

MOCK ADJUDICATION. RUDOLPH'S REVENGE

- (1) **SB** Introduction. Refer to Timeline and Summary of Respective Cases.
 - (2) In this adjudication, Pangalactic seek a decision from the adjudicator John Rushton that MCR be ordered to indemnify Pangalactic 12 Partridges in a Pear Tree etc together with costs of 5 gold rings, both items having already been paid by Pangalactic to the Three bears Corporation, in accordance with the judgment of Mr Justice Once in the High Court. On the other hand, MCR seek a declaration from the adjudicator Delia Dumaresq that the items are not recoverable due to the intervention by way of the holding of an Ice Gala on the roof in question. Further, MCR contend that Pangalactic's claim is now time barred.
 - (3) Please refer to the questions included in the briefing note at page 4. The parties will be making submission on the majority of these questions, but to make the presentation manageable, we will be taking this adjudication in stages. At the end of each stage I will lead the audience through a debate about the key points that arise from the issues that have been argued before the adjudicators and some related points that arise from those issues.
 - (4) Let the party commence.
 - (5) **Adjudicator (JR)** opens the Meeting
 - (a) Introductions:

JR adjudicator appointed by NOEL upon application by Pangalactic

Pangalactic Barhumbug Corp are the main contractor Pangalactic and for the purpose of this meeting will be the Referring Party
Pangalactic are represented by Mr Pompous, QC (David)

MCR are the roofing sub-contractor Mary, Christmas and Rudolph Ltd and for the purpose of this meeting will be the Responding Party
MCR are represented by Mr Whippet (Rob)
 - (b) Protocol for the meeting
 - (c) Agenda of questions that the parties are requested to address the adjudicators on.
- DD interrupts and introduces herself - adjudicator appointed by YULE upon application by MCR
- (6) DD says that before considering any of the substantive matters, we need to consider the issues relating to the adjudication itself. We should perhaps first deal with the question of the concurrent appointment of two adjudicators to decide essentially the same question – is MCR liable to Pangalactic for the damage incurred due to water ingress through the roof following a heavy storm? Could we please hear from the parties on this point first. Perhaps you

could begin Mr Pompous by providing us with your client's submission on the question of which, if any of us should give way?

ADJUDICATION

(a) Which if any of the adjudicators should give way?

- (7) Thank you Maaam. Can I just commence by introducing my esteemed client Baron Hardup. The Baron is no doubt well known to you all. Besides owning 20% of a number of well heeled Queens Counsel, he is managing director of the Pangalactic Building Company.
- (8) As a consequence of the very poor workmanship of my "provincial" friends yonder, the Baron has had to pay the Three Bears Corporation the princely sum of 12 Partridges and indeed 5 Gold Rings in "costs" (ahem ... quite reasonable the costs I say).
- (9) We seek recovery of these amounts in this new fangled adjudication, which unfortunately appears here to stay Blasted liberals! In the good old days such matters of honour were better resolved by pistols at dawn.
- (10) Pangalactic say that concurrent adjudications on precisely the same issue can not be valid or indeed practical. Imagine the chaos if these adjudicators were to arrive at differing conclusions. If indeed the awards were different the later award will of course be unenforceable.
- (11) Imagine the chaos that would ensue in the industry if the concurrent launching of adjudications was to be countenanced! The mere suspicion that a particular adjudicator might not be sympathetic to a party's case would invite a re-launch. If, for instance, one doesn't like the prospect of a TECSA appointed adjudicator a party could simply refer the same dispute with a request to YULE for nomination. This cannot be right, as I'm sure my learned friend Mr Whippet will agree.
- (12) The facts are that the adjudication of this dispute was **already** underway when Ms Delia Dumaresq was appointed. Mr John Rushton, affectionately known as JR, was appointed first on the morning of 10 November 2005.
- (13) Moreover, the parties are very lucky to have JR as their adjudicator – I have it on good advice that JR is currently being "courted" by Mr Justice Jackson, and was seen just this week in Temple being fitted for a wig – which in his case will be of great benefit. With all due respect to DD she's but a mere 'babycham' to JR's Dom Perignon. Pangalactic submit that Ms Delia Dumaresq should be the adjudicator to step down. Indeed, I must, in the strongest terms, request that Ms Dumaresq immediately desist and depart.
- (14) MCR: On the basis of logic and common sense, we agree that a sole adjudicator should decide upon all of the issues concerned in a consolidated adjudication. MCR submit that it is JR who should recuse himself and return to Dallas and the South Fork Ranch. It may be that JR accepted the nomination from NOEL on the morning of the 10 November 2005 and DD accepted the nomination by YULE later on that same day, nevertheless MCR say this factor

is not determinative of the issue. MCR's case is that the relevant experience of the adjudicator with respect to the nature of the dispute is the most important factor. Adjudicators are appointed because of their knowledge of the construction industry and adjudication and construction law.

- (15) MCR say that the dispute is fundamentally about roofing. Whilst DD has experience and knowledge of the law, DD formerly qualified as a roofing engineer. Perhaps less well known is the extent of her **recent** practical experience of roofing matters. DD has spent many a night out on the tiles and doubtless hopes to do so again in the future, however, MCR hastens to add DD has been out on the tiles and other roofs awaiting the arrival of Father Christmas to ensure that briefs (the kind with red tape around) get dropped down the right chimney. DD has also indulged her interest in reindeer by welcoming Dasher, Dancer, Prancer, Vixen, Comet, Cupid, Donner and Blitzen with a carrot each.
- (16) Plainly, DD's experience will better enable her to understand and arrive at a fair decision in this adjudication. Therefore, with all respect to JR's legal experience, MCR say he should resign, forthwith.
- (17) JR says pay my fees for the next two weeks, given that I have cleared my diary for this case, and I shall step down.
- (18) MCR say that in light of JR's offer to resign, we have our solution, he should step down. As to his fees MCR did not nominate him and we see no reason to pay them.
- (19) Pangalactic insist that JR is not entitled to resign, and in any event Pangalactic would in such circumstances not be willing to pay his fees.
- (20) JR says in that case he will not be willing to step down.
- (21) Pangalactic say that while it maintains the view that DD should be the adjudicator to step down, that perhaps my "regional" friend might consider that a compromise solution may be for the adjudicators to reach a joint decision – they are quite an attractive pair and perhaps might be happier working in unison. Alternatively, they could share the load, with JR (given his legal background) taking on the key legal aspects of the dispute. Whereas DD being the roofing guru could deal with the technical aspects.
- (22) MCR say I just need to take instructions on this point. (Arbuthnot Christmas is quite upset). No, this would just not be tenable, what will happen if the two adjudicators cannot agree on any particular issue? In addition this would pose potential jurisdictional problems.
- (23) **SB** to review with the audience

Questions:

- (a) Which if any of the adjudicators should give way?
- (b) Since there has been no binding decision by one of the adjudicators is there anything to prevent a second adjudicator being appointed?
- (c) Could the adjudicators agree without the consent of the parties to provide a joint Decision?

(d) What would be the outcome if on the same facts the adjudicators came to different Decisions on the same issues?
What can the parties do to thwart the other pending the existence of a decision?

- (24) **Adjudicators:** Discussion between adjudicators. DD says we still have a number of questions to consider but for my part I am content to proceed with this meeting and I do not propose to stand down. JR says I will also continue. Mr Pompous says given that all the key players are assembled, perhaps my “rural” colleague might agree that we continue with today’s hearing to avoid wasting costs. Mr Whippet agrees (... it’s about the only thing we will agree on).
- (25) **Adjudicator DD:** Now there are a number questions that arise from the earlier adjudication resulting in a decision by Mr Bingham. In particular, in the last adjudication, Pangalactic sought an indemnity from MCR in favour of Pangalactic, for all loss and damage recoverable from Pangalactic by TBC and Pangalactic’s costs in defending the court action by TBC against Pangalactic. Could we hear from the parties on question (b): [repeat question (b)]
- (b) **Will the Decision of Mr Bingham that there was insufficient evidence for him to decide on whether MCR should indemnify Pangalactic prevent the current adjudicators from re-hearing the dispute?**
- (26) Pangalactic would like to remind the adjudicators of Mr Bingham’s conclusions in respect of the first adjudication, i.e. “*I cannot reach a decision on the indemnity*”. It does not, I say, require a visit to the House of Lords to glean the meaning of this statement. Surely my learned and “bucolic” friend must agree that if Mr Bingham could not reach a decision, then it follows that no decision was reached! Therefore the issue of the indemnity remains alive to be heard and decided upon by the adjudicator.
- (27) MCR say firstly the question of an indemnity, which is directly connected to the matter now referred to the adjudicators in this adjudication, was a point specifically referred to Mr Bingham for a decision. He had jurisdiction to reach a decision and as a matter of fact he has made his decision on this particular issue which must stand. His decision was perfectly valid and disposed of the particular issue in that previous adjudication. If Mr Bingham was unable to establish whether there should be an indemnity then clearly Pangalactic had failed to establish that MCR was liable for the loss or the extent of that loss. Pangalactic had the burden of proof on this issue and the fact that it failed to adduce sufficient evidence to sustain its case on the last occasion should not give rise to Pangalactic having a further bite of the roof tile.
- (28) **Adjudicator (DD)** says, thank you. Mr Pompous could you please help us with the further point concerning the manner in which Mr Bingham reached his decision: [repeat question (c):]
- (c) **Was Mr Bingham’s Decision valid since it was made in conjunction with approximately 50 pupils on 9th December 2004?**
- (29) The point I seek to make will no doubt be rendered irrelevant by the fact that you two excellent adjudicators will surely agree with me that Mr Bingham made no decision in regards to the issue of indemnity. However, in the extremely

unlikely event that you each would be taken in by my “rustic” friend’s desperate attempts to deny Baron Hardup his constitutional right to adjudication, or indeed his access to the great British institution of ‘fair play’, I would like to point out that Mr Bingham’s “decision” was not his own! Those who were in attendance will remember that Mr Bingham put the issue of the indemnity to a vote. Indeed, it was reminiscent of a Tory leadership battle, but with less drugs. Mr Bingham simply adopted the views of the majority of his pupils in reaching the conclusion that he could not decide the indemnity. Clearly if it is determined that Mr Bingham’s indecisiveness is in itself a decision, then that decision is surely un-enforceable.

- (30) MCR say with respect to my learning friend, this is utter nonsense. Whilst there was a vote, this was for the purpose of entertaining the audience and had nothing to do with the serious and learned process in which Mr Bingham was engaged in reaching his decision. The fact that the decision coincided with that of the masses was entirely coincidental since Mr Bingham is well experienced at making up his own mind on all matters except in relation to the purchase of Mrs Bingham’s Frocks. MCR say the decision was valid; it would be absolute nonsense for any right minded person to think that an experienced adjudicator and member of the bar as Mr Bingham would allow himself to be influenced by a number of pupils or indeed any one pupil. Nothing in Mr Bingham’s approach can be said to be biased or unfair. In fact I suspect Mr Bingham’s mind was more exercised at the time by the imminent cost of Mrs Bingham’s Christmas frocks.

- (31) **SB** to review with the audience

Questions:

- (e) Will the Decision of Mr Bingham that there was insufficient evidence for him to decide on whether MCR should indemnify Pangalactic prevent the current adjudicators from re-hearing the dispute?
- (f) Was Mr Bingham’s Decision valid since it was made in conjunction with approximately 50 pupils on 9th December 2004?
- (32) **Adjudicator (DD)**. Mr Whippet, can we deal with limitation. You have argued that Pangalactic’s claim is time barred because the decision is due after the expiry of the limitation period. Pangalactic say this is not right and/or that this adjudication stops time running. Please start with your submissions on the question [repeat question (a)]:

LIMITATION

(a) Does this adjudication stop time running?

- (33) MCR say, thank you. There is no argument that MCR’s works were practically complete on 9 December 1999. In the present adjudications, referrals were served simultaneously by both parties on 14 November 2005 and the decision is to be reached on 12 December 2005 (shortly after expiry of the limitation period on MCR’s submission). MCR’s position is that in the circumstances, Pangalactic’s claims against MCR are time barred.
- (34) MCR submits that it is only an ‘action’ in accordance with the Limitation Act that can stop time running. MCR submit that “action” denotes proceedings before a court of law or arbitrator and not adjudication given the temporary

binding nature of an adjudication action. MCR contend this submission is supported by the Limitation Act at section 38, the interpretation section which defines "action" - "*action*" includes any proceedings in a court of law, including an ecclesiastical court".

- (35) It is MCR's case that it is plain that adjudication does not take place in, or in any way can be regarded as, a "court of law". Therefore MCR submit that neither this nor the initial adjudication action before Mr Bingham would not stop time running.
- (36) Pangalactic say that my "countryside alliance" colleague Mr Whippet is mistaken, adjudication does indeed stop time running. For example arbitration is considered a court of law under the limitation act, and so it follows must adjudication be.
- (37) Anyway, Sir and Maaam, while this limitation point taken by MCR is weak and ill founded, there is a more serious point in relation to limitation that requires your assistance. On the basis of a 28 day period for this adjudication your award will not be published until Monday 12 December 2005. This is of course after the limitation period expiry date of Friday 9 December 2005. It is perhaps likely that one or other of the parties will be disappointed with your award and would require redress through the courts. This would require either of us to file such proceedings by 9 December 2005. Could we therefore humbly request that you issue your decision by lunchtime on 9 December which should not be too much of a burden given that 10 and 11 December are the weekend.
- (38) MCR agree.
- (39) **Adjudicators** confer and say no, sorry we are entitled to the statutory period of 28 days within which to reach our decision and we are not prepared to agree to reach our decisions any earlier. We have our Christmas Party in this period and cannot possibly curtail the merriment in order to reach an earlier decision.
- (40) **SB** to review with the audience

Questions:

Does the notice of adjudication stop time running?

If it did stop time running, when would it start again?

If the adjudicator reaches a decision after the expiry of limitation, is the decision binding and enforceable?

If the adjudicator gets it wrong and decides that the decision is not time barred, what will the court do?

What happens if the decision is reached on the day before the claim becomes time barred, but the decision is published at 6.00 pm after the court had closed for the day thus denying the other party from taking steps?

Can the statutory timescale for reaching a decision be reduced from 28 days by agreement?

DOCUMENTS

(41) **Adjudicator (JR).** Now could we look at the various issues relating to the documents.

(42) **SB** to set the scene about what the letter says.

(a) Is the letter from Pangalactic’s former legal advisors legally privileged?

(43) MCR say that in the previous adjudication Mr Bingham decided that a letter from a former legal advisor to Pangalactic was legally privileged and therefore could not be relied upon in the adjudication. However, new law has been established on this matter via the Three Rivers Case which would clearly render incorrect that decision. The key point being that such privilege now only attaches to a letter of advice given to the ‘client’ rather than an employee as in this case and such advice must affect the rights, liabilities obligations or remedies of the client, again which we say this letter does not do. MCR argue that in light of this new case, the parties and these adjudicators are entitled to consider this letter in these proceedings.

(44) Pangalactic says that while it may well be the case that the previous Adjudicator had reached a different decision to the one he might have today in light of the Three Rivers Case, the fact remained that it had been decided in a statutory adjudication procedure that the document was privileged, and the only forum for rehearing or overturning that decision was the Courts. Accordingly, in these proceedings, I submit that my “rural” colleague can not and should not refer to the letter from Pangalactic’s former legal advisors.

(45) **SB** to review with the audience

Questions:

Does the fact that the law has changed enable a matter to be reconsidered in a subsequent adjudication?

(b) Can Pangalactic insist on the right to cross-examine the expert for MCR on his report?

(46) Pangalactic identify that MCR has submitted an expert report on technical roofing matters from a Mr Jack Tar, and is pleased to note that he is in attendance at the hearing. Pangalactic say that they have identified a number of significant concerns with this report. Pangalactic submit that it should be entitled to test this opinion evidence that is so highly relied upon by MCR, and request that the Adjudicators require Mr Tar to submit himself for cross examination this afternoon.

(47) MCR then says “can I have a moment”, and walks over to Jack Tar for a word – Jack is heard to say “Oh God, No!”, whereupon MCR returns to his seat. I’m afraid that Mr Tar has lost his mar mar mar mar . . . reading glasses!

(48) MCR state that adjudication is not an adversarial process that characterises court proceedings, and is not subject to court procedure. Further adjudication is not subject to the CPR rules, including those concerning expert evidence. The strict rules of evidence do not apply to adjudication. If it had chosen to,

Pangalactic could have made similar written or oral submissions in reply to these opinions, including if necessary producing their own expert opinion.

- (49) MCR say the report is an excellent piece of work, that stands in its own right, and the only reason Mr Tar does not wish to testify is that he hadn't prepared himself for such an examination today and does not wish to blacken his reputation by appearing unprepared. The report is signed and concludes with a declaration and a statement of truth. Mr Tar has confirmed that he understands his duty is first to the tribunal as it is in litigation and has applied the same standards of independence in preparing his report as he would in a court proceeding.
- (50) Pangalactic restates that the adjudicators should require Mr Tar "to take the stand", but that in any event it must be patently clear to all present that it is likely that Mr Tar will shortly be attending another hearing, one convened under the Mental Health Act! Clearly little weight can be given to his evidence, particularly in light of his clear reluctance to have it gently tested.
- (51) **DD** – Thank you, I shall draw such inference as I consider appropriate arising from Mr Tar's unwillingness to take questions.
- (52) **SB** to review with the audience

Questions:

What should the adjudicators decide?

Is there anything to prevent the cross examination of experts or indeed witnesses of fact in an adjudication?

What inference should an adjudicator draw from the unwillingness of the expert to be cross-examined?

Is there any reason why the adjudicators cannot question the expert directly?

ADJUDICATOR INVESTIGATING THE FACTS AND THE LAW

- (53) **Adjudicator (JR):** I thought that you should know that I was in the area of the building the other day. I went to see it. I saw a rusty drum nearby stamped "Moronic Acid". As you may know, this is a sealant which has a sparkling orange colour. It has come in for a lot of criticism because it is alleged to have a corrosive effect when it comes into contact with asphalt. However, seeing the drum got me thinking. I borrowed a ladder, looked at the roof and spotted traces of orange around the asphalt. It seemed to me that I should give my good friend, Mr D Ubious, a call and ask him to check out the roof. He confirmed my suspicion that moronic acid had been used.
- (54) MCR: Mr Whippet turns to client who too loudly says 'this is outrageous'. Yes, excuse me, but you have raised a number of issues in the last few minutes with which we would like to take issue. Firstly this is outrageous. . Secondly, it all seems far fetched – even Austin Powers would have struggled to make up such a story about an orange agent on the roof. In any event, Pangalactic has not raised the issue of moronic acid. Thirdly, you have taken it upon yourself to look at the roof without any "by your leave" or prior consent or knowledge of

the parties. Fourthly, you have taken it upon yourself to choose your own expert. Finally, you appear intent to do your own thing, as ever Mr Rushton.

- (55) Pangalactic: I for one would applaud the initiative of the (if I can be a little premature) Lord Justice Rushton. You have clearly risked life and limb in the constant and righteous search for truth and justice. It is just such activity that the Act envisaged when at paragraph 13 it stated *“The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute ”*.
- (56) **Adjudicator (JR):** I certainly chose my own expert, and had I notified you I would still have persisted in his appointment, so ‘no harm no foul’. I have a duty to investigate the facts and the law. It is irrelevant whether a party has raised an issue. I am fully entitled to go and look at the roof; and, as Mr D Ubious’ tests show, it takes time to reach any conclusions on the effect of moronic acid. I have acted entirely properly. If I had not acted so swiftly, I would not be able to reach a just decision within the timescale laid down by the Construction Act. Your remarks might be seen as showing that you are intent on denying justice in this matter.
- (57) MCR (indignantly): We do not deny that an adjudicator has the power to take such initiative, but we would contend that he or she is certainly not under any duty to do so. The operative word in Section 108 of the Act is ‘may’. The adjudicator is under a clear duty to act impartially, and to ensure procedural fairness so as not to breach the rules of natural justice. We take exception to an adjudicator wandering off and doing his or her own thing, particularly when the Pangalactic has not raised the issue which has, apparently, concerned the Adjudicator and the Adjudicator has given no prior warning that it has concerned him. We have not had any opportunity to adduce any evidence on this point and in normal circumstances would require a reasonable opportunity to adduce such evidence. There is nothing fair about the way this issue has been approached. Given the criticality of securing an early decision, we contend that the only proper course of action is for you to disregard this evidence since MCR in particular cannot have a fair opportunity to deal with this D Ubious point.
- (58) **SB** to review with the audience:
- Questions
- What should the Adjudicator have done?
Did he have any right to take the course he did?
What right has either party to object to the line which the Adjudicator actually took?
Can Pangalactic realistically expect the adjudicator to exclude from his deliberations the new evidence he has referred to?
- (59) MCR’s client (waving a piece of paper) says . eer ...what about this then?
- (60) Mr Whippet says all this stuff about oranges is bad enough, but it has just been brought to my attention that in examining the question of documents earlier, Pangalactic avoided the fact that they have included in their bundle without

prejudice correspondence which should not have been included. The question for the adjudicators is: [repeat the question:]

Should the without prejudice correspondence be admitted?

- (61) MCR objects to the inclusion within Pangalactic's bundle of without prejudice correspondence and submit such correspondence should not be admitted. The fact that in the previous adjudication, the adjudicator read privileged documents is not relevant. Plainly, in order to decide whether or not a document may be privileged it must be read by the adjudicator. Without prejudice correspondence is quite different. Absent any challenge that correspondence was not generated in order to reach a settlement, without prejudice correspondence is inadmissible. See the case of *Rush & Tompkins-v-GLC* (1988), HL 43BLR 1. In the words of Lord Griffiths: -

"I have come to the conclusion that the wiser course of action is to protect without prejudice communications between parties to litigation from production to other parties in the same litigation."

- (62) Pangalactic says he is not surprised by MCR's reluctance to have this highly relevant document hidden by the without prejudice cloak. This was a desperate attempt to avoid revealing to the Adjudicator(s) that they had no faith in their own case, so much so that they had offered to settle the case by paying Pangalactic 8 Maids A Milking. To now be seeking to avoid payment at all through some nebulous arguments about an ice gala and that Pangalactic claims are time barred is an abuse, solely aimed at 'chancing their arm' in the breakneck speed dispute resolution process that is adjudication.
- (63) MCR expresses outrage that Pangalactic has revealed certain of the contents of the 'clearly' without prejudice documents when the adjudicators had yet to rule on its admissibility.
- (64) Pangalactic says nonsense these are experienced people who are capable of exercising discretion and judgment, and in any event would have had to read the document to consider whether to exclude it.
- (65) MCR says that this without prejudice material clearly should not have been disclosed. Whilst there is no question over the extensive mental capacity of the adjudicators, we doubt that it will be physically possible for them each to erect within their minds a Chinese gable end wall behind which this material can be placed and disregarded. MCR submits that the adjudicators are now tainted and should step down.
- (66) **SB** concluding discussion with audience. Let's revert to the adjudicators for their reaction to this problem.
- (67) Adjudicators confer for a minute and decide to step down!
- (68) **SB**: closing quip.