
**AND**
**Having regard to the provisional and binding nature of the Decision**
**Then: -**

(a) Act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) Adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

The Nature of Adjudication has changed: -

*Balfour Beatty v. Lambeth* [12 April 2002] H H Judge Lloyd Q.C.: -

> "It is now clear that the construction industry regards adjudication not simply as a staging post towards the final resolution of the dispute in arbitration or litigation but as having in itself considerable weight and impact that in practice goes beyond the legal requirement that the decision has for the time being to be observed."

Adjudication is now part of a complete range of ideas for managing disputes: -

- Early neutral evaluation;
- Negotiations;
- Expert evaluation;
- Expert determination;
- Mediation;
- Conciliation;
- Med/Arb;
- Conciliate/Arb;
- Adjudication;

- Arbitration (several types);
- Litigation;
- Commission of Inquiry.

**<u>BLUE STANDARD</u>:** **Absent express and plain and unambiguous authority, remain qua adjudicator. (**See *Glencott v. Barrett*).

**<u>BLUE STANDARD</u>:** **Decide the case *put.***

The Adjudicator is a summary decision-maker. It is an abridgment of the dispute resolution processes of litigation and/or arbitration . . . an overview, a summation, a compact formulation of what might be a wide-ranging subject. It is reaching a decision in a foreshortened timescale using: -

- 'A' and 'B's submissions/arguments/points of view;
- Weighing the evidence on its face
- Applying the burden of proof.

**<u>BLUE STANDARD</u>:** **As a summary dispute decider, decide between 'A' and 'B' on *their* arguments and *their* taken positions . . . and decide on the weight of evidence and burden of proof and do so given absent exploration by trial.**

**<u>BLUE STANDARD</u>:** **Do not (**absent express agreement**) become a certifier. Instead you are to summarily decide *between 'A' and 'B's arguments* who is right about a certificate. Decide upon *their* taken position on the weight of evidence and burden of proof given the absent exploration by trial.**

**<u>BLUE STANDARD</u>:** **Do not (**absent express agreement**) become a detective. Instead you are a summary dispute decider on what 'A' and 'B' says about the facts.**

**Decide upon their taken positions on the weight of evidence and burden of proof given the absent exploration by trial.**

**BLUE STANDARD:** **Do not (**absent express agreement**) become a forensic scientist. Instead you are a summary dispute decider on what 'A' and 'B' says about their case. Do not become a programmer or expert witness or witness of opinion. Bring your ordinary construction knowledge and apply it to 'A' and 'B's case but do not become an expert super-man know all.**

**BLUE STANDARD:** **Do not (**absent express agreement**) become a valuer. Instead you are a summary dispute decider on what 'A' and 'B' says about value. Evaluate *their* taken positions on the weight of evidence and burden of proof given absent exploration by trial.**

**BLUE STANDARD:** **Do not (**absent express agreement**) become an advocate. Instead you are a summary dispute decider on what the advocates for 'A' and 'B' say about *their* taken positions. Ask questions about their case but not by way of a line of argument not thought of by one or other party. Do not give bright ideas of your own; remain independent, arms length. Only watch for unfairness via inequality of arms. Decide on the case put using the weight of evidence and burden of proof given absent exploration by trial.**

**BLUE STANDARD:** **Do not (**absent express agreement**) be a mediator. Instead decide the *rights* of 'A' and 'B' on the cases advanced by 'A' and 'B'.**

**BLUE STANDARD:** **Do not (**absent express agreement of the parties and Lord Chancellor**) become a Judge presiding over a hearing. Ordinarily the adjudicator is deprived of observing the trial process. The facts via the evidence will not be probed in cross-examination. You will be deprived of seeing, hearing, sensing witness of fact, deprived of experience and training of the judiciary, deprived of being carefully taken through the case. Instead you are a summary dispute decider on the bundles placed before you, which contain the positions taken by 'A' and 'B'. Decide using the burden of proof and weight of evidence on the information presented to you.**

**BLUE STANDARD:** **Do not (**absent express agreement**) become an inquiry of investigation. You are not an appointed Lord Hutton.**

**BLUE STANDARD:** **Remain completely independent. Do not advance a better claim for 'A' or better defence for 'B'.**

**BLUE STANDARD:** **Be very cautious about using own knowledge (**built-in knowledge**)**

*Fox v. Wellfair Ltd* Lord Denning: -

"His (the arbitrator's) function is not to supply evidence for the defendants but to adjudicate upon the evidence given before him. He can and should use his special knowledge so as to understand the evidence that is given – the letters that have passed – the usage of the trade – the dealings in the market – and to appreciate the worth of all that he sees upon a view. But he cannot use his special knowledge – or at any rate he should not use it – so as to provide evidence on behalf of the defendants, which they have not chosen to provide for themselves. For then he would be discarding the

role of an impartial arbitrator and assuming the role of advocate for the defaulting side. At any rate he should not use his own knowledge to derogate from the evidence of the plaintiff's experts – without putting his own knowledge to them and giving them a chance of answering it and showing that his view is wrong."

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**BLUE STANDARD**: **Do not leave the decision-taking task to the last minute. Jealously guard the time anticipated in the Adjudication Rules for the Adjudicator.**

**It is not unusual for the rules (**See JCT**) to provide for 21-days from Response for the Adjudicator to carry out the task. It is not unusual for the Parties to wish to continue the exchanges . . . Referral . . . Response . . . Reply to Response . . . Response to Reply to Response . . . and more. Those exchanges are acceptable to *me* only when the parties agree that the Adjudicator's 21-days begins once these exchanges have stopped.**

**Ordinarily the parties will apply for leave to serve a further submission. Read** *London & Amsterdam v. Waterman* **for a useful lesson when one party will not extend time. Bear in mind that Parties feel aggrieved if cut off by the Adjudicator be ready to extend but preserve your 21-days.**

## 8 DECISION MAKING

**BLUE STANDARD**: **Search for the Issues and Sub-Issues.**
**Sometimes even modest sized disputes eventually reveal numerous Issues and Sub-issues; a good example is a dispute about Variations or loss and expense. It is vital: -**

- That all Issues are decided
- The Adjudicator does not decide Issues outwith his authority.

**Seek the assistance of the Parties in identifying the Issues. Put what you believe to be the Issues and Sub-Issues and Sub-sub-issues to them or ask them to identify the Issues. Identify too which Party bears the burden of proof on each issue.**

**<u>BLUE STANDARD</u>:** **Identify: -**

- Undisputed facts;
- Undisputed and indisputable propositions of law;
- Fact sensitive cases;
- Facts supported by evidence;
- Background to facts;
- Facts in issue;
- Weight of evidence to support/deny facts
- Corroborating evidence to support/deny facts;
- Inferences and strength of those inferences.

**<u>BLUE STANDARD</u>:** **In doubt?**

- Seek parties help;
- Seek outside help: -
  - Law — Inform the Parties
  - Technicalities — Inform the Parties
  - Tell the Parties what advice was obtained.

**<u>BLUE STANDARD</u>:** **Apply decided facts (**on the evidence**) to decided law**
**To**
**Each Issue/Sub-issue.**

**<u>BLUE STANDARD</u>:** **Do not make commercial Decisions**

**BLUE STANDARD:** **Do not work backwards *from* a result**

- To avoid a complaint
- To "remain popular".

**BLUE STANDARD:** **Keep reminding yourself the need for an open-mind.**
**Beware the human flaw – prejudice.**

## 9 DECISION WRITING

**BLUE STANDARD:** **In the Decision: -**

(1) Identify the Issue and Sub-issue; say what the Issue is.
(2) Recite what 'A' says about it;
(3) Recite what 'B' says about it;
(4) Say which you prefer and why;
(5) Let there be nothing upon which your Decision depends which will be a surprise to the Parties.
(6) Deal with the next issue in the same way.

**BLUE STANDARD:** **Let the process of making the Decision arise out of writing down the positions taken, and the weight of evidence and the burden of proof. Do not be surprised when the analysis provides a result, which early views would have dismissed.**

## 10 BEING AN ADJUDICATOR

- **Know your law . . . when it is put to you; don't show off**
- **Know your construction law . . . when it is put to you; don't show off**
- **Know your technical game . . . when it is put to you; don't show off**
- **Know your Adjudication cases . . . when it is put to you; don't show off**

- **Know your Arbitral Principles . . . when it is put to you; don't show off**
- **Practice**
- **Pray!**

<u>**Tony Bingham**</u>
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